THE INDIAN DECISIONS, NEW SERIES.
CALCUTTA, VOL. VI.

THE

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Standing Counsel :

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THE

INDIAN DECISIONS

NEW SERIES.

CALCUTTA—VOL. VI.

I.L.R., 12 CALCUTTA.

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Rafique and Jackson's P. C. No. 91.

1885
MARCH 17.

PRIVY COUNCIL.

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PRIVY COUNCIL.

PRESENT :

Lord Blackburn, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On appeal from the Court of the District Judge of Lucknow.*]

JEHAN KADR (*Plaintiff*) *v.* AFSAR BAHU BEGUM, AND ON HER DEATH BADSHAH SAHEEBA AMIR-UL-NISSA (*Defendant*).
[18th, 19th and 20th February and 17th March, 1885.]

Confiscation and restoration of lands in Oudh in 1858, *and of immoveables in Lucknow—Gift—Title.*

On a claim for a share in property consisting of (*a*) immoveables in Lucknow, and (*b*) revenue-paying land in a district of Oudh, the defence was title by gift, with possession, from the former owner, a member of the family through which the plaintiff claimed.

As to the immoveables in Lucknow, they having been included in the confiscation, which, having followed the capture of the town in 1858, was subsequently abandoned without any intention on the part of Government to make a re-grant in favour of any person, the result in regard to the present question was the same as if no such event had occurred.

The other property, (*b*), came under the general confiscation of Oudh lands in 1858, and also was restored through subsequent settlement operations in which the final order, relating to the land in question, was to the effect that settlement should be made with the "heirs" of the previous owner.

Held, that the above did not preclude the defence of exclusive title by gift; the order last mentioned, on its true construction, only designating all those who might take under and through the previous owner, (deceased at the time of settlement), without excluding any claimant, save those who might claim adversely to such title. The Government did not, in the settlement which followed the confiscation, make any arbitrary, or wholly-new, re-distribution of estates, or proceed as if the existence of previous titles (although they had been brought to an end), was to go for nothing. The inquiry in most cases was as to who would have been entitled, had there been no confiscation. As to both classes of property the gift was maintained.

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[2] APPEAL from a decree (18th February 1880) of the District Judge of Lucknow, affirming a decree (18th June 1879) of the Civil Judge of Lucknow, dismissing the appellant's suit after a hearing directed by Her Majesty's order in Council (30th December 1878).

The suit out of which this appeal arose was commenced in June 1875 to obtain possession of immoveables, with mesne profits, and was remanded in accordance with a judgment of the Judicial Committee (1) (14th December 1878) for hearing on the issues stated below.

The records I and II, referred to in the judgment now reported, were the record of the former appeal and that of the proceedings after the remand which formed the subject of the present appeal. The property claimed was a two-thirds share of a two-fifths share of houses, with land attached thereto, situate in the town of Lucknow, and of a village, mouzah Sahrawan, in the Unao district. All of it belonged, until 1856, to Nawab Mulka Kishwar, mother of the ex-King of Oudh. She died in February 1858 leaving issue, besides the ex-King Wajid Ali, another son named Secunder Hashmat, who died in the same month, but after his mother. She also had a daughter, Nawab Afsar Bahu Begum who was the defendant. Secunder Hashmat left a son, who was of full age in 1865, and brought the present suit in 1875, in which he claimed a two-fifths share of a share to which he alleged that his father became entitled on the death of Mulka Kishwar.

The defendant alleged that Mulka Kishwar had before her departure from Oudh in 1856 made a gift of the property to her by *hibanama*, and had made over possession to her.

After this appeal had been presented, Afsar Bahu Begum died, leaving Amir-ul-nissa, her sole legal representative, against whom this appeal was revived by order (30th December 1884). The name of the former has been retained in this report.

Mouzah Sahrawan, and the property in Lucknow, came under two separate confiscations. The mouzah came under that of 15th March 1858, whereby all proprietary rights in the lands of Oudh were confiscated to the Government. The property in Lucknow [3] came under the confiscation of the 22nd idem, whereby a specified time was given to the fugitive house-owners of Lucknow, within which they might return and regain possession of their property. The defendant was one of those who did not return in due time. The right of the Government to the Lucknow property was afterwards, on 6th July 1863, relinquished, without restoration to any particular person. The mouzah in Unao was made the subject of summary settlement operations in 1858; and settlement of it was made with the representatives of former zemindars in the village. In 1862, however, on the respondent's application, at regular settlement, the Settlement Commissioner made an order in her favour, recognizing her proprietary right. Against this the holders under the summary settlement appealed to the Chief Commissioner of Oudh, with the result, set forth in the judgment on this appeal, that in accordance with his order (25th October 1863) the settlement officers made entry in the record in favour of the heirs of Mulka Kishwar.

The suit, in the stage before the remand, was dismissed both in the Court of first instance, that of the Civil Judge of Lucknow, and in the appellate Court, the Commissioner of Lucknow, on the ground of

(1) 6 I. A. 80=4 C. 727.

limitation under Act IX of 1871. This was reversed on appeal to Her Majesty, and the suit was remanded, the following issues being fixed—

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As to mouzah Sahrawan—

(1) Whether the plaintiff, after the confiscation of mouzah Sahrawan, under Lord Canning's proclamation acquired, by any and what means, any and what right or title to any and what share of and in the said mouzah.

(2) Whether after the Chief Commissioner's order of the 25th of October 1863, directing that a settlement should be made in the names of the heirs of Mulka Kishwar, the settlement was so made, or whether a settlement was made with the defendant or with any other and what person or persons, and under what circumstances, and what was the effect thereof.

(3) Whether at the time of such settlement, and if any, what kabuliyat was executed by any and what person or persons.

(4) Whether the plaintiff was according to Mahomedan law one of the heirs of the said Mulka Kishwar, or whether the [4] Commissioner intended by the words "heirs" to include the plaintiff to the share or any portion of the share which his father would have been entitled to if he had then been alive.

As to the immoveables in Lucknow—

(1) Whether considering that the confiscation of some of the above houses and property was abandoned by the Government, leaving all the former owners to their rights by law, the plaintiff was entitled to any, and what share thereof, at the time when he brought his suit.

(2) Whether the defendant was in possession of the said houses and property, or of any, and what portion thereof, and if so, under what circumstances, before the proclamation of Lord Canning, and if so, whether the suit in respect thereof was barred by the Act of Limitation.

As to all the property—

Whether the late Mulka Kishwar did in her lifetime make some, and what gift, in respect of the said properties or any, and what portion, thereof in favour of the defendant, and if so, whether the same was valid in law.

The Civil Judge of Lucknow, Mr. F. Lincoln, found as follows;

As to Sahrawan: *1st*, that the plaintiff had acquired no right or title to any share in the village; *2nd*, that the settlement of that mauza was made with the defendant solely and exclusively; *3rd*, that no kabuliyat was executed; *4th*, that the Chief Commissioner meant the heirs of Mulka Kishwar, whoever they may have been, and that his order had no reference to the plaintiff, or any one else in particular. As to the immoveables in Lucknow: *1st*, that the plaintiff was not entitled to any share in that property when he brought this suit; *2nd*, that the defendant was in possession thereof in 1856, and had so continued since except for the period when the property was under confiscation; after the release, the defendant obtained exclusive possession, and the claim was barred by limitation.

As to all the property in suit, it was gifted to defendant by Mulka Kishwar. A deed was executed, but had been lost. The gift was proved and was valid according to law.

On appeal to the District Judge of Lucknow, Mr. H. B. Harrington, that officer's findings were as follows:

[5] As to mouzah Sahrawan—

1.—The plaintiff, after confiscation of mouza Sahrawan under Lord Canning's proclamation, did acquire, by virtue of the Chief Commissioner's

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order, dated 25th October 1863, a title to claim his share in the mouzah, the amount of that share being two-thirds of two-fifths.

2.—That the Chief Commissioner's order of the 25th October 1863, was carried into effect, and that the settlement was made, not with the defendant, but with the heirs of Mulka Kishwar, the effect being that any person covered by the term "Mulka Kishwar's heirs," in the sense intended by the Chief Commissioner, could come in and claim his share.

3.—That a kabuliyat was executed in the defendant's name as *lambardar* on behalf of such heirs.

4.—That although the plaintiff was not by Mahomedan law one of Mulka Kishwar's heirs, the Chief Commissioner intended by the word "heirs" to include the plaintiff to his own portion of the share which his father would have been entitled to had he been then alive.

As to the houses and other property in Lucknow—

1.—Were it not for the deed of gift plaintiff would, at the time he brought his suit, have been entitled to a share amounting to two-thirds of two-fifths.

2.—Defendant having in 1856-57 been, by virtue of gift, in possession adverse to plaintiff and the parties through whom he claims, plaintiff's suit was barred by Act of Limitation (IX of 1871, art. 145).

As to all the property—

1.—Although no deed of gift was executed, the late Mulka Kishwar did, in her lifetime, make a verbal gift of the kind known as *hibba-bil-iwaz* of all the property in suit in favour of the defendant, and this gift was valid in law.

On this appeal,—

Mr. *J. Graham*, Q.C., and Mr. *J.T. Woodroffe*, for the appellant, argued that the District Judge, having correctly found against the execution of the deed of gift, no verbal gift, or *hibba-bil-iwaz*, of the property in suit, had been established in favour of the defendant. The case was such that without proof of the execution **[6]** of a deed of gift it was hardly consistent with there having been a valid transfer for the exclusive benefit of the defendant of all the property said to have been thus disposed of by Mulka Kishwar. The Mahomedan law required, in a transaction by way of *hibba-bil-iwaz*, not indeed equality of values, but at all events a real exchange of property. Moreover, the defence was committed to an undertaking to prove that there had been at some time or other a deed of gift.

As to Sahrawan, the rights, if any, created by Mulka Kishwar must have been extinguished when the confiscation of 1858 brought titles to an end; while the settlement proceedings showed that the subsequent rights in the mouzah were vested in the heirs of Mulka Kishwar, and on this point the finding of the first Court was incorrect.

Mr. *J. F. Leith*, Q. C. and Mr. *R. V. Doyne*, relied on the concurrent findings of the two Courts that the gift took place; and that there had been adverse possession under it for more than the period of limitation. There had been an acquiescence for eleven years; and the ex-King, who, upon the plaintiff's theory, would have been entitled to a share, had never claimed it.

As to Sahrawan, the use of the words "heirs of Mulka Kishwar," in the orders made, implied no exclusion of a claim by gift from her.

Mr. *J. T. Woodroffe* was heard in reply.

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JUDGMENT.

On a subsequent day March 17th, their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—This suit relates to certain lands in Oudh which formerly belonged to Mulka Kishwar, the mother of the king who was deposed in the year 1856. She died on the 12th February 1860, leaving three children—her eldest son, the ex-King, the second son who was commonly called the General Sahib, and the respondent who was the defendant below. The General Sahib died on the 28th February 1858, leaving one son, the appellant, who was the plaintiff below, and one daughter. The defendant has for many years been in possession of the lands in question.

The plaintiff commenced this suit on the 11th March 1875, claiming four-fifteenths of the property, as being his share of [7] the share which his father took as one of Mulka Kishwar's heirs. The defendant alleged that she was rightfully in possession under a deed of gift or exchange executed in her favour by Mulka Kishwar some time in the year 1856.

At the first hearing of the suit the Court, without going into the merits, dismissed it on the ground that it was barred by lapse of time, and the same view was taken by the Court of Appeal. It was held that time began to run from the death of Mulka Kishwar. The plaintiff then appealed to Her Majesty in Council, who remanded the suit to be tried on certain issues, seven in number. On this appeal a distinction was taken between one portion of the property which is situate in the city of Lucknow, and another portion known as the mouzah Sahrawan, which is in the district of Unao. It will be convenient to deal first with the property in Lucknow.

As regards this property the Judicial Committee found that, though it was confiscated in 1858, the confiscation was annulled in July 1863 without any intention on the part of the Government to make a grant in favour of any person, and therefore the case must be treated as if there had never been any confiscation at all. If then the defendant could prove either the gift she alleged, or possession prior to the confiscation, the plaintiffs' claim would be defeated. But those questions had never been tried, and so issues were directed upon them.

The issue as to the gift was tried by Mr. Lincoln, the Civil Judge of Lucknow, who found that "the property was gifted to defendant by Mulka Kishwar. A deed was executed and lost. That gift is proved, and is valid according to law." On appeal to the District Judge, Mr. Harington, he found thus: "Although no deed of gift was executed, the late Mulka Kishwar did in her lifetime make a verbal gift of the kind known in India as *hibba-bil-iwaz* of all the property in trust in favour of the defendant, and this gift was valid in law." Those findings are impugned by the present appeal.

The first observation that occurs is that the plaintiff seeks to overturn the concurrent judgments of two Courts on a question of fact. To meet this difficulty, it is urged that, though the two Courts are agreed as to the gift, they are at variance on [8] the vital question whether the gift was by deed or by word of mouth; that the evidence of a gift is so inseparably mixed up with the evidence of a deed, that to deny the deed is tantamount to denying the gift; that the principal witnesses were not examined in Court, and therefore the first Court had not that advantage over Courts of Appeal which make them reluctant to disturb its

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findings; and that the issues are not so much upon primary facts as upon inferences from complex groups of facts.

There is so much force in these observations that their Lordships have thought it necessary to hear and consider every part of the case. But the Judges below know the language used by the parties, and they live in the locality, and understand better than their Lordships can what modes of action are probable or improbable for persons in the situation of Mulka Kishwar and her children. And with regard to the variance between the Courts, it is remarkable that Mr. Harington, while rejecting the story of the deed, should yet have felt himself constrained by the probabilities of the case and by the weight of some of the evidence to decide in favour of the gift.

It would require strong and clear proof of miscarriage to induce this Committee to decide against two such findings: whereas the utmost their Lordships can say in favour of the appeal is that the case is attended with so much obscurity that, if it were untouched by previous decisions, they would have great difficulty in deciding it. On the whole, however, their judgment is in favour of the gift, and they are clear that, if the evidence proves a gift, it proves a gift by deed. They will indicate the main lines of reasoning which lead to their conclusion.

In the first place, the defendant has been in open and undoubted possession ever since July 1863. It appears that formal notice of release from confiscation was served on a person who describes himself as agent of the ex-King and for the property of the General Sahib. No claim has been made by the ex-King or by the plaintiff's sister. The plaintiff himself does not allege ignorance or any other disadvantage which might explain why he never preferred any claim till the filing of his plaint. He only says that he was a minor when his father died in February 1858. He had certainly reached majority in 1865, perhaps earlier. In [9] such a case every reasonable intendment must be made in favour of long possession, and of the conclusion that a claim so long delayed is not a just one.

From the month of February 1859 up to July 1863 the defendant told a consistent story about the gift, and she tells the same again in this suit. It is true that in some petitions put in on her behalf prior to February 1859 by an agent, her claim to Mulka Kishwar's property is rested on gift generally without mentioning a deed. This is one of the reasons why Mr. Harington found there was no deed, but there is no inconsistency between making a claim in respect of a gift, and afterwards, when inquiry is made, stating that the gift was by deed. Seeing that Mahomedan law does not require any deed, and the alleged deed was not forthcoming, it was not dishonest or discreditable, though it may have been unwise, to make the first claim on the more general ground. Their Lordships attribute little weight to this circumstance.

The occasion of the alleged gift was one which was very likely to lead to some re-arrangement of family property. The exact date is nowhere stated. But it appears to have been after the annexation, and very shortly before Mulka Kishwar departed for London to plead her son's cause. She was going on what to *purda-nashin* ladies, who had probably never been far beyond the precincts of the palace, must have seemed a terrible journey. The mother and son, who were going away, must have looked at the chance that their parting with the defendant would be a final one, as it proved to be in fact. It does not indeed follow that, because some dealing with the property was likely to take place, it should be the particular dealing alleged; and part of the story, *viz.*, that the

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daughter's gift of jewels to her mother formed the consideration of the gift by the mother, seems very improbable. But there is no difficulty whatever in believing that the daughter contributed what moveables she could to put her mother in funds which she must have needed, or that the mother made over her immoveable property to the daughter, who alone of her children remained in Oudh.

The witnesses, who have all been orally examined and cross-examined, though not all in Court, have in essential matters told a consistent story. In some incidents they have contradicted [10] one another, or themselves. They have not been drilled into uniformity of statement. But there is no substantial discrepancy with regard to the following allegations: that a few days before her departure Mulka Kishwar sealed a deed making over her immoveable property to the defendant; that orders were given to send a copy of the deed to Colonel Outram, the Resident; and that Jowahir Ali, the steward, received orders to obey the defendant as he had been obeying Mulka Kishwar herself. It may be added that the defendant, though of royal rank, was submitted to cross-examination by Mr. Thomas, the plaintiff's Counsel, and was not shaken in the essentials of her deposition.

Moreover, their Lordships think that the evidence establishes a probability that the copy ordered for Colonel Outram, or some notice of the deed, was actually sent to him. The loss of the deed and of the copy are easily accounted for by the general plunder and wreck which took place when Lucknow was in the hands of the insurgents. It may well be supposed that such places as the palace and the office of the Chief Commissioner would be severely ransacked. Under such circumstances, and after the lapse of twenty years, the Courts below were justified in taking what evidence they could find in the official reports of those who enquired into the case many years earlier.

It seems that towards the end of the year 1858, when the defendant first applied to be restored to Mulka Kishwar's property the matter was referred to Mr. Bickers, one of the Treasury officers, for inquiry. The date of his report is not given. Several witnesses appeared before him to prove the gift, which he calls a bequest. After mentioning this he says: "A regular deed (since lost) is alleged to have been executed, and the late Mir Munshi of the Chief Commissioner's office, Tufazul Hosain, declares that he saw a copy of it in the office, and that Nawab Afsar Bahu was recognized as the proprietor of her mother's estate after her departure." He recommends relinquishment of the property in favour of the defendant. This report was before Mr. Lincoln, and was used by him as evidence in the defendant's favour.

On the appeal Mr. Harington examined a number of official records not previously produced, and among them a report of Mr. Capper, the Deputy Commissioner of Lucknow, before whom [11] the question had come. It is dated the 9th February 1863, and, so far as appears, it was founded on examination of papers, not on any further hearing of witnesses. He mentions that the claimants produce witnesses to the deed and to notice having been given to the Chief Commissioner. He then says that no official sanction was given to any acts of the ex-King or his relatives at annexation, and adds: "The evidence only amounts to this, that a letter was sent to Colonel Outram, and that without replying he ordered it to be *dakhil duftured*, and there can be no doubt that this was not an official registry of the transaction." Referring to Mr. Bickers' report as having been contained in Captain Perkin's docket of 15th June 1862, he

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says it is opposed to his previous ones and is inaccurate. But he does not say in what points it is inaccurate, and in one respect he says it is valuable. As regards the property now in suit, he recommends that the confiscation should be withdrawn, and that claimants should be left to make good their claims. As to other property then claimed for the defendant, he holds that Mulka Kishwar had no power to dispose of it. It does not appear to their Lordships that the inference to be drawn from the specific statement in Mr. Bickers' report is at all displaced by Mr. Capper. The latter officer, while stating that there was evidence of the deed and of notice to Colonel Outram, contents himself with replying that the Government never recognized it. And that appears to have been quite sufficient for the purpose in hand, because the Government had complete dominion over the property by virtue of the confiscation.

In fact the Government did not on this occasion come to any decision on the question of the deed. As to part of the property then claimed by the defendant they decided that Mulka Kishwar had no transferable title, and that on her death it reverted to the State. As to the other part, the property now in suit, they decided to abandon the confiscation. From the documents now in the Record, it seems that the Government substantially followed Mr. Capper's recommendations, while declining to give any opinion as to the alleged deed of gift.

Mr. Harington founds his opinion against the deed on two grounds. First, the non-mention of it in the defendant's [12] applications prior to February 1859, which has been before observed on. Secondly, that the Government officers had decided against its existence. It has just been shown that as regards the Lucknow property there was no such decision. But the defendant also claimed under the gift the sum of five lacs of Government paper belonging to her mother. The decision of the Government was against her. The claim seems to have been disposed of very quickly, certainly before Mr. Bickers' report was made. Nothing whatever appears as to the grounds of decision : but it may be noticed that, though Mr. Bickers mentions the decision, he could not have considered that it governed the claim to the Lucknow property, because as to that property he thinks it open to him to advise, and does advise, a decision in favour of the defendant. Nor do either Mr. Capper or the Government treat the decision upon the five lacs as applying to the Lucknow property. All that can certainly be said is that, if the Government decided upon any ground applicable to the present case, they must have decided not only against the deed, but against the gift, in which Mr. Harington differs from them.

The gift being established, the defendant's possession is only material if possession was necessary to sustain such a gift as is here proved. On this it is sufficient to say that, if possession was necessary, both Judges have found the fact in favour of the defendant, and there is no reason to question their decision.

As regards the Sahrawan property, some different considerations arise. The view taken by this Committee in 1878 was that, as the effect of Lord Canning's proclamation was to put an end to all previous titles, the title of either party must depend on some subsequent grant or proceeding of the Government, which again must have been within twelve years of the suit. In the Lucknow case, where there was no settlement to be made, this Committee considered that the Government had withdrawn themselves without making any order in favour of any definite person, and therefore the former title, whatever it might be, was let in. In the Sahrawan case,

where a settlement was necessary, they found an order of the Chief Commissioner in favour of "the heirs of Mulka Kishwar;" that is, the distinction taken between the two properties.

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[13] But the case had been imperfectly tried, and the materials for a complete judgment were wanting. The Committee had before them the extracts from the *wajib-ul-arz* which tended to show that the settlement was actually made with the defendant. But no *kabuliyat* was forthcoming. Upon this they doubted whether the order of the Chief Commissioner was ever carried into effect. They desired to know whether there was any evidence that by the indefinite term "heirs of Mulka Kishwar" the Chief Commissioner intended to include the plaintiff; and to know with whom the settlement was executed, and, if with the defendant, whether she took it adversely to the other heirs or as a trustee. In effect the Committee decided that according to the evidence before them the root of the title was in the order of the 25th October 1863; that therefore no question of limitation could arise; and that the only question was whether the plaintiff had been let in, or could come in, under the terms of that order. For the purpose of deciding that question, they directed issues calculated to elicit the whole of the facts.

On the second and third issues Mr. Lincoln finds that settlement was made with the defendant solely and exclusively, and that no *kabuliyat* was executed. Mr. Harington on the contrary finds that the settlement was made not with the defendant but with the heirs of Mulka Kishwar, and that a *kabuliyat* was executed in the defendant's name as *lambardar*. Such a flat contradiction on two simple matters of fact is somewhat startling, and has caused a good deal of perplexity. There are two documents in the record which were before Mr. Lincoln, and which, if they were the final documents, would warrant his finding as to the settlement.

One is in page 14 of Record II, and is to the same effect as the extract from the *wajib-ul-arz* given in page 9 of Record I. It is taken from the settlement volume, and is called "Statement of Khawut of village Sahrawan." Under the head "Details of Shares of the Sharers," the defendant is entered as having 20 biswas, or the entirety of the village.

The other document is a copy of *rubkar* given at page 15 of Record II, and was not in Record I at all. It purports to be [14] a "Proceeding of the Settlement Court presided over by Munshi Niamat Ali Khan, Extra Assistant Settlement Commissioner, held on 21st July 1865."

It runs thus:—

"In the matter of appointment of *lambardar* of village Sahrawan, Janki Pershad, agent of Nawab Afsar Bahu Begum, Lambardar of Sahrawan, presented himself to-day, and a *fard-e-razamandi* (record of assent) was drawn up. As Nawab Afsar Bahu Begum, Lambardar, is the sole proprietor of this village, and it is a zemindary village, and the Government revenue assessed thereon amounts to Rs. 2,973, it is ordered that Nawab Afsar Bahu Begum Saheeba, the sole proprietress, be appointed *lambardar*, and *parwanah* be issued for information of Sadr Munserim and Tehsildar.

"A copy of this proceeding to be forwarded to the Deputy Commissioner for his information.

"Case to be consigned to record."

And it appears to have been put up with the settlement judicial volume.

Mr. Harington does not take any notice of these documents, but only says that the volume of proceedings produced before Mr. Lincoln

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was the wrong volume, and of course did not contain the documents wanted. He called for the Final or Kishwar Volume, and treats the *rubkar* of the 28th September 1865, which is found there, as being the authentic and conclusive record. As regards the *kabuliyat*, it appears clear that none was found in the Judicial Settlement Volume, but that there was one duly entered in the final volume. As regards the *khewat* and the *rubkar* of 21st July 1865, it is quite unexplained how such instruments have got into the Judicial Settlement Volume and are unnoticed in the Final Volume.

Perhaps the difficulty which here seems great is not great to those who know the system of book-keeping in the Oudh Settlement Office. However that may be, their Lordships think it right to act on the statement of Mr. Harington, which appears to be accepted as correct by the Judicial Commissioner, that the entry of 20th September 1865 in the Final Volume represents the final settlement, and that, though the defendant was to be *lambardar*, it was made in favour of the heirs of Mulka Kishwar in the exact terms of Sir C. Wingfield's order of October 1863.

[15] It remains then to enquire who may claim under this order. On issue 4 the two Courts have again given contrary opinions. Mr. Lincoln holds that the Chief Commissioner meant the heirs of Mulka Kishwar whoever they may have been, and that the order had no reference to the plaintiff or any one else in particular. Mr. Harington holds that the Chief Commissioner intended to "include the plaintiff to his own portion of the share which his father would have been entitled to had he been then alive." But there is no further evidence of the intention, and the reasoning of both Courts proceeds on the order of October 1863 and the antecedent circumstances. Both Courts find that the gift of 1858 excludes the plaintiff.

The language of Sir C. Wingfield is "that the decree shall run in the name of the heirs of Mulka Kishwar," and he adds that "the defendant and her other children can claim a share in the property." If these expressions are to be literally construed, it is clear that the plaintiff can make no claim, for he is neither heir nor child of Mulka Kishwar. Their Lordships agree in the view that the instrument is not one which ought to be construed as if it were using exact terms of art. But if the strict meaning of the terms is departed from, the question arises whether the departure must not be carried to a greater length than is just sufficient to let in the claims of the plaintiff. That question must be determined on a view of the circumstances under which Sir C. Wingfield made his order.

The course of decision in the Settlement Courts is recited in the *rubkar* of 20th September, and was as follows: Four parties claimed the settlement,—the old zemindars, Kishen Sahai, a person who had spent money on the village, the defendant as representing Mulka Kishwar, and one Fatima Khanum representing Agha Ahmed. Both the latter claimed as mortgagees, and the question between them was whether the mortgage really belonged to Agha Ahmed or to Mulka Kishwar. On the 2nd January 1863 Mr. Mackonochie decided in favour of the old zemindars, dismissing the other claims. On appeal from this decision "the late Settlement Officer" (his name does not appear) made a decree, dated 12th March 1863, in favour of Fatima Khanum. A second appeal was then carried to the Settlement Commissioner Mr. Currie, [16] who made his decree of 3rd August 1863 in favour of the defendant. A third appeal was

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carried to the Chief Commissioner, who made his decree of the 25th October 1863 which this Committee took as the root of title.

The first observation on these proceedings is that the Settlement Courts were clearly inquiring into the old titles as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted, as Mr. Lincoln suggests, whether in 1863 that effect was realized to the minds of the Government officers, as it has become since the legal decisions which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary, or wholly new, redistribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk of properties, they inquired who would be entitled if no confiscation had taken place, and effected settlements with those persons. Certainly that was the operation in which the three lower Settlement Courts had been engaged with regard to Sahrawan when the case came before Sir C. Wingfield as the highest Court of Appeal.

The only issue then raised was between the representative of Mulka Kishwar, on the one part, and persons claiming adversely to Mulka Kishwar, on other parts. There was no contest between different persons claiming under Mulka Kishwar. The only representative of that lady was the defendant, and it is somewhat significant that in the proceedings she is said to claim as heir, though it is clear that she was claiming under the gift. Mr. Currie, differing from the Courts below, had come to the conclusion that Mulka Kishwar was the true owner, and he incautiously worded his decree in favour of the only claimant under Mulka Kishwar. Sir C. Wingfield approved the substance of his decision, and, so far as regards all the parties before the Court, affirmed it, but having regard to parties not before the Court, he modified its language so as to avoid prejudice to others who might claim to represent Mulka Kishwar.

It is true that the ground assigned for the modification is that in another case it had been shown that there was no proof [17] of the alleged gift to the defendant. The other case is doubtless the Lucknow case, which was before Sir C. Wingfield in the previous July. His recollection of that case served his present purpose, that is, it warned him not to prejudice the pending question in favour of the defendant, as Mr. Currie's decree would do; but he must have spoken from memory, and his memory was not quite accurate for all purposes. There was evidence of the gift, though whether it amounted to proof or not the Government never decided. They left that question to be decided at law.

Their Lordships think that the same course has been taken in the Sahrawan case. The intention of Sir C. Wingfield was simply to decide the case before him. On an inquiry into the old title he finds, as between Mulka Kishwar and the other parties, that she is entitled. But she is dead, and the decree cannot run in her name, so he uses a comprehensive expression which is in common use, and which is used elsewhere in these very proceedings, to designate those who take a dead man's property. Their Lordships see no trace of any intention on his part to use exact terms of art, or to decide in favour of one person or another as between claimants under Mulka Kishwar, or to prejudice the litigation which he contemplated between such claimants, or to do anything but exclude those whose claims were wholly adverse to Mulka Kishwar. If he had been told a month afterwards that the deed of gift had been

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discovered, or that a Court of law had (as has now happened) decided that the gift was established, he would probably not have found it necessary to rehear the case, or to do anything more than adjudicate between the claimants under Mulka Kishwar. It would have been just the same if a will of Mulka Kishwar had been produced, or if she had made a grant of the village to some entirely different person, or if some of the heirs themselves had made an alienation. Sir C. Wingfield could not possibly tell what interests might be set up when the "heirs of Mulka Kishwar" were the only parties in the field, and were called on to claim as against one another. He left all whom it concerned to fight that out. If we suppose him to have meant more than this, we should be attributing to him an intention to [18] do the very thing he was correcting in his subordinate, *viz.*, to decide in the dark, and to prejudice claims which had never been tried.

It has before been pointed out that the difference between the two properties in dispute consists in the circumstance that in the one case a settlement was to be made, and in the other none. It was quite necessary to have the additional materials now afforded as regards Sahrawan; but having got them, their Lordships find that, so far as regards the form of orders made by the Government, little difference is left between this property and the other. In the Lucknow case the order of 4th July 1863 is: "The heirs of Jania Ali will be informed that they have no claim against Government, and should settle the dispute among themselves just as they like." And the *parwana* issued the same day directs the *darogah* "to inform all the heirs to the Queen Dowager that the Government have reserved no claim whatever . . . . , and that they may mutually settle among themselves as they like." Yet in the Lucknow case the question of gift or no gift being decided in favour of the donee, the property falls to the donee.

The same result must follow in Sahrawan. The plaintiff wholly fails, and his appeal must be dismissed with costs. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Mr. *T. L. Wilson.*

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PRIVY COUNCIL.

PRESENT:

Lord Watson, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On appeal from the High Court at Fort William in Bengal.*]

BHUBANESWARI DEBI (*Plaintiff*) *v.* NILCOMUL LAHIRI (*Defendant*).* [9th June, 1885.]

Hindu law, Adoption—Adoption as regards succession to estate of a collateral relation vested in an heir before the adoption—Fraud on the part of such heir delaying adoption.

According to Hindu Law, as laid down in the decided cases, an adoption effected after the death of a collateral relation does not entitle the adopted son to come in among the heirs of such collateral.

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Of three brothers deceased, the one who died first left one son; the second dying left a widow, who took her estate for life in her husband's [19] property; and the third left a widow to whom he gave by will a power to adopt.

On the death of the widow of the second deceased, the son of the first inherited his uncle's share in the family estate, and by fraudulent acts caused delay in the exercise of the power to adopt by the widow of the third. Afterwards a boy, who had not been born in the lifetime of the widow who took for life as above stated, was adopted under the said power.

Held, that the adopted boy could not claim to share along with the nephew the estate which had belonged to the uncle, notwithstanding the nephew's conduct in reference to the exercise of the power to adopt, inasmuch as the date of this boy's birth rendered it impossible for him, under any circumstances, to have been made an adoptive heir to the uncle.

[F., 2 C.L.J. 87 = 9 C.W.N. 795; **Cons.**, 14 B. 463 (469); 22 B. 416 (420).]

APPEAL by special leave from a decree of the High Court (25th March 1880) (1) reversing a decree of the Subordinate Judge of Rangpur (30th April 1879).

This was a suit on the ground of title by inheritance as an adopted son to obtain possession, with mesne profits, of a half share in zemindaries which had belonged to Rammohun Lahiri, deceased, who was the defendant's uncle, *i.e.*, his father's brother.

The plaintiff claimed to be entitled in equal degree with this nephew, as he was the adopted son of another brother, and thus nephew to Rammohun, it being also part of the plaintiff's case that the adoption had been delayed in consequence of the defendant's fraud. These brothers, with a third, were all dead, the three being Kalimohun, Rammohun and Shibnath Lahiri, sons of Ramanath Lahiri, deceased many years ago. Rammohun left a widow Chandmoni, who took his property for her widow's estate, and died on the 15th June 1867. Shibnath, who survived the other two brothers, died in 1861, leaving a son and two daughters, all infants. He also had made a will, whereby he gave his estate to his son, but directed that if his wife Bhubaneswari, who was then pregnant, should give birth to a second son, that son should take half the estate. He also empowered Bhubaneswari, in the event of the son dying, or of her not having a second son, or of such second son's dying, to adopt one son after another, as might be necessary. The son died, as also **[20]** all the offspring of Shibnath Lahiri. But the adoption was delayed under the following circumstances :—

After the death of Shibnath, Nilcomul acted for some time as Bhubaneswari's manager, but ceased so to do after about four years; and in 1866 he set up another will, purporting to have been made by Shibnath, containing no power to adopt. This was disputed by Bhubaneswari, and led to litigation. The High Court found, on 25th May 1869, that the will put forward by Nilcomul was a forgery, and that having got the true will into his hands he had suppressed it. Nilcomul appealed to Her Majesty in Council, but his appeal was dismissed on 23rd March 1874. Whilst that litigation was pending, Bhubaneswari applied to several persons to give her a son to adopt, but without success, in consequence of the uncertainty cast upon the will. Afterwards, whilst the appeal was still undisposed of, Akhoy Chunder Singh executed to Bhubaneswari a deed of gift, dated 22nd January 1879, giving her his second son, for the purpose of adoption. This boy was duly adopted by her to her deceased husband Shibnath, receiving the name of Jotendromohun;

(1) 7 C. 178.

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and now, by his adoptive mother as his guardian, he brought this suit, and preferred this appeal.

The defence of Nilcomul was that, granting that Bhubaneswari had power to adopt, yet, as she had not adopted till after the death of Chandmoni, whom he, the defendant, had succeeded as sole heir in 1867, the adopted son, who was not born when Chandmoni died in that year, could take no share in Rammohun's estate.

The Court of first instance, the Subordinate Judge of Rangpur, found that the defendant had fraudulently, and in breach of the trust reposed in him, suppressed the will of Shibnath Lahiri, putting forward a forged will which contained no power to adopt, and had also influenced several persons not to give their sons to Bhubaneswari to adopt. The Court was of opinion that as a matter of equity, Nilcomul should not be allowed to derive advantage from his own wrong, and to deprive the adopted son of that moiety of Rammohun's estate to which he would have been entitled had he been adopted before Chandmoni's death. A decree was, therefore, made in favour of the plaintiff.

[21] On appeal the High Court (MORRIS and TOTTENHAM, JJ.) reversed this decree. In their judgment, printed in the report of the appeal *Nilcomul Lahiri* v. *Jotendromohun Lahiri* (1) they held that, though the fraud of Nilcomul had put obstacles in the way of the taking a son in adoption by Bhubaneswari under the power conferred upon her, yet, inasmuch as "the minor plaintiff, subsequently adopted, was not even in existence when the fraud was committed by the defendant," and inasmuch as Bhubaneswari had not been wholly without any opportunity of adopting before Chandmoni's death, the fraud committed "was of too remote a character, so far as it affected Jotendromohun, for the Court, as a Court of Equity, to disturb the estate, which naturally vested in the defendant as sole heir of Chandmoni at the time of her death." The suit having been, accordingly, dismissed, the present appeal was brought.

For the appellant, Mr. *J. Rigby* and Mr. *R. V. Doyne* argued that, with regard to the fraud found by both the Courts below, which had differed as to the effect of the fraud, but not as to its having been committed, the lower appellate Court had erred in allowing the appellant's title to be defeated on the ground of the delay in the adoption, seeing that the respondent had himself caused that delay. [Their Lordships intimated that the difficulty in the appellant's case was that the adopted son, not having been alive in the lifetime of Chandmoni who died in 1867, could not be said to have been among the heirs of Rammohun at her death. If the title of the adopted son was incomplete in itself, how could the effect of fraud convert him into an heir who would not have been one had no fraud occurred ?] Upon this it was contended that the strength of the appellants' case was in the doctrine of estoppel ; the respondent being estopped from alleging that Jotendromohun had not been adopted in due time. [Their Lordships asked whether the fact that the appellant was not in existence until several years after Nilcomul had taken the inheritance, did not prevent his making good his claim, whatever might be the assistance that he could get from the law of estoppel.]

[22] It was then submitted that, under all the circumstances, the respondent could not allege at all the ground against the appellant that he was not born till 1870 or 1871 ; this was in consequence of the position of Nilcomul. The latter had become manager for the widow, and

(1) 7 C. 178.

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was in a position of trust at the time when he suppressed the will empowering her to adopt. At that time it was his duty to promote the adoption in fulfilment of the trust, and yet he had frustrated the widow's attempts to adopt, while still remaining in this fiduciary relation. This misconduct deprived him of any right to insist on any defect in the title of the adopted son, arising from the fact that the widow had deferred adopting.

Reference was made to *Padmakumari Debi Chowdhrani* v. *The Court of Wards* (1); Macnaghten, H. L., 189, Chap. VI, adoption Case XIV; *Lutterel* v. *Waltham* (2).

Mr. *J. T. Woodroffe*, for the respondent, referred to the Full Bench decision of the High Court in *Kalidas Das* v. *Krishna Chandra Das* (3), for the proposition that property once descended to an heir cannot be divested in favour of a nearer relative, not in existence, or conceived, at the time of the death of the owner, from whom the property has so descended. This adopted son's claim must fail, as he was not in existence at the death of the Chandmoni in 1867. The learned Counsel was also heard as to costs.

Mr. *J. Rigby*, Q. C., replied.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—Bhubaneswari Debi, as the mother and guardian of Jotendromohun Lahiri, sues to recover, on behalf of her son, half the estate of Rammohun. Rammohun died leaving two brothers, and a widow, Chandmoni. He left no son, and consequently the widow succeeded and took the widow's estate, and until her death no one could be designated as his reversionary heir. She died on the 15th June 1867. Shibnath, one of the brothers of Rammohun, died on the 28th May 1861 in the lifetime of Chandmoni, having given power to his widow to adopt [23] a son. He consequently did not succeed to any portion of the estate of his brother. Kalimohun, the other brother of Rammohun (we have not got the precise date of his death) died before Chandmoni, leaving a son, Nilcomul, who was the defendant in the suit. If the widow of Shibnath had adopted a son during the lifetime of Chandmoni, that son would have been entitled to a half share of the estate of Rammohun as one of the reversionary heirs of equal degree with Nilcomul, who was also a nephew. But the allegation is, that in consequence of Nilcomul's fraud in setting up a forged will, the widow of Shibnath was unable to get anyone to give her a son in adoption, and could not adopt until after the death of Chandmoni. In consequence of her not having adopted a son in the lifetime of Chandmoni, Nilcomul, the defendant, became entitled to the whole of the property of his uncle unless his fraud entitles the boy, who was subsequently adopted by the widow of Shibnath, to come in as the heir of one moiety of the estate.

It appears that the widow from time to time tried to get different persons to give her a son in adoption, and that they refused upon the ground of the forged will which had been set up by the defendant; and that consequently she could not get anyone to give her a son in adoption.

After the death of Chandmoni she did adopt the present plaintiff; but it appears clearly upon the evidence that the plaintiff was not in existence at the time of the death of Chandmoni.

(1) 8 C. 302=8 I.A. 229. (2) Cited in 14 Vesey 290. (3) 2 B.L.R. F.B. 103.

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The widow never could, by adoption, if there had been no fraud, have made the present plaintiff a reversionary heir of half the estate of Rammohun, because he was not in existence at the time of Chandmoni's death. According to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral. It appears from the evidence of the natural father of the present plaintiff that the widow applied to him in 1277—that is, in the year 1870—to give her his son in adoption, and that at that time he gave to her in adoption his second son.

That was about four years after the death of Chandmoni, and then the father says in his cross-examination: "When in 1277 [24] she made her first attempt, the age of my second son"—that is the present plaintiff—"was about two months." He was consequently only about two months old in 1870 or 1871, the widow having died in June 1867. The boy never could, in the course of nature, have become the heir of Rammohun's estate. Under these circumstances the High Court came to a right conclusion in dismissing the plaintiff's suit.

A question then arises whether, under the circumstances which have been detailed in the evidence, the fraud which has been brought home to the defendant and the forgery to which the High Court alluded, this is a case in which in their discretion their Lordships ought to give the respondent the costs of the appeal.

Their Lordships are of opinion that the respondent ought not to have those costs.

They will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and they make no order as to the costs of this appeal.

Appeal dismissed without costs.

Solicitors for the appellant: Messrs. *Wrentmore & Swinhoe.*

Solicitor for the respondent: Mr. *T. L. Wilson.*

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12 C. 24.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

KRISTO CHUNDER GHOSE AND OTHERS *(Plaintiffs)* v. RAJ KRISTO BANDYOPADHYA AND OTHERS *(Defendants)*.*
[8th July, 1885.]

Bengal Rent Act (VIII of 1869), ss. 26, 64—Suit for possession by unregistered purchaser after ejectment—Effect of sale of tenure by shareholder in zemindari—Onus of proof.

K, the recorded tenant of a *maurasi mokurari* tenure, died leaving *G* his son and heir, who sold the tenure, which eventually came into the hands of the plaintiff's father, and afterwards on his death became vested in the plaintiffs, but neither they nor their father, though they made attempts to do so, ever obtained the registration of their names as tenants.

[25] *R*, one of the two shareholders in the zemindari, brought a suit for arrears of rent of the tenure against *G*, and in execution of the decree he obtained

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* Appeal from Appellate Decree No. 788 of 1884, against the decree of Baboo Bhuban Chunder Mukerji, Second Subordinate Judge of Hooghly, dated the 4th of February 1884, affirming the decree of Baboo P. N. Banerji, Second Munsif of Howrah, dated the 31st of January 1883.

in that suit the tenure was sold and purchased by the other zemindar, by whom the plaintiffs were dispossessed. *Held*, that the plaintiffs were not precluded by the fact that their names were not registered as tenants, under s. 26 of the Rent Act, from bringing a suit to recover possession of the tenure. The holder of the decree, in execution of which the tenure was sold, assuming him to be only a shareholder in the zemindari right, had no right under s. 64 to sell the tenure, but only the interest of the person against whom the decree was passed. The onus was on the defendant to show that the sale under the decree for rent was of such a nature as to give him priority over the plaintiffs.

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[F., 10 Ind. Cas. 899; **Rel. upon** 20 Ind. Cas. 337 (339); **R.**, 6 Ind. Cas. 605; 4 C.L.J. 68 (72) = 10 C.W.N. 176; **D.**, 26 C. 677 (682); 1 Ind. Cas. 257.]

THIS was a suit to recover possession of certain rent-paying land from which the plaintiffs stated they had been illegally ejected under the following circumstances:—

They alleged that one Kashi Nath, the father of Goburdhan, the defendant No. 3, was the recorded *maurasi mokurari* tenant of the tenure in dispute; that Goburdhan in 1269 (1862) sold the tenure to Manick Ram Ghose, the plaintiffs' father, and one Bhola Nath Ghose who were in joint possession in paying rent; that in 1274 (1867) Bhola Nath sold his moiety to one Gobind Hazra, by whom it was again sold in 1276 (1869) to the plaintiffs' father, who died in 1280 (1872), when the plaintiffs succeeded him in possession of the whole tenure and paid rent for the same. Before his death, however, he had granted a lease of the whole of the lands to Goburdhan and others; and the plaintiffs alleged that these persons in collusion with each other, and in order to destroy the title of the plaintiffs, brought a suit through the second defendant, Raj Kristo Banerjee, a zemindar shareholder of half the tenure, against the third defendant, alleging him to be a tenant, for arrears of rent; that the plaintiffs, in order to protect their rights, paid the sum of Rs. 68 on account of the decree, but that nevertheless in execution of the decree, but without any proper attachment or sale proclamation being made, the tenure was brought to sale and purchased for a nominal sum by the zemindar, who dispossessed the plaintiffs. The plaintiffs therefore prayed for declaration of title and for possession.

The defendants denied the plaintiffs' title and possession; they denied that rent was ever received by the zemindars from the [26] plaintiffs or their predecessors in interest. They alleged that the suit for arrears of rent was properly and legally brought against Goburdhan as the recorded tenant; that no such payment of Rs. 68, as alleged by the plaintiffs, was made; and that the proceedings in execution of the decree were properly taken and all legal formalities duly complied with.

It was found that Kashi Nath was the recorded tenant of the tenure, the name of his son Goburdhan being entered as the *surbarakar*; and that though an attempt had been made by the plaintiffs' father and Bhola Nath to compel the landlords to register their names as tenants, and the plaintiffs had endeavoured to have their names recorded as tenants, these attempts had been unsuccessful.

Both the lower Courts gave a decree in favour of the defendants.

The plaintiffs appealed to the High Court.

Mr. *R. E. Twidale*, Baboo *Mohesh Chunder Chowdhry*, Baboo *Srish Chunder Chowdhry*, and Baboo *Abinash Chunder Banerji*, for the appellants.

Baboo *Trilokyanath Mitter*, for the Respondents.

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12 C. 24.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The plaintiffs in this case sue to recover certain property from which they say they have been dispossessed. Their story is shortly this: That there was a permanent tenure of which Kashi Nath was the tenant; that Kashi Nath died leaving the defendant Goburdhan his son and heir; that Goburdhan sold the tenure, and that by several devolutions, which it is not necessary for us to examine in detail, the whole tenure became vested in the plaintiffs; that subsequently one of the defendants, an 8-anna share holder in the zemindari interest, brought a rent-suit, not against the plaintiffs, but against Goburdhan, that in execution of that decree against Goburdhan he professed to sell the tenure to another defendant; and that in consequence the plaintiffs have been ejected from the property, and hence the suit.

The lower appellate Court has dismissed the suit in this way,—the Subordinate Judge says: "I think the plaintiffs in this [27] case have no *locus standi*. The plaintiffs admit that their father once sued the landlord-defendant to register his name on the strength of the bill of sale of 1269 B. S." (that is the bill of sale through which the plaintiffs claim) "executed by the defendant No. 3; that suit was dismissed, after which repeated private attempts were made by the plaintiffs or their father to secure the landlord's recognition of their purchase, but they failed," and so on. And then he says that the plaintiffs, not having obtained registration in the zemindar's sherista as directed by s. 26 of the Rent Act, are not entitled to recover in this suit.

In that, it appears to us that the lower appellate Court has made a mistake. That section does no doubt require the transferee or inheritor of a tenure to register it in the zemindar's sherista. It appears on the face of the judgment that the plaintiffs or their predecessors in title made attempts to register their transfer. The section also requires the zemindar to register when so called upon. It appears on the face of the judgment that the zemindar did not do so. There is nothing in the terms of any section of the Rent Act saying that if for any reason, whether by the default of the tenant or anybody else, the registration is not effected, the transferee of the tenure shall take no title. On the contrary, there are provisions in the Rent Act which indicate that that cannot be so. For example, the provision in s. 63 says that an unregistered transferee shall not be recognized as a person entitled to come in and object to the sale taking place, implying that he has an interest. If the general intention of s. 26 had been that an unregistered transferee should take no title, it would have been unnecessary to insert such a proviso to this section. The law was expressly laid down in the case of *Nobin Kishen Mookherjee* v. *Shib Pershad Pattack* (1). And all the other cases imply the same thing. The case so much relied upon of *Sham Chand Coondoo* v. *Brojo Nath Pal Chowdhry* (2) clearly does so. That was a suit by an unregistered transferee seeking to establish his right as against a purchaser of the tenure under a decree for arrears of rent. If an unregistered purchaser [28] *prima facie* takes no title, that case might have been very quickly disposed of on that ground. Whereas the case was really decided on the construction of the sections with reference to the rights of a purchaser.

(1) 8 W.R. 96.

(2) 12 B.L.R. 484=21 W.R. 94.

No doubt an unregistered purchaser does take subject to many disadvantages by reason of the want of registration. One of these is that embodied in the proviso, to which we have just referred, namely, that he cannot come in and object to the sale. A second is that established in the case of *Sham Chand Coondoo* v. *Brojo Nath Pal Chowdhry* (1) that if a sale takes place in a rent suit brought by and against proper persons, and the sale be of the tenure, the unregistered transferee has no title as against the purchaser. But none of the cases show that an unregistered transferee takes no title, or, as the lower appellate Court expresses it, has no *locus standi* to bring a suit complaining of an ejectment. On that point we think that the lower appellate Court is wrong.

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Then there is another important point which should be noticed, because it goes to the very root of the case.

In the first place, the plaintiff raises this contention: he says that, assuming that the rent suit was brought, and that there was a sale, the person who brought that suit was not a zemindar, but an 8 anna shareholder in the zemindari right, and therefore under s. 64, he could not, in execution of his decree, sell the tenure: all that he could sell would be the rights of the person against whom he recovered his decree, just in the same way as he could sell the rights of that person in an ordinary execution under the Procedure Code in a suit other than a rent suit.

Now the mode in which the first Court dealt with that point is this: "It is said that as one of the co-sharer landlords obtained the rent decree, he could not have sold the tenure, but only the right, title and interest of the tenant; and as these are proved to have passed from the tenant by private sale to plaintiffs prior to date of decree, in reality there was no right, title and interest of the tenant which could be sold." The mode in which that was dealt with is this: "All this seems to me to be [29] exceedingly ingenious, but unfortunately is not to be found in the plaint."

As to some of the points of which the Munsif was speaking, he was no doubt right in saying that they should not be raised at that stage. As to so much as related to the plaintiff's title he was right in saying that the plaintiff, having alleged one title in the plaint, must not be allowed at the last moment to rely upon another title. But this, about the nature of the rent suit, is a matter not of the plaintiff's title, but of the defendant's title. The plaintiff is not called on to define the nature of his opponent's title. It is for the plaintiff to state his own case. It is for the defendant to state and prove everything which is necessary to the case on which he relies. It was therefore for the defendant to allege and to prove what the rent suit was, and what the decree was, and that the sale under the rent decree was of such a nature as to give him priority over the plaintiff. We think, therefore, that the Munsif was wrong in dismissing the matter in that way. Moreover we think that the contention thus set up by the plaintiff, supposing it to be well founded in fact, is sound in law. The terms of s. 64 are express, and the distinction between the two procedures, the procedure to sell the interest of the tenant and the procedure to sell the tenure, is very clearly pointed out by the Privy Council in the case of *Dular Chand Sahu* v. *Lalla Chabeel Chand* (2). That was a case in which the plaintiff, who sued, had the whole interest in the zemindari right; and having recovered a decree against the proper person for rent, it was open to him to proceed, if he liked, under s. 59 of

(1) 12 B. L. R. 484=21 W. R. 94.

(2) 6 I. A. 47.

1885 JULY 8. — APPELLATE CIVIL. — 12 C. 24.

the Rent Act, and to sell the tenure. But it was found on examination of the documents that as a fact he had elected not to proceed to sell the tenure but to sell the interest of the debtor. Accordingly the title of the purchaser was good only to the extent of the interest of the debtor.

The present case is stronger, because it is not the case of a person who had a right to sell the tenure (assuming the facts to be as alleged), but of a person who had no right to sell anything beyond the interest of the debtor. If therefore the fact be that [30] the defendant who brought the rent suit was no more than a shareholder in the zemindari rights, he could not sell the tenure. And we think it clear in point of law that, if the plaintiff prove his title, then the purchaser-defendant took no right as against him by the sale.

These are the only points on which we think it necessary to express our opinion.

The case must go back to the lower appellate Court. There is no express finding that what was sold, was sold in execution of a decree obtained by an 8-anna sharer. It is so stated in the plaint and certainly by implication in one at least of the written statements. And it is stated that the evidence is all one way, but there is no finding upon it ; therefore the facts must be found by the lower appellate Court. The lower appellate Court will then consider the case on the merits—that is to say, it will find whether the plaintiff has established his title either under the alleged transfer to him, or by having been recognized as tenant by receipt of rent or otherwise, or by the length of his occupation or on any other ground. And if it be that the sale which took place and at which the defendant purchased was a sale in a suit by an 8-anna sharer, then, as a matter of law, the title of the plaintiff will prevail.

The appellant will have the costs of this appeal. The costs in the Court below will be dealt with by the Court below.

Appeal allowed.

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12 C. 30.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

GUNGA DASS DEY (*Plaintiff*) *v.* RAMJOY DEY AND OTHERS (*Defendants*).* [20th July, 1885.]

Appeal—Second Appeal—Civil Procedure Code, 1882, *s.* 584—*Limitation Act,* 1877, *ss.* 4 *and* 12—*Time requisite for obtaining copy of decree.*

An order dismissing an appeal as being presented out of time under s. 4 of the Limitation Act, 1877, is a " decree passed in appeal " within the meaning of s. 584 of the Civil Procedure Code, 1882. A second appeal will therefore lie from such order. Where a decree was passed on the 22nd September, and application for a copy was made not until 29th and then [31] with insufficient folios, and the Court was closed for the vacation from 30th September to 1st November, the deficient folios being filed on the day it reopened, 2nd November, the copy delivered on the 6th, and the appeal filed on the 14th: *Held* that the appeal was out of time under s. 12 of the Limitation Act, the appellant not being entitled to a deduction of the time occupied in ascertaining what the requisite number of folios was.

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* Appeal from Appellate Decree No. 286 of 1884, against the decree of R. Towers, Esq., Judge of Tipperah, dated the 3rd of December, 1883, affirming the decree of Baboo Protab Chunder Mozoomdar, Third Munsif of Muradnagore, dated the 21st of September 1883.

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[F., 27 M. 21 (22)=13 M.L.J. 300; Appr. 12 A. 461 (478); Cons., 4 C.P.L.R. 188 (189); R. 8 C.W.N. 141 (142); 17 C.W.N. 807 (808)=19 Ind. Cas. 931; 10 M.L.T. 437=21 M.L.J. 1063; 18 C.L.J. 209 (213)=17 C.W.N. 868 (870)=19 Ind. Cas. 630 (631); D. 3 C.W.N. 55; 7 C.W.N. 109.]

THE facts are stated in the judgment appealed from, which was as follows :—

"This application must be rejected as out of time. The appellant is not entitled to a deduction of the time covered by the Dusserah vacation (30th September to 1st November.) The decree was prepared on the 22nd September; there was time to apply for and obtain the requisite copies between that date and the 30th September, but the application for a copy was not made until the 29th, and then with insufficient folios. The deficient folios were filed on the day the Court re-opened (2nd November) and the copy was ready for delivery and delivered on the 6th November. The appeal was filed on the 14th. The requisite number of folios should have been filed with the application for the copy (General Rule and Circular Order, Civ. Ch. IV., p. 237, Rule 12*b*). I can find no authority for the contention that the appellant is entitled to a deduction of the time occupied in ascertaining what the requisite number of folios was."

Baboo *Baikant Nath Dass*, for the appellant.

Baboo *Grish Chunder Chowdry*, for the respondents.

The judgment of the High Court (WILSON and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

This is an appeal against a decision of the District Judge of Tipperah, rejecting an appeal as having been presented out of time.

A preliminary objection has been raised that no appeal will lie in such a case to this Court. The question is, whether an order dismissing an appeal under s. 4 of the Limitation Act is a "decree passed in appeal," from which a second appeal is allowed under s. 584 of the Code. We think that it is such a decree. By s. 2 of the Code, an order rejecting a plaint is within the definition of "decree" and by s. 582 the provisions hereinbefore contained are made to apply to appeals so far as such provisions are applicable. We think then that an order rejecting or dismissing an appeal is a decree of the appellate Court under the terms of the definition.

[32] The decree against which the appeal was preferred was prepared on September 22nd, 1883, and the application for a copy was made on September 29th. From September 30th to November 1st, the Court was closed for the Dusserah vacation. On the following day (November 2nd) the appellant filed some extra sheets of blank paper which he had not been able to procure on September 29th. The copy was ready and delivered on November 6th, and the appeal was filed on November 14th.

The appeal was thus presented 53 days after the date of the decree; but under s. 12 of the Limitation Act the appellant is entitled to exclude the time requisite for obtaining a copy of the judgment. This time he would calculate as 39 days, that is to say, from the 29th September to 6th November, and if this calculation be allowed, the appeal is clearly within time. But the District Judge appears to consider that as the requisite number of folios or sheets of blank paper were not filed with the application, that application must be held to have been made on the date on which the deficient folios were supplied, *viz.*, November 2nd. According to this calculation, the appellant would be entitled to exclude five days only instead of 39 days, and the appeal would be barred.

1885 JULY 20. — APPELLATE CIVIL. — 12 C. 30.

We are asked in second appeal to say that the District Judge is wrong in the interpretation he has put on the words "the time requisite for obtaining a copy" in s. 12 of the Limitation Act.

We think that no hard-and-fast rule can be laid down to meet all cases that occur under that section. Ordinarily no doubt the application for copies of the judgment and decree should be accompanied with a sufficient number of sheets of stamped paper for the copies; and parties should not be allowed to extend the period prescribed for appeal by any unnecessary delay in putting in the requisite papers. But, on the other hand, it would be grossly unfair to disallow the application if the requisite papers were not procurable, or if a mistake were made in calculating the number of sheets required. Each case, we think, must be decided on its own merits. In the present case it is said that the paper was not procurable on September 29th, and it was put in on the next Court day (November 2nd). But it [33] does not appear how many sheets were wanting on September 29th, and whether the inability to procure them was noted on the application of that date. These facts, however, would be before the Judge, who was in a better position than this Court can be to say whether the omission to file the paper on September 29th, was unavoidable or intentional. The contention before the Judge apparently was, not that the paper could not be procured, but that the appellant was entitled to a deduction of the time requisite for ascertaining the number of folios required. We think the Judge took a right view on this point, and we are not disposed to interfere.

The appeal is dismissed with costs.

Appeal dismissed.

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12 C. 33.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

HURMUTJAN BIBI (*Plaintiff*) *v.* PADMA LOCHUN DAS AND OTHERS (*Defendants*.)* [4th August, 1885.]

Land Acquisition Act (*X of* 1870), *ss.* 9, 19, 39 *and* 40—*Settlement of amount of compensation—Apportionment of compensation, Notice of Proceedings for—Right of suit to recover share of compensation.*

The apportionment of the compensation under s. 39 of Act X of 1870 is intended to be a proceeding distinct from that of settling the amount of compensation under the previous provisions of the Act, and any dispute as to the apportionment is only decided as between those persons who are actually before the Court. A separate notice therefore of the apportionment proceedings is requisite to bind any person by those proceedings, and where such a notice has not been served, any party interested, although served with notice of the proceedings for settling the amount of the compensation, cannot be considered a party to the proceedings for apportioning it, and is not barred, by the decision in the latter proceedings, from bringing a suit under the proviso to s. 40, to recover a share of the money so apportioned.

[R., 2 C.L.J. 359=10 C.W.N. 991.]

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*Appeal from Appellate Decree No. 1378 of 1884, against the decree of Baboo Ram Kumar Pal, Rai Bahadur, Subordinate Judge of Sylhet, dated the 3rd of May 1884, modifying the decree of Baboo Rajoni Nath Mitter, Munsif of Shoonamgunge, dated the 14th of May 1883.

Baboo *Joygobind Shome*, for the appellant. 1885

Baboo *Sharoda Charan Mitter*, for the respondents. AUG. 4.

THE facts are sufficiently stated in the judgment of the Court (WILSON and BEVERLEY, JJ.) which was as follows :— APPELLATE CIVIL.

JUDGMENT.

12 C. 33.

[34] This was a suit to recover from the defendants a share in certain money received by them from Government as compensation, for land acquired under Act X of 1870, on the allegation that a portion of the land acquired was situated within the plaintiff's taluk.

The plaintiff states that she is a *purdanashin* lady, and that no notice of the proceedings under Act X was served upon her.

The defendants raised various objections to the suit, but both Courts have disposed of it on a preliminary issue, *viz.*, issue No. 6, which was as follows : " Whether the suit can proceed in this Court under the provisions of a special law, and also under the ordinary principles of law ?"

The finding of the lower Courts is that the plaintiff was a party to the proceedings under Act X, and is therefore barred from bringing this suit.

The facts appear to be these : The plaintiff, as one of the persons believed to be interested in the land to be acquired, was served by the Collector with a notice under s. 9 of the Act. She did not appear, however, or make any claim before the Collector. Ultimately the matter was referred to the Court under s. 15, the order of reference being as follows : " As there are conflicting claims and some persons interested do not appear, and the persons interested do not accept my award, the matter must be referred for the determination of the Court " This order is dated 19th April 1881.

A notice was then issued on the plaintiff under s. 19 of the Act. This notice called on the plaintiff to make a claim and to appoint an assessor to assist the Court in determining the proper amount of compensation ; there is no mention in it of any intention to apportion the compensation money when determined. The plaintiff did not appear before the Court. On the 21st July, the Judge proceeded to determine the amount of compensation in the presence of those claimants who did appear, and on the 14th September, he apportioned the compensation amongst them under s 39. The money was apportioned among the five defendants and two other persons, who have not been made defendants in this suit. No fresh notice was served on the plaintiff.

[35] Two objections have been raised on second appeal against the decision of the lower Courts.

In the first place it is said that the lower Courts were wrong in not trying the question whether the notices under ss. 9 and 19 of the Act were actually served on the plaintiff ; and, secondly, that even assuming that those notices were duly served, the plaintiff was not a party to the apportionment proceedings under s. 39 so as to be bound by them. On the first point it seems to us that both the lower Courts have found as a fact that the notices in question were duly served and it is not open to the plaintiff-appellant to question this finding in second appeal.

There remains the question whether, the notice having been issued with a view to the determination of the amount of compensation, and the plaintiff not having appeared, she is barred from questioning the further proceedings of the Court in apportioning the compensation under s. 39.

1885 AUG. 4. — APPELLATE CIVIL. — 12 C. 33.

Section 39 runs as follows: "When the amount of compensation has been settled by the Court, and there is any dispute as to the apportionment thereof * * * the Judge sitting alone shall decide the proportions in which the persons interested are entitled to share in such amount."

It seems clear from these words that the apportionment of the compensation is intended to be a distinct proceeding from that of settling the amount; and that the dispute is only decided as between those persons who are actually before the Court. If it is intended to bind any other person not then before the Court and not a party to the dispute, notice of the further proceeding should, we think, be served on such person. In this case the plaintiff admittedly had no notice that the compensation money was to be apportioned by the Court. She may well have been content to let the amount of compensation be settled by the Collector, or by the Court, as the case might be. It not unfrequently happens that the persons interested do not appear, and the amount of compensation has to be settled in their absence. But we are not aware that it has ever been ruled that by their absence they have disentitled themselves to receive the amount which may be found due to them. Neither in our opinion can it rightly be said that when the amount of compensation has without notice to them been [36] apportioned and paid away to third parties, they are barred from recovering their share of the money because they omitted to appear before the Court.

In deciding this question, the lower Courts have relied upon the ruling of the Privy Council in the case of *Nilmoni Singh Deo Bahadur* v. *Ram Bandhu Rai* (1), but we think that that decision does not necessarily govern the present suit. In that case the plaintiff was admittedly a party to the apportionment proceedings, and it was held that he was bound by those proceedings and could not re-open the matter by bringing a suit under the proviso to s. 40. Their Lordships were of opinion "that the Courts in India, who both concur on this point, have rightly held that this proviso applies only to persons whose rights have not been adjudicated upon in pursuance of ss. 38 and 39." If then we are right in holding that the plaintiff in this suit was not a party to the apportionment proceedings, the Privy Council decision is direct authority to show that she is not barred from suing under s. 40.

Reference has also been made to a dictum of Pontifex, J., in the case of *Nobodeep Chunder Chowdry* v. *Brojendro Lall Roy* (2), to the effect that "any party who has been summoned before the Judge and has not appeared is bound by the decision." But that was not the point decided in the case, and the language of the learned Judge is not altogether free from doubt. Possibly a person summoned to take part in the apportionment proceedings would in default of appearance be bound by those proceedings. But we cannot accept the dictum as authority for the proposition that a person summoned in one proceeding is to be held bound by the decision in a subsequent and distinct proceeding. Indeed the contrary view seems to have been taken in the case of *Kamini Dabia* v. *Protap Chandra Sanyal* (3), though the facts of that case are not very clearly stated in the report.

In the present case we think that the plaintiff was not a party to the apportionment proceedings under s. 39 of the Act, and consequently that

(1) 7 C. 388. (2) 7 C. 406. (3) 25 W. R. 103.

she is not barred by the decision in those proceedings from bringing the present suit under the proviso to s. 40.

[37] The case must therefore go back to the first Court for the trial of the remaining issues.

The costs will follow the result.

Appeal allowed.

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12 C. 37.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

GOPAL SINGH (*Plaintiff*) *v.* JHAKRI RAI AND OTHERS (*Defendants*).* [7th August, 1885.]

Civil Procedure Code (*Act XIV of* 1882), *s.* 568—*Additional evidence in first Court of Appeal—Procedure in second Court of Appeal.*

The provision in s. 568 of Act XIV of 1882, as to an appellate Court recording its reasons for admitting additional evidence, is directory merely and not imperative.

Where the first Court of Appeal has admitted additional evidence, the hearing in the second Court of Appeal will not be treated as first appeal, so as to allow the pleaders to go into the facts.

[F., 24 C. 98 (101).]

THIS suit was for the recovery of arrears of rent. The facts of the case are not essential for the purposes of this report.

The Subordinate Judge of Mozufferpore gave judgment for the plaintiff. The defendants appealed to the District Judge of Mozufferpore, who reversed the Subordinate Judge's decree. The material part of the District Judge's judgment is as follows: "The lower Court has found in favour of the plaintiff, simply on the basis of *jamabundi* papers put in by plaintiff, and sworn to by a *putwari*, who appears to know very little about them, and by his *naib* who appears to know more. In my opinion evidence of this sort, which can be manufactured to order, is worth next to nothing, except under special circumstances, none of which appear here. I have admitted further evidence. This evidence seems to me absolutely to annihilate the evidence of the plaintiff. I, therefore, reverse the judgment of the lower Court."

Against this judgment the plaintiff appealed to the High Court.

Baboo *Hem Chunder Banerji* and Baboo *Umakali Mukerji*, for the appellant.

[38] Baboo *Amarendranath Chatterji*, for the respondent.

The arguments sufficiently appear in the judgment of the Court (FIELD and O'KINEALY, JJ.), which was delivered by:

JUDGMENT.

FIELD, J.—Two points are raised in this second appeal. First it is said, that the Judge in the Court below has received additional evidence without recording his reasons for so doing as required by s. 568 of the Code of Civil Procedure; and that, therefore, this evidence was improperly

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* Appeal from Appellate Decree No. 1800 of 1884, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 7th of August 1884, modifying the decree of Baboo Ram Pershad, Rai Bahadur, First Subordinate Judge of Tirhoot, dated the 20th of September 1883.

1885 AUG. 7. — APPELLATE CIVIL. — 12 C. 37.

received, and ought to be treated as if it were not on the record. We think that the provisions of s. 568 as to an Appellate Court recording its reasons for admitting additional evidence is mandatory or directory merely, and not imperative ; and we think that the fact that the Judge in the Court below did not comply with this provision (with which most certainly he ought to have complied) does not, however, render the evidence irrelevant.

The second point pressed upon us is that, inasmuch as the Judge in the Court below received additional evidence, this appeal ought to be treated as a first appeal, and the learned vakil ought to be at liberty to go into the facts ; and in support of this argument a decision of the Madras High Court (1) is relied upon. As at present advised, we are not prepared to concur in this contention.

The appeal is dismissed with costs.

Appeal dismissed.

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12 C. 38.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

DHARM SINGH AND OTHERS (*Defendants*) *v.* HUR PERSHAD SINGH AND OTHERS (*Plaintiffs.*)* [10th August, 1885.]

Possession—Limitation Act (XV of 1887), arts. 143, 144—Conflicting evidence of possession—Presumption of Title.

Where two adverse parties are each trying to make out a possession of twelve years, and the evidence is conflicting and not conclusive on either side, *held* that the presumption that possession goes with the title must prevail.

[F. 8 C.W.N. 876 (880) ; Expl., 7 C.P.L.R. 12 (13) ; 27 C. 25 (27).]

[39] THIS suit was brought to recover possession of 12 bighas of land, under the following circumstances :—

The plaintiffs claimed the land in question as part of a plot of 48 bighas, descended to them as heirs of one Ram Dyal Singh, by whom the said plot had been acquired. The defendants denied this, and contended that the 48 bighas had been acquired by one Baij Nath Singh, the father of Ram Dyal Singh ; and that he had made over the 12 bighas in dispute to this daughter's son Rawul Singh by a deed of gift ; and they claimed to be entitled to them as his heirs. They further contended that they had been in adverse possession of the land for more than 12 years, and that therefore the plaintiffs' claim was barred by limitation.

The case was tried by the Subordinate Judge of Chupra, who on the 9th March 1883, gave judgment for the plaintiffs with costs. The defendants appealed, and their appeal was heard by the Judge of Sarun, who delivered judgment on the 12th of July 1884.

The material part of his judgment is as follows :—" The parties are at issue on two points, *viz.*, (*a*) as to title, and (*b*) as to possession ; and these points have to be determined in this appeal. The Subordinate Judge finds that the alleged gift of the land by Baij Nath Singh to Rawul Singh has not been proved by the defendants. I agree with him. There is only oral

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* Appeal from Appellate Decree No. 2048 of 1884, against the decree of H. W. Gordon, Esq., Judge of Sarun, dated the 12th of July 1884, affirming the decree of Baboo Kali Prasunna Mukherji, First Subordinate Judge of Sarun, dated the 9th of March 1883.

(1) See *Hinde* v. *Brayan*, 7 M. 52.

1885 AUG. 10. — APPELLATE CIVIL. — 12 C. 38.

evidence on this head, and that is mostly hearsay, which cannot be admitted as legal evidence.

"The question then arises, by whom was the *mokurari* tenure acquired,—whether by Baij Nath Singh or by Ram Dyal Singh? The *rubakari* of 14th December 1827 (Exhibit p. 7) shows that the *mokurari* stands in the name of Ram Dyal Singh, and one of the defendants' witnesses admitted in the former suit that the *mokurari* was acquired by Ram Dyal. The Subordinate Judge's view, therefore, that the property belonged to Ram Dyal, and not to Baij Nath, is clearly correct. Further, even if it be admitted that Baij Nath gave the property to his grandson (daughter's son), such gift was not valid, because he had no interests in the property, which he could transfer to him; and plaintiffs, being the lineal descendants of Baij Nath and Ram Dyal, are entitled to the property by right of inheritance. The plaintiffs then [40] having established their title, there remains the question of possession. The defendants plead limitation, and therefore it rested on the plaintiffs to make out a *prima facie* case. The title being with the plaintiffs, the Subordinate Judge thinks—and I am of opinion rightly thinks—that the reasonable presumption is that they have been in possession under this title. He finds that the evidence of possession on the plaintiff's side is, on the whole, reliable when coupled with the presumptions and probabilities of the case; and holds therefore that they have made out a *prima facie* case of possession within twelve years, which it lay on the defendants to rebut." The Judge then stated that he agreed with the reasons of the Subordinate Judge for regarding the defendant's evidence as suspicious and untrustworthy, and dismissed the appeal with costs. The defendants then appealed to the High Court.

Mr. *C. Gregory* and Munshi *Mahomed Yusuf*, for the appellants.

Baboo *Mohesh Chunder Chowdhry*, for the respondents.

JUDGMENT.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—The question argued in this case is one of limitation. It has been pressed upon us that the Judge in the Court below has disposed of the question of the plaintiffs' possession within twelve years with reference only to the presumption arising from the title which the Judge found to be in the plaintiffs. Now if the Judge had pursued this course, he would undoubtedly have been wrong. But beyond all doubt there is positive evidence of the plaintiff's possession upon the record—evidence to which the Subordinate Judge very distinctly alludes; and it must be borne in mind that the Judge was confirming the judgment of the Subordinate Judge. We think then that what really was done is this: There was evidence of possession on both sides, and the Courts below preferred the evidence given by the plaintiffs, because it accorded with the title which was found to be in the plaintiffs. In doing so, that is, in taking this course, they have followed the principle laid down by the Privy Council in the case of *Runjeet Panday* v. *Goberdhun Ram Panday* (1), a case [41] the facts of which are very similar to those of the present case. Their Lordships of the Privy Council there said: "In the midst, therefore, of this conflicting evidence, their Lordships think it right to consider whether there is any presumption to be derived from the other

(1) 20 W. R. 25.

1885 Aug. 10. — Appellate Civil. — 12 C. 38.

parts of the case in favour of the one side or the other. Now the ordinary presumption would be that possession went with the title. The presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but where there is strong evidence of possession, as there is here on the part of the respondents, opposed by evidence, apparently strong also, on the part of the appellant, their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded; and that with the aid of it, there is a stronger probability that the respondents' case is true than that of the appellant."

We see, therefore, no reason to interfere, and we dismiss this appeal with costs.

Appeal dismissed.

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12 C. 41.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

S. CAMPBELL (*Defendant*) *v.* J. A. JACKSON, MANAGER OF THE JOKAI ASSAM TEA COMPANY, LIMITED (*Plaintiff*).*
[19th June, 1885.]

Plaint, Form of—Practice—Form of suit by Company—Corporation, Suit by—Plaintiff, Misdescription of—Civil Procedure Code (*Act XIV of* 1882), *s.* 435—*Indian Companies Act* (*VI of* 1882), *s.* 41.

A plaint was filed in which the plaintiff was described as Mr. J., Manager of the X Company, Limited, and in the body of the plaint several allusions were made to the "plaintiff company," and the claim made in the plaint was a claim made on behalf of the Company.

It was not suggested that the X Company was a Company authorised to sue or be sued in the name of an officer or trustee, nor was it shown that it was registered as a corporation under S. 41 of of the Indian Companies Act.

Held, that the suit was badly framed and that it should be dismissed.

[R., 103 P.L.R. 1902; D., 30 C. 103 (106).]

IN this case the plaintiff was described as "Mr. J. A. Jackson, Manager of the Jokai Division of the Jokai Assam Tea Company, [42] Limited, of Chalkhowa, Debrugur." The plaint commenced with the following: "I, J. A. Jackson, Manager of the Jokai Assam Tea Company, Limited, stated as follows," and contained in several places allusions to "the plaintiff-company."

The suit was brought for the purpose of recovering possession of some ten acres of land in the possession of the defendant, upon the allegation that they lay within the boundaries of a grant from the Secretary of State to the Jokai Company, which grant had been redeemed by the said Company, and of which land the Company was therefore the absolute owner. There was also a claim for damages for wrongful cutting and removing of timber from the land in suit, but that claim was abandoned.

The plaint was verified by Mr. Jackson as Manager and Attorney for the Jokai Tea Company, Limited.

The defendant in answer, amongst other pleas, contended that, as the Jokai Assam Tea Company was conducted in London, the plaintiff

* Appeal from Appellate Decree No. 1259 of 1884, against the decree of C. J. Lyall, Esq., Officiating Judge of the Assam Valley Districts, dated the 18th of April 1884, affirming the decree of F. St. C. Grimwood, Esq., Subordinate Judge of Debrugur, dated the 11th of September 1883

Jackson was not entitled to sue unless duly empowered in that behalf by the Director of the Company.

No evidence was adduced to show that the Jokai Company was a Company authorized to sue or be sued in the name of an officer or trustee, nor was it shown that the Company was registered under the Indian Companies Act.

The first Court treated the suit as one brought by the Company through Mr. Jackson, its Manager, and amongst other issues framed the following: Can plaintiff (Mr. Jackson) sue? On this issue the Court held that there could be no doubt that upon the power-of-attorney originally filed, Jackson was not empowered to sue, as the Company had, subsequently to the date of the power, been dissolved and a fresh Company formed. The Court found, however, that Jackson had subsequently filed a fresh power granted by the new Company, and prayed that the new Jokai Company might be substituted as plaintiffs under s. 27 of the Civil Procedure Code, and holding that there had only been a nominal change, decided the issue in the affirmative. The other issues being found in favour of the claim set up in the plaint, the first Court passed a decree giving "the plaintiff company" possession of the land, the subject-matter of the suit.

[43] The defendant appealed, and in his memorandum of appeal raised the same issues as were raised in the Court below, but it appeared from the judgment of the lower appellate Court that at the hearing of the appeal he had abandoned the plea that Jackson had no right to sue on behalf of the Company.

Upon the other issues the lower appellate Court upheld the finding of the Court below, and the appeal was accordingly dismissed with costs.

The defendant now preferred a special appeal to the High Court upon, amongst others, the following grounds :—

(1) That the lower Courts were wrong in law in proceeding with the suit on behalf of the Manager and in allowing the amendments of the plaint, and that the provisions of s. 26 were not applicable to the case.

(2) That the lower appellate Courts erred in stating that this plea was abandoned on the appeal.

None of the other grounds were touched upon at the hearing of the appeal.

Mr. *R. E. Twidale* appeared on behalf of the appellant.

Baboo *Mohini Mohun Roy* and Mr. *Simmons*, for the respondent.

JUDGMENT.

The judgment of the High Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—We think this appeal must succeed upon a single point. The suit was brought by Mr. J. A. Jackson, as Manager of the Jokai Division of the Jokai Assam Tea Company, Limited. There is no doubt that the plaintiff on the record is Mr. Jackson, who is described as the Manager of the Jokai Division of the Jokai Assam Tea Company. The plaintiff on the record is not the Jokai Assam Tea Company; and in saying this we do not overlook paras. 2 and 7 of the plaint which speak of "the plaintiff-company." The law on the subject is very simple, and it is to be found in s. 435 of the Civil Procedure Code. In suits by a corporation, or by a company authorized to sue and be sued in the name of an officer or of a trustee, the plaint may be subscribed and verified on behalf of the Corporation or Company, by any Director, Secretary or

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other principal officer of the Corporation or Company, who is able to depose to the facts of the case." Now, there is no suggestion in this case that this Company is a Company [44] authorized to sue or be sued in the name of an officer or trustee. Such authority could only be conferred by Act of Parliament or by an Act of the Indian Legislature. There are some Acts in the Indian Statute Books by which certain companies are authorized to sue and be sued in the name of an officer, but no authority has been shown for holding that this Company is one of them. Then the word "Corporation" is used with reference to s. 41 of the Indian Companies Act. Under that section, when a Company has been registered, the Registrar is to certify under his hand the fact of such incorporation. The effect is that a Company which was been duly registered under the Indian Companies Act of 1882 is a Corporation, and being a Corporation, although the suit must be brought in the registered name of the Company, the plaint may be verified by a Secretary, Director or other principal officer, &c. If the present suit had been brought in the name of the Jokai Assam Tea Company, and if that Company had been registered under the Indian Companies Act, and if Mr. Jackson, as an officer of the Company, had verified the plaint, the procedure would have been correct. But the suit has not been brought in the name of the Company. It is brought in the name of Mr. Jackson. Even if we could so construe the plaint as to treat the suit as a suit by the Company, there is nothing to show that the Company has been registered under the Indian Companies Act, and is therefore entitled to have the plaint verified by a principal officer on behalf of the Company.

We think, therefore, that this suit must fail. The appeal will be decreed, but without costs, as we find that the point was abandoned in the Court below.

The defendant will get his costs in both the Courts below.

Appeal allowed.

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12 C. 45.

[45] APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

JATINGA VALLEY TEA COMPANY, LIMITED (*Plaintiffs*) *v.* CHERA TEA COMPANY, LIMITED (*Defendants*).* [19th June, 1885.]

Local investigation, Power of Court to direct, when parties do not ask for it—Remand order, Proceedings taken by Court of first instance pending appeal against—Civil Procedure Code (Act XIV of 1882), *ss.* 562, 588—*Proceedings taken on remand order made without jurisdiction.*

In a suit for land where the question was as to whether the laud lay within the boundaries of the plaintiffs' or the defendants' land, the Court of first instance suggested to the parties that the proper mode of determining the case was in the first instance to hold a local investigation, and that such local investigation should be applied for by one or other of the parties. Both parties resolutely refused to make such application, and the Court thereupon dealt with the case upon the materials before it, and passed a decree. Upon appeal the lower appellate Court remanded the case for the purpose of a local investigation being held at the cost of the plaintiff in the first instance.

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* Appeal from Appellate Order No. 67 of 1885, against the order of J. Kennedy, Esq., Officiating Deputy Commissioner of Cachar, dated the 18th of November 1884, reversing the order of Baboo Nritya Gopal Chatterji, Munsif of that District, dated the 21st of April 1884.

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Held, that inasmuch as neither of the parties desired to have a local investigation, the Court was wrong in remanding the case, and that it was bound to decide it upon the evidence before it.

Held, also, that all proceedings taken by the Court of first instance, after the remand, and pending the hearing of the appeal against the remand order, were null and void, inasmuch as the jurisdiction of that Court to hear the case upon remand depended upon the validity of the remand order. An appeal therefore lay from the order of remand notwithstanding the Court of first instance had subsequently made what purported to be a final decree in the case.

[F. 89 P.R. 1891; **Appr.**, 12 A. 510 (515) (F.B.); **R.**, 83 P.R. 1886; 6 C.L.J. 547 (549) = 12 C.W.N. 590; 30 A. 479 (F. B.) = (1908) A.W.N. 195 = 5 A.L.J. 447; **D.** 9 C.W. N. 895 (896) = 32 C. 1023.]

THE plaintiff-company in this suit sought to recover possession of 129 acres of land, alleging that it had belonged formerly to one Klubu Dao and others by right of settlement, and had been purchased from them by the Company. The plaint further alleged that the plaintiff-company, had been in possession of the land in suit since the date of their purchase, but that owing to a claim set up by the defendant-company, the Deputy Commissioner, in the exercise of his criminal jurisdiction, had issued an injunction **[46]** restraining both parties from taking possession of the disputed land until the question of title had been decided by a Civil Court. The plaintiff-company had, therefore, been forced to institute this suit. The defendant-company based their claim to the land upon the *potta* granted to them at the date of the settlement with them, and alleged that the land in dispute fell within their boundaries.

Among the issues framed the principal question raised was as to whether the land in suit lay within the boundaries covered by the *potta* of the plaintiff or that of the defendant. At the hearing before the Court of first instance, it was suggested by the Court that an *amin* should be deputed to make a local investigation, and that it was usual in such cases for the parties to ask that such a course should be taken. Both parties, however, resolutely refused to apply for a local investigation, and thereupon the Court, whilst regretting the course taken by the parties, proceeded to hear and determine the case upon the evidence placed before it, and ultimately gave the plaintiff-company a decree.

The defendant-company thereupon appealed, and the judgment of the lower appellate Court was as follows:—

"There can be only one order in this appeal. The whole question is one of the position and boundaries of the land sued for, and can only be settled by a local investigation. For this the plaintiff must in the first case pay the costs, as he cannot, without such an investigation, establish his title to the land."

The case was, therefore, remanded under s. 562 to the lower Court for the purpose of a local investigation being held, and for the suit thereafter to be decided on its merits.

The plaintiffs now preferred a special appeal to the High Court against the last-mentioned remand order.

Mr. *M. P. Gasper* and Messrs. *Watkins & Co.*, for the appellants.

Mr. *Pugh* and Messrs. *H. Adkin* and *W. K. Eddis*, for the respondents.

At the hearing of the appeal it was brought to the notice of the Court that, after the remand order, the Court of first instance had called upon the plaintiff-company to deposit the costs of the local investigation within two days, and upon that order not being **[47]** complied with

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had taken the case up and passed a final decree dismissing the suit, and it was contended that all such proceedings taken after the remand order, and pending the hearing of the appeal to the High Court, were void and should be set aside.

JUDGMENT.

The judgment of the High Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—We think that the Judge in the Court below was wrong in making the remand order in this case. The Munsif states in his judgment that both parties resolutely refused to have a local enquiry ; and it is admitted that the correctness of this statement was not challenged on appeal to the Deputy Commissioner. The Deputy Commissioner has remanded the case in order that there may be a local investigation. He says : "The whole question is one of the position and boundaries of the land sued for, and can only be settled by a local investigation." We think that the parties were themselves the best judges as to what evidence they desired to put before the Court, and that when the parties "resolutely refused" to have a local investigation, the Judge below was bound to decide the case upon the evidence put before him ; and was wrong in remanding the case for a local investigation, which the parties were not desirous to have.

It has been contended before us that this appeal ought not to be heard. It is said that after the remand order, the Munsif proceeded to make a final decree ; and the existence of that final decree is a bar to the hearing of this appeal against the order of remand. We are unable to concur in this contention. The law, sub-section 28 of s. 588 of the Code of Civil Procedure, expressly gives an appeal against an order under s. 562 remanding a case. That provision is not, in any way, qualified. The Code does not say that there shall be an appeal only if the case has not been finally determined in the Court of first instance, before that appeal is preferred or comes on for hearing. We cannot, therefore, import into the Code a provision which does not there exist. The Munsif's jurisdiction to hear the case upon remand depended upon the remand order. If the remand order were badly made, the decree, and, indeed all the proceedings taken under that remand order, are null and void.

We set aside the remand order, and the decree made after and [48] based upon that remand order, and we direct the Deputy Commissioner to proceed to try the appeal. The Deputy Commissioner will of course determine the appeal upon the evidence on the record at the time when the appeal was preferred. Costs in this Court will abide the result.

Appeal allowed and case remanded.

12 .C. 48.

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CIVIL.

12 C. 48.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

ALIM BUKSH FAKIR (*Defendant No.* 1) *v.* JHALO BIBI AND ANOTHER MINOR, BY HER GUARDIAN AND NEXT FRIEND JHALO BIBI (*Plaintiffs*).* [16th July, 1885.]

Minor, Suit by—Next friend—Certificate under Act XL of 1858*—Objection to frame of suit.*

In a suit brought on behalf of a minor by his next friend, it is not necessary for the next friend to have a certificate under Act XL of 1858, provided he has in fact permission of the Court to sue.

Where a suit was brought in the name of *A*, for self and as guardian of her daughter *B*, a minor, and it was objected that it should have been brought in the names of *A*, and of *B*, a minor by her next friend and guardian, *held*, that as no one was misled or injured by the improper form of the plaint, the objection ought not to be held fatal, but the decree must be taken to be in favour of *A* and of *B* suing by *A* as if the suit had been properly framed.

[R., 14 C. 754 (756).]

THIS was a suit for the recovery of certain lands, brought by the plaintiff Jhalo Bibi, widow of late Genda Fakir, "for self and as guardian of her minor daughter, Safina Bibi."

In the Munsif's Court of Sherepore, where the suit was originally heard, the first, and for the purposes of this report, the only material issue raised, was: "Can the plaintiff sue on behalf of the minor daughter without a certificate under Act XL of 1858?" On this issue the Munsif gave judgment as follows: "One Genda Sheik has filed an affidavit to the effect that the plaintiff Jhalo Bibi is the next friend of her minor daughter, Safina Bibi; accordingly Jhalo Bibi has been allowed to conduct the suit on behalf of the latter. The properties sued for are not large, and I think the plaintiff can sue on behalf of the minor daughter [49] without a certificate under Act XL of 1858 under Chapter XXXI of the Civil Procedure Code. Hence this issue is decided in favour of the plaintiff." The case was then heard on its merits, and the plaintiff's suit was decreed with costs. On appeal to the Subordinate Judge of Mymensingh, the Munsif's decree was upheld both as to law and fact. Defendant No. 1 then appealed to the High Court, where a further objection was raised that the suit was improperly framed, inasmuch as it was brought by the plaintiff "Jhalo Bibi for self and as guardian of her minor daughter Safina Bibi" instead of by "Jhalo Bibi and by Safina Bibi, by her next friend and guardian Jhalo Bibi."

Baboo *Jogesh Chunder Roy*, for the appellant.

Baboo *Dwarka Nath Chuckerbutty*, for the respondent.

The Court (WILSON and BEVERLEY, JJ.) delivered the following

JUDGMENT.

We see no ground for interfering in this case.

Two points have been raised in this appeal: first, that the first plaintiff had no authority to represent the second plaintiff, her minor daughter.

* Appeal from Appellate Decree, No. 1479 of 1884, against the decree of Baboo Parbati Coomar Mitter, First Subordinate Judge of Mymensingh, dated the 14th of May 1884, affirming the decree of Baboo Sashi Bhusan Basu, Munsif of Sherepore, dated the 3rd of August 1883.

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But the finding on the first issue is to the effect that the Court did give sanction to the lady to represent her minor daughter. That we think is sufficient on the authority of the case of *Durga Charan Shaha* v. *Nilmoney Dass* (1).

Another point taken is an objection to the form in which the suit was brought. The first plaintiff purports to sue for herself and as guardian of her minor daughter. The suit ought to have been brought by Jhalo Bibi, and by her minor daughter Safina Bibi by Jhalo Bibi, her mother and next friend. But the objection was not taken at any stage of the case to that incorrect description. No one appears to have been misled by it. Everybody proceeded on the understanding that what was meant was that the minor appeared by her mother as next friend. So strongly does that appear that in the memorandum of appeal by which the matter has been brought before us, the appellant himself describes the minor's suit in this way. No injustice has been done, and the remedy given is undoubtedly right. That [50] being so we think we are justified in following the course taken in the case above quoted, and saying that under those circumstances the objection ought not to be held fatal to the case. Of course, as in that case, the decree ought to be and must be regarded as a decree, not in favour of the widow in her own interest and as guardian of her minor daughter, but as a decree in favour of her as widow and of her minor daughter suing by her.

The appeal will be dismissed with costs.

Appeal dismissed.

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12 C. 50.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

ADHIRANI NARAIN KUMARI, RAJRANI OF BURDWAN (*Plaintiff*) v. RAGHU MAHAPATRO (*Defendant*).* [22nd July, 1885.]

Civil Procedure Code (Act XIV of 1882), *s.* 43—*Suit for arrears of rent—Application of the Civil Procedure Code to suits in Revenue Courts—Relinquishment of part of claim.*

The plaintiff sued under the provisions of Act X of 1859 to recover arrears of rent for the years 1287, 1288 and 1289 (1880—1882), after having obtained a decree for the rent due for the year 1286 (1879) in a suit instituted after the rent for the year 1289 (1882) had become due.

Held, that the provisions of s. 43 of the Civil Procedure Code applied and that the second suit was consequently barred. *Madho Prakash Singh* v. *Murli Manohar* (2) cited and approved; *Taruck Chandra Mookerjee* v. *Panchu Mohini Debya* (3) cited.

[Appl., 2 C.L.J. 490 (491); D., 21 C. 514 (518).]

THIS was a suit under the provisions of Act X of 1859 for recovery of arrears of rent alleged to be due for the years 1287, 1288 and 1289 (1880—1882). The plaintiff in her plaint alleged that she had obtained a decree against the defendant for rent for the year 1289 (1879), but that decree was still unsatisfied.

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* Appeal from Appellate Decree, No. 1821 of 1884, against the decree of H. Gillon, Esq., Officiating Judge of Cuttack, dated the 12th of June 1884, reversing the decree of A. J. Fraser, Esq., Deputy Collector of Cuttack, dated the 15th of August 1883.

(1) 10 C. 134. (2) 5 A. 406. (3) 6 C. 791.

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The defendant denied that any rent was due, and further pleaded that the suit was barred by s. 43 of the Civil Procedure Code, inasmuch as the plaintiff had sued for rent for the year 1286 only on the 9th of June 1882 after the rent for the years 1287, 1288 and 1289 was due, and that consequently she must in that suit be taken to have abandoned her claim to rent for those years.

[51] The other issues raised are immaterial for the purposes of this report.

The first Court held that there was no dispute as to the amount of rent payable, and without deciding the question whether the suit was barred under s. 43, decreed the case in favour of the plaintiff, the defendant not appearing to prove the payments alleged by him or to support his case.

On appeal the lower appellate Court reversed the decision of the Court below, holding upon the authority of *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (1) that the suit was barred under s. 43 of the Civil Procedure Code.

The plaintiff now preferred a special appeal to the High Court.

Baboo *Basant Coomar Bose* appeared for the appellant.

No one appeared for the respondent.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

The plaintiff in this case sues under Act X of 1859 for rent for the years 1287, 1288 and 1289. It appears that in 1289, after the rent for that year had become due, she sued for rent for the year 1286. The District Judge has held upon the authority of *Tarack Chunder Mookerjee* v. *Panchu Mohini Debya* (1) that the suit is barred. The only question which we have to decide is whether the provisions of s. 43 of the Civil Procedure Code apply to suits under Act X of 1859. The point has not, so far as we are aware, been raised in this Court. We find, however, that a Full Bench of the Allahabad High Court has held in the case of *Madho Prakash Singh* v. *Murli Manohar* (2) that the Courts of Revenue in the North-Western Provinces in those matters of procedure upon which the Rent Act of those provinces is silent, are governed by the provisions of the Civil Procedure Code, and that s. 43 is applicable to suits tried under the North-Western Provinces Rent Act, 1881.

We see no reason to dissent from the view taken by the Allahabad Court, and we, therefore, dismiss this appeal without costs; no one appearing for the respondent.

Appeal dismissed.

(1 6 C. 791. (2) 5 A. 406.

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12 C. 52= 10 Ind. Jur. 264.

12 C. 52=10 Ind. Jur. 264.

[52] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Grant.

AMJAD ALI (*Defendant*) *v.* MONIRAM KALITA (*Plaintiff*).*

[4th August, 1885.]

Hindu Law, Alienation—Sale by widow of husband's estate—Maintenance of widow remarried—Necessity—Legal expenses—Mortgage, Proof of existence of—Oral evidence.

Where a Hindu widow is remarried, or is living with another man, it does not necessarily follow that she would not be entitled to sell her deceased husband's estate for her maintenance.

Legal expenses incurred by a Hindu widow, in defending her life estate in her husband's property, constitute such a charge on the property as to make a sale thereof by her binding as against the reversioners.

Where a question arises (not between mortgagor and mortgagee) as to the previous existence or non-existence of a particular mortgage, the oral evidence of the mortgagee that it did exist will be sufficient to prove the fact, without the production of the mortgage deed.

[F., 31 C. 433 (443) = 8 C. W. N. 408.]

THIS was a suit brought for the recovery of possession of certain lands.

The plaintiff was the cousin of one Gondhala Kalita, who died some years ago, leaving a widow, one Kirikalitani, now deceased. On her husband's death Kirikalitani married again, and the plaintiff on that ground brought a suit against her to recover possession, as reversionary heir, of the property which had come to her through his cousin. The suit went up to the Privy Council, and the widow's life interest in a part only of the disputed property (including that now in suit) was eventually confirmed ; and she obtained a *potta* for it in her own name. She subsequently sold it to the defendant in the present suit. She is now dead ; and the plaintiff asks that he may be put in possession of the property, on the ground that Kirikalitani had only a life interest therein, and was in consequence incapable of alienating it. In the Court of the Extra Assistant Commissioner of Jorehat, where the case was originally tried, the main issue raised was " whether Mussamut Kirikalitani had any actual and legal necessity to sell her land for the purpose of liquidating debts as well as for maintaining herself."

[53] On this issue the Assistant Commissioner found that the plaintiff had forced her into a very heavy litigation, for the costs of which he held a decree against her, that with the exception of this estate she had little if any other means of paying her debts and maintaining herself, and that the purchase-money was *bona fide* applied to the payment of a mortgage on the estate, and for her maintenance. The plaintiff moreover made no attempt to taint the transaction with fraud on her part, nor was there any allegation by him that the defendant had failed to make proper enquiries as to the existence of a legal necessity pressing upon her.

On these findings the Assistant Commissioner held that the widow was legally justified in selling, and that the sale was consequently a good one against her husband's reversionary heir.

* Appeal from Appellate Decree, No. 58 of 1885, against the decree of Col. W. S. Clark, Subordinate Judge of Zillah Sibsagar, dated the 11th of September 1884, reversing the decree of Babu Madhub Chunder Bordobi, Sudder Munsif of Jorehat, dated the 31st January 1884.

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The plaintiff's suit was accordingly dismissed with costs. Against this decision he appealed to the Deputy Commissioner of Sibsagar, who held that the expenses of litigation could not properly be pleaded as proof of a legal necessity to part with the estate; that the oral evidence put forward to prove the alleged mortgage was quite insufficient in law, the only admissible evidence being a duly executed and registered deed; that seeing she was living with another man she could hardly claim to sell her life estate for purposes of maintenance; and, lastly, that there was no evidence that defendant had made proper enquiries before purchase. Plaintiff's appeal was accordingly decreed with costs. Against this decree the defendant appealed to the High Court.

Baboo *Troiluckynath Mitter*, for the appellant.

Baboo *Jogendra Chunder Ghose*, for the respondent.

The Court (PRINSEP and GRANT, JJ.) delivered the following judgment:—

JUDGMENT.

We think that this case must be remanded to the lower appellate Court for re-trial. Kirikalitani was the defendant in the suit which went up in appeal to the Privy Council, and is generally known as the Hindu Widow Unchastity case. The plaintiff in the suit now before us then sued this widow to obtain possession of the entire estate of her husband on the ground of her having forfeited her rights on account of her subsequent **[54]** unchastity. He succeeded in obtaining a decree for one-half that estate. The widow apparently was possessed of small means, and it has been found in the present case that she incurred debts on account of legal expenses in defending her rights in that litigation. The plaintiff, who has succeeded as heir of her husband on her death, now sues to set aside the sale by her to the defendant made on the 6th November 1879, as having been made without legal necessity. The defendant replied that the sale was effected by the widow to enable her to pay off the debts incurred in consequence of this litigation, and also for the purposes of her own maintenance. The defendant further pleaded that he had made the purchase after having made full enquiry in the manner enjoined in the well-known case of *Hunooman Persad Pandey* (1).

The Munsif found all these points in favour of the defendant and dismissed the suit, but this judgment has been reversed on appeal by the Deputy Commissioner and the Subordinate Judge. In the commencement of his judgment, the Subordinate Judge states that the plaintiff was justified, "under the then existing law," as he terms it, in bringing the former suit to obtain possession of the property held by the widow. But he seems to think that the widow was not justified in incurring expenses in defending that suit so as to make them form a charge on the estate, thus to be eventually borne by the plaintiff. We have no doubt, on the facts found, that the legal expenses incurred by the defendant in that litigation were expenses with which a Hindu widow in the position of the defendant might reasonably charge her husband's estate. The lower appellate Court then proceeded to find that, in the absence of the mortgage deed, the defendant cannot show that the money paid by him in the purchase of this property was money paid to satisfy a debt incurred by the widow. We think that this view of the law taken by the lower appellate Court is incorrect. We observe that a person said to be the mortgagee, and another person said to hold a decree against the widow,

(1) 6 M. I. A. 393.

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who were thus both her creditors, have been examined in the present case, and have deposed that they lent her money for certain purposes. There is no reason why such evidence should [55] not be accepted for the purposes of the present suit; for the terms of the transaction between the widow and the so-called mortgagee and decree-holder, are not in issue in this case, but rather whether these persons were the creditors of the widow, and whether the property had been sold in order to satisfy their debts. The lower appellate Court then proceeds to express an opinion that it cannot be pleaded that the widow, that is to say, the vendor who lived with a second husband, or, it would seem more properly, lived with another man after the decease of her husband, would have been driven to sell the estate to maintain herself. From this he would seem to mean that, if she lived with another man, she would not have to support herself. That is a matter which would depend upon evidence, and could not be assumed either one way or another, simply from the relation between the parties. Lastly, the lower appellate Court states that it does not consider that the defendant could have used due diligence in ascertaining whether legal necessity on the part of the vendor existed. Now, if the evidence of the so-called mortgagee and decree-holder be believed—and on this point, sitting on second appeal, we are not able to express any opinion—we think their statements certainly justified a stranger in purchasing from a Hindu widow. We must, therefore, return this case to the lower appellate Court for re-trial, having regard to the observations made above.

The costs will abide the result.

Appeal allowed and case remanded.

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12 C. 55 = 10 Ind. Jur. 297.

CRIMINAL REVISION.

Before Mr. Justice Pigot and Mr. Justice O'Kincaly.

IN THE MATTER OF THE PETITION OF JUGGESHWAR DASS AND OTHERS.

JUGGESHWAR DASS AND OTHERS *v.* KOYLASH CHUNDER CHATTERJEE.* [22nd September, 1885.]

Mischief—Penal Code (Act XLV of 1860), ss. 341, 425—*Wrongful Restraint—Invasion of right causing wrongful loss.*

Where complainant had for the purpose of removal placed certain goods upon a cart, and accused came and unyoked the bullocks, and turned the [56] goods off the cart on to the road, and complainant thereupon went away at once leaving them lying there: *Held*, that under these circumstances a conviction under s. 341 of the Penal Code could not be sustained; but that there was such "mischief" as to bring the offence within s. 425.

Held, also, that s. 425 does not necessarily contemplate damage of a destructive character. It requires merely that there should be an invasion of right, and diminution of the value of one's property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it.

THE petitioners in this case have been convicted of an offence under s. 341 of the Penal Code. It appears from the evidence that on the 5th of

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* Criminal Revision, No. 336 of 1885, against the order of J. G Ritchie, Esq., Officiating Joint Magistrate of Serampore, dated the 14th August 1885.

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August last the complainant was engaged in removing an iron chest and a box from his shop to another *hat*. The accused came up and ordered him not to move them; and on his refusing to obey overturned the cart, thereby throwing the boxes on to the road, where complainant left them lying and himself went off to the new *hat*. The *hat* from which he was at the time removing belonged to the employers of the accused.

The accused swore that they knew nothing of the occurrence alleged by complainant, but were found guilty of causing wrongful restraint, and sentenced to 15 days' rigorous imprisonment under s. 341 of the Penal Code.

Against this sentence the accused presented the present petition.

Mr. *R. Mitter* and Munshi *Serajul Islam*, for the petitioners.

JUDGMENT.

The judgment of the Court (PIGOT and O'KINEALY, JJ.) was delivered by

PIGOT, J.—The petitioners have been found guilty by the Magistrate of an offence under s. 341 of the Indian Penal Code. The complainant was examined by the Magistrate at the time of the issue of the summons, and before the issue of the summons. In his evidence endorsed on the back of the petition taken by the Magistrate, he states that he was not himself present when the occurrence of which he chiefly complains took place. Before the Magistrate he appears to have stated that he was present. What he complained of was this, that when on the 5th August he or those in his employ were removing some things to the new *hat* at Champdani from the *hat* belonging to the persons in whose [57] employ the accused are, the accused said the things must not be removed, and on his not listening to that, they turned the cart upside down, and the things fell down to the ground, where they remained some days afterwards. This story of the complainant was not controverted, and upon this state of things the Magistrate found the accused guilty under s. 341 of the Indian Penal Code.

We do not think that under the circumstances the conviction under that section can be sustained. The charge was one of wrongful restraint, and whether the evidence of the complainant, as given when the summons was issued, or before the summons was issued, is to be taken, or that given at the hearing before the Magistrate, it appears to us inconsistent with the idea of wrongful restraint. In one case he was not present, and in the other he went away to the new *hat* after the things were thrown down from the cart. But we think that the case does come under s. 425 of the Indian Penal Code, that there was such a change in the situation of the property done by the persons who brought it about with intent to cause, or knowing they were likely to cause, wrongful loss or damage to any person, that is the complainant, as diminished its value or utility or affected it injuriously. We think those words are sufficiently satisfied by the circumstances of this case. There was an unlawful removal of goods from the cart, and an unlawful change in their situation, with the knowledge that that change must amount to an inconvenience, more or less serious, to the owner of the goods, and must, to some extent, diminish the utility of the goods which it was desired to remove from one place to another by the fact of their being cast out of the conveyance in which they were to be removed. To that extent the utility of those goods was diminished, and to that extent they were injuriously affected. We think it is not necessary that the damage required by this section should

1885 SEP. 22. — CRIMINAL REVISION. 12 C. 55=10 Ind. Jur. 297.

be of a destructive character. All that is necessary is, that there should be an invasion of right and diminution of the value of one's property caused by that invasion of right, which must have been contemplated by the doer of it when he did it.

As to punishment we do not think that, under the circumstances, the punishment was excessive. The offence is one which, though [58] not of very great gravity, is not without a certain amount of seriousness. We think that the reasons stated by the Magistrate in his judgment were quite sufficient to show that such a sentence was, under the circumstances, desirable. We, therefore, set aside the conviction under s. 341, and for it substitute a conviction under s. 426, and we direct that the prisoners be imprisoned for the remainder of the sentence not yet suffered by them.

(The remainder of the judgment was not material to this report.)

Conviction altered, but sentence confirmed

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12 C. 58 (F.B.).

FULL BENCH REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Field and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF KRISHNANUND DAS.
KRISHNANUND DAS *v.* HARI BERA.*

[4th September, 1885.]

Sanction to prosecution--Criminal Procedure Code, Act X of 1882, *s.* 195—*Notice to accused.*

No notice is necessary to the person against whom it is intended to proceed, before the Court, before which the alleged offence has been committed, can, under s. 195 of the Criminal Procedure Code, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section.

[F., 18 A. 358 (359)=16 A.W.N..113; Appl., 10 M. 232 (237, 238) (F.B.)=2 Weir 181 (184).]

THE petitioner, Krishnanund Das, on the 30th December 1884 lodged a complaint in the Court of the Deputy Magistrate of Balasore, against Hari Bera and others for forcibly cutting and taking away the paddy from his field. The case was tried on the 19th February 1885, when the accused were discharged, because, in the opinion of the Magistrate, the evidence for the prosecution was "at the best but suspicious, and the oral testimony was untrustworthy."

On the 20th February 1885 an application was made to the Deputy Magistrate by Hari Bera for sanction to prosecute Krishnanund under s. 211 of the Penal Code, which sanction was granted without any notice being given to Krishnanund.

[59] On motion made to the High Court to have the order granting the sanction set aside on the ground (among others) that no such notice had been given, that Court granted a rule to show cause why the order should not be set aside. The following order was made eventually on

*Reference to the Full Bench in Criminal Motion, No. 105 of 1885, against the order of Baboo Kali Podo Mookerji, Deputy Magistrate of Balasore, dated the 20th February 1885.

24th April 1885 by the Court (PRINSEP and PIGOT, JJ.) referring the case to a Full Bench :— 1885 SEP. 4.

FULL BENCH.

12 C. 58 (F. B.).

" This matter arises out of an order passed under s. 195 of the Code of Criminal Procedure, giving sanction to a prosecution under s. 211 of the Penal Code, against the petitioner for having made a false charge.

"In his judgment dismissing that charge the Magistrate stated : 'I shall be quite prepared to sanction the prosecution of the complainant under s. 211 of the Penal Code, if accused wishes to prosecute him.'

"On the following day application was made for sanction to prosecute the complainant in that case, which was at once granted.

"On motion made to a Division Bench (FIELD and BEVERLEY, JJ.), a rule was granted to show cause why the proceedings of the Deputy Magistrate sanctioning the prosecution of the petitioner under s. 211 of the Penal Code should not be set aside, on the ground that before granting sanction to prosecute under s. 211 the Deputy Magistrate did not serve the petitioner with notice and give him an opportunity to be heard.

" After hearing petitioner's pleader in favour of the rule, and considering the case of *Abbilakh Singh* v. *Khub Lal* (1), we are not prepared to agree in the view therein expressed regarding the proceedings which are necessary before sanction, under s. 195 of the Code of Criminal Procedure, can be given to a prosecution for an offence as therein specified.

" We accordingly direct that this case be referred to a Full Bench of this Court in order that it may determine whether in a case, such as is described in s. 195 of the Code of Criminal Procedure, in which sanction to prosecute was not given immediately upon termination of the proceedings in the course of which the offence is alleged to have been committed, it is necessary before sanction be given that notice should be given to the person [60] concerned so as to give him an opportunity of appearing and being heard."

The opinion of the Full Bench was as follows :—

OPINION.

In our opinion no notice is necessary to the person against whom it is intended to proceed, before the Court, before which the alleged offence has been committed, can, under s. 195 of the Code of Criminal Procedure, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section.

(1) 10 C. 1100.

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JUNE 12.

APPEL-
LATE
CIVIL.

12 C. 60.

12 C. 60.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Ghose.

PRAMADA DASI (*Plaintiff*) *v.* LAKHI NARAIN MITTER AND OTHERS (*Defendants*).* [12th June, 1885.]

Civil Procedure Code (*XIV of* 1882), *s.* 43—*Res judicata—Suit for maintenance and suit for a share of the inheritance, distinguished—Hindu Law, Bengal School—Election, Doctrine of—Indian Succession Act* (*X of* 1865), *s.* 172, *excep.*

A testator bequeathed all his property to his nephew, in which he included the share of his brother's widow in the ancestral property; but at the same time made a suitable provision for her maintenance and worship. The widow at first sued for and obtained the allowance allotted to her under the will, and afterwards brought a suit for a share in the ancestral property.

Held, that, although having regard to the doctrine of election (Succession Act, s. 172), the widow was precluded from again bringing a suit for a share of the ancestral property, it could not be said that the suit was barred under the provisions of s. 43 of the Code of Civil Procedure, inasmuch as the two claims were distinct and indeed inconsistent, and did not arise out of the same cause of action.

THIS was a suit by a Hindu widow for her husband's share of the ancestral property. From the evidence it appeared that she had on a former occasion sued for and obtained an allowance for maintenance under the following circumstances: One Brindabun Chunder had in the year 1871 made a will whereby he gave away to [61] his nephew not only all his ancestral and self-acquired property, but included in the devise the share of a deceased brother, who had left a widow (the plaintiff). He, however, made a suitable provision for the widow under his will in these words: "The little ancestral property there is, is insufficient to support my sister-in-law, so if she lives with my nephew he is to support her, or if she does not live with him, he is to provide for her maintenance and give her Rs. 8 a month for worship." The Court of first instance held that the former maintenance suit could not be treated as a relinquishment by the plaintiff of her husband's share in the ancestral property, and consequently the provisions of s. 43 of the Code did not stand in the way of the present suit; and gave the plaintiff a decree to the extent of her actual share. On appeal the District Judge dismissed the claim, (1) because the suit was barred under the provisions of s. 43, and (2) because the doctrine of election as laid down in the exception to s. 172 of the Succession Act (Hindu Wills Act, s. 2) prevented the suit.

The plaintiff appealed to the High Court.

Baboo *Kali Charan Banerji*, for appellants.

Mr. *Palit*, Mr. *Mullick* and Baboo *Umbica Churan Bose*, for respondents.

The judgment of the Court (GARTH, C.J. and GHOSE, J.) was as follows:

JUDGMENT.

GARTH, C.J.—We think that the judgment of the Court below should be confirmed; but upon one only of the grounds, upon which the District Judge has proceeded.

* Appeal from Appellate Decree No. 2714 of 1883, against the decree of J. P. Grant, Esq., Judge of Hooghly, dated the 25th of June 1883, reversing the decree of Baboo Bhuban Chunder Mukherji, Subordinate Judge of that district, dated the 24th of April 1882.

The facts, so far as it is necessary to mention them for our present purpose, are, that in the year 1871 Brindabun Chunder, by his will, professed to dispose of not only the property belonging to himself, over which he had a disposing power, but also certain property belonging to Gonesh Chunder, who was the husband of the present plaintiff. 1885 JUNE 12. — APPELLATE CIVIL. — 12 C. 60.

By that will, he devised the whole property belonging to himself and Gonesh Chunder in favour of his nephew, Apara Prosad ; and by way of making a larger provision for the plaintiff than she would have had from her husband's ancestral property, he [62] goes on to say in his will : " The little ancestral property there is, is insufficient to support my sister-in-law (meaning the plaintiff) ; so, if she lives with my nephew, he is to support her ; or if she does not live with him, he is to provide for her maintenance, and give her Rs. 8 a month for worship."

Now, the ancestral property which he is speaking of there was a property which belonged to Gonesh, and which of right belonged to the plaintiff as her husband's heir.

Upon Brindabun's death in 1871 the plaintiff never claimed that ancestral property ; but on the contrary, in the year 1873, she brought a suit to recover the provision that had been made for her by the will as well out of the property which had belonged to Brindabun, as out of the ancestral property which properly belonged to herself, and in that suit she got a decree for the maintenance that was intended to be provided for her by Brindabun, as well as for the Rs. 8 a month for worship.

From that time until the year 1880 she has never made any claim whatever to the ancestral property which she now claims. That property, with the other property devised by the will, remained in Apara's possession, until a decree was obtained against him, when, in the year 1877, that property was sold under that decree to the present defendants. It was then, and not till then, that the plaintiff brought this suit in the year 1880 to recover the ancestral property.

We are of opinion that, having regard to the doctrine of election, the plaintiff was not entitled to make this claim. It is clear that she must have known that this ancestral property, which was insufficient for her support, was devised to her nephew for the very purpose of his providing her with a maintenance. In other words, she must have known that this maintenance was provided for her *in lieu of her ancestral property*, and knowing this, she brought a suit in 1873 to enforce her claim for maintenance against the whole of the property devised by Brindabun, including this ancestral property.

She therefore clearly made her election within the meaning of s. 172 of the Succession Act, and she cannot now, after the property has been sold as belonging to Apara, revert to her former position (and especially under the very suspicious [63] circumstances that she does bring it now) to recover the property from the defendants who have bought it *bona fide* under the decree against her nephew.

This is one of the grounds upon which the District Judge has decided against the plaintiff, and in that we entirely agree.

But with regard to the other ground, upon which he has based his judgment, we cannot agree with him. He seems to consider that the plaintiff is barred from maintaining this suit, upon the ground that her present claim is a part of the same cause of action for which she brought her suit in the year 1873 ; and that she is consequently barred by s. 43 of the Civil Procedure Code.

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Now, speaking for myself, I am one of those who believe that, however construed, s. 43 has done, and will do, a vast amount of injustice; and I am therefore particularly careful to give it a construction no larger than it will reasonably bear.

That section enacts that "every suit shall include the whole claim which the plaintiff is entitled to make in respect of the cause of action." Now, in my view of the case, the claim which the plaintiff makes in this suit is a totally different claim from that which she made in her suit in 1873. One claim is for land, the other is for maintenance, and, moreover, the two claims seem to me entirely inconsistent with each other.

If the plaintiff had a right to bring her suit in 1873, she had no right to bring her present suit, and *vice versa*. It can hardly be, therefore, that in making her present claim, she is suing *for the same cause of action*, which she sued for in 1873.

We think that the appeal should be dismissed and with costs.

GHOSE, J.—I concur.

Appeal dismissed.

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12 C. 64.

[64] APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

PUNCHANAND DASS CHOWDHRY (*Plaintiff*) *v.* TARAMONI CHOWDRAIN, FOR SELF AND AS GUARDIAN OF HER MINOR SONS PARBATI CHURN DAS AND ANOTHER (*Defendants*).*

[1st June, 1885.]

Stamp Act (*I of* 1879), *s.* 3, *sub-s.* 4, *cl.* (b), *s.* 34, *pro.* 1 *and* 3, *s.* 50—*Unstamped document admitted by Original Court on payment of duty and penalty—Power of Appellate Court to review such admission.*

Where the Court of first instance has, on payment of the prescribed duty and penalty, admitted an unstamped document as evidence, under s. 3, provision 1 of Act I of 1879, a superior Court sitting in appeal has no jurisdiction to review the Lower Court's proceedings, in so far as they concern such admission except in the case provided for by s. 50 of that Act.

[F., L. B. R. (1893-1900) 485 (487); R., 17 B. 235 (240).]

THE plaintiff in this suit is the son of one Petamber Dass Chowdhry, deceased; the defendants are his widow Taramoni, and his two infant sons represented by her. Plaintiff claimed a third part of Petamber Dass Chowdhry's estate, including, *inter alia*, the sum of Rs. 600, being one-third of a sum of Rs. 1,800, alleged by him to have been deposited with Taramoni by her husband, for division between plaintiff and the two infant defendants on their attaining majority. In support of his claim plaintiff put in a *roka* by which Taramoni had bound herself to pay the said sum of Rs. 1,800 to plaintiff. This document was not stamped, and an issue was raised before the Munsif as to whether it was admissible in evidence. The Munsif held that being an instrument attested by witnesses, not payable to order or bearer, by which Taramoni obliged herself to pay a sum of money to plaintiff, it was a bond within s. 3, sub-s. 4, cl. (*b*), of the

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* Appeal from Appellate Decree No. 74 of 1884, against the decree of Babu Ramanath Seal, Second Subordinate Judge of Tipperah, dated the 17th of September 1883, reversing the decree of Babu Nilmadhab Dey, Second Munsif of Brahmunberia, dated the 1st of August 1882.

Stamp Act (I of 1879), and therefore came within proviso 1 of s. 34 of the same Act. He thereupon ordered plaintiff to pay the full duty and fine, and admitted the document; but on examination found it to be not genuine, and dismissed plaintiff's suit as far as that portion of his claim was concerned.

Against the Munsif's finding plaintiff appealed to the second Subordinate Judge of Tipperah, and defendants filed a cross- [65] objection as to the admission of the document on payment of duty and fine. The following is the judgment of the Subordinate Judge on this point: "The *roka* bears date the 22nd Assin 1277 (7th October 1870). The provisions of the Stamp Act of 1877 have been misapplied to it by the Munsif, as Act XVIII of 1869 was in force on the date of the execution of the *roka*. In this Act the following definition is given of 'bond': 'Bond includes every instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specific act is performed, or is not performed as the case may be.' See No. 5, s. 3 of the Act. This section does not contain any provision similar to cl. (*b*), No. 4, s. 3 of Act I of 1879. The *roka* therefore does not come under the definition of 'bond' as given in Act XVIII of 1869. It comes under No. 5, sch. 2 of this Act, which is as follows: 'Note or Memorandum written in any book, or written on a separate paper whereby any account, debt or demand, or any part of any account, debt or demand therein specified, and amounting to Rs. 20 or upwards, is expressed to have been balanced, or is acknowledged to be due.' The stamp duty payable on such an instrument is an adhesive stamp of one anna. Section 28 of the Act provides that, 'except as provided in ss. 8 and 26, no stamp shall be affixed to, or impressed on, any bill of exchange or promissory note, or any instrument chargeable hereunder with the duty of one anna, subsequent to the execution thereof, nor shall the provisions of ss. 20 and 24 apply to any such instrument.' The Munsif was, therefore, not authorized to levy the duty and penalty, and admit the *roka* in evidence. By reading ss. 18 and 28 of the Act together, the *roka* cannot be admitted in evidence in any civil proceeding. It is unnecessary therefore to look at the evidence bearing on the genuineness of the *roka*, as the oral evidence on this point is not admissible, the document itself being inadmissible."

The appeal was therefore dismissed.

The plaintiff then appealed to the High Court.

Munshi *Serajul Islam*, for appellant.

Baboo *Boikant Nath Dass*, for respondents.

JUDGMENT.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

[66] FIELD, J.—The only point taken in this appeal is that the lower appellate Court was wrong in holding that the *roka* was not admissible in evidence. The *roka* was admitted by the Munsif, who was of opinion that it ought to have been stamped; and he required the person who filed it to pay stamp duty and a penalty. Such stamp duty and penalty having been paid, he admitted the document in evidence.

The Subordinate Judge was of opinion that the Munsif had wrongly applied the provisions of the Stamp Act. He considered that the stamp which ought to have been put upon the *roka* was a one-anna adhesive stamp; and inasmuch as this stamp had not been originally affixed, he

1885 JUNE 1. — APPELLATE CIVIL. — 12 C. 64.

held that the defect could not be cured by the payment of a penalty, and that the document was absolutely inadmissible in evidence.

We think that the Subordinate Judge had no authority, sitting in appeal, to review the Munsif's proceeding in so far as it concerned the admission of the *roka* in evidence. The new Stamp Act I of 1879 governs the case, the point being one of procedure. Section 345 of this Act enacts " that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law, or consent of parties, authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer, unless such instrument is duly stamped : *provided* that—then come two provisos ;—and the third proviso is that "when an instrument has been admitted in evidence, such admission shall not, except as provided in s. 50, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped." Section 50 empowers an appellate Court of its own motion, or on the application of the Collector, to take into consideration the order of a Subordinate Court admitting an instrument in evidence upon payment of the duty and penalty, but for one purpose merely, that is, for the purpose of ascertaining whether the Government revenue has suffered; whether a higher duty and penalty than that required by the Court of first instance ought to have been demanded from the person filing the document. This section clearly does not apply to the present case. The result is that, inasmuch as the third clause [67] of s. 34 is not as regards this case affected by s. 50, the admission in evidence of the document by the Court of first instance could not be questioned or interfered with by the Court of appeal.

We think, therefore, that the Subordinate Judge was wrong in excluding the *roka* from his consideration on the ground that it was not admissible in evidence. We must, therefore, set aside his decree, and remand the case in order that the Subordinate Judge may consider the effect of the *roka* as evidence, and decide the appeal accordingly. Costs will abide the result.

Appeal allowed and case remanded.

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12 C. 67.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

MAHOMED ZAMIR (*Plaintiff*) *v.* ABDUL HAKIM AND ANOTHER (*Defendants*).* [30th June, 1885.]

Sale for arrears of rent—Bengal Regulation (VIII of 1819), *s.* 8—*Notice of Sale—Publication of Proof of Service—Suit to set aside sale.*

Compliance with the directions in Regulation VIII of 1819 as to service of notice is essential to the validity of a sale under that Regulation. Where there was evidence of service upon the defaulter personally, but not of service at his *kachari* : *Held,* that this was not sufficient, and that the sale must be set aside.

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* Appeal from Appellate Decree No. 1327 of 1884, against the decree of Baboo Kanie Lall Mukherji, First Subordinate Judge of Chittagong, dated the 17th of April 1884, reversing the decree of Baboo Hara Kumar Rai, Munsif of Utterpotia, dated the 6th of October 1882.

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Maharajah of Burdwan v. *Tarasundari Debi* (1) and *Maharajah of Burdwan* v. *Kristo Kamini Dasi* (2) followed.

[F. 27 M. 94 (96)=13 M.L.J. 479; Appl., 19 C. 699 (703); Expl., 19 C. 703 (713).]

This was a suit to set aside a sale under Regulation VIII of 1819. The plaintiffs were talukdars of a plot of land in the zemindari of defendant No. 2. Defendant No. 1 was the auction-purchaser at the sale sought to be set aside. Plaintiffs objected to the sale on the ground, among others, that notice thereof had not been given in accordance with s. 8 of the Regulation. That section provides that notice shall be posted at the *kachari* of the defaulter whose land is to be sold. The Munsif of North Putia, who tried the case, found that the evidence adduced by [68] defendants to prove service of notice was quite insufficient, and ordered the sale to be set aside. On appeal the Subordinate Judge of Chittagong found that there was evidence of service upon the defaulter sufficient to satisfy the requirements of the section. He also held that, in order to set aside the sale, it was necessary to show fraud on the part of the auction-purchaser in collusion with the zemindar; and on those grounds, as well as on the ground that the plaintiffs had suffered no material loss by the irregularity, he reversed the decree of the lower Court.

Against this decree plaintiff appealed to the High Court.

Moulvie *Serajul Islam*, for the appellant.

Babu *Akhil Chunder Sen*, for the respondents.

The Court (WILSON and BEVERLEY, JJ.) delivered the following

JUDGMENT.

This was a suit to set aside a sale under Regulation VIII of 1819, the plaintiff being the proprietor of the tenure sold, and the principal defendant the purchaser at the sale.

The first issue raised was, "whether the sale notification was duly published as required by Regulation VIII of 1819."

Regulation VIII of 1819 lays down a certain procedure with regard to the service of notice: *First*, that a notice is to be stuck up at the Collector's *kachari*; *secondly*, that a similar notice is to be stuck up at the sudder *kachari* of the zemindar; and, *thirdly*, that a copy or extract of so much of the notice as affects a particular defaulter, is to be similarly published at the *kachari* of the defaulter, or at the principal town or village upon the land of the defaulter.

The Regulation further provides, with regard to the service at the *kachari* of the defaulter, that the evidence of that fact must be preserved in the way prescribed. In the case of *The Maharajah of Burdwan* v. *Tarasundari Debi* (1) the Privy Council have held that compliance with the directions in the Regulation is absolutely essential to give validity to the sale. They held, therefore, in that particular case that where the service was disputed, compliance with the provisions as to the mode [69] of proof was absolutely necessary. In the same way, in a Full Bench case in this Court, the *Maharajah of Burdwan* v. *Kristo Kamini Dasi* (2) it was held that the service at the *kachari* of the defaulter is essential and that service upon the defaulter himself is not sufficient.

In the present case there is no evidence of service at the *kachari* of the defaulter: there is evidence of service upon the defaulter, but that

(1) 10 I. A. 19=9 C. 619. (2) 9 C. 931.

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will not do. There is no evidence, on which any Court could act, of any service by sticking up at the Collector's *kachari* ; and there is no evidence at all of any compliance with the terms of the Regulation as to the preservation of the evidence of service at the Sudder *kachari* of the defaulter.

On these grounds we think that the decree of the lower appellate Court cannot be sustained. That decree will be set aside, and the decree of the Munsif will be affirmed with costs in all Courts.

Appeal decreed.

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12 C. 69.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

RAGHUBAR DYAL SAHU AND OTHERS (*Defendants* NO. 1) *v.* BHIKYA LAL MISSER (*Plaintiff*) AND ANOTHER (*Defendant* NO. 2).*

[12th August, 1885.]

Guardian—Minor-Decree against infant, Sale under—Suit to set sale aside on attaining majority—Limitation—Act (XV of 1877), *arts* 44, 144*—Procedure.*

Where a decree has been made against an infant duly represented by his guardian, and the infant on attaining his majority seeks to set that decree aside by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian.

If the infant desire to have the decree set aside, because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree were an *ex-parte* one, the procedure adopted should be that given in the Civil Procedure Code for setting aside *ex-parte* decrees.

Where a certain period is allowed by the Law of Limitation, within which an instrument affecting a person's rights or immoveable property must be impugned, and the person whose rights or property are affected fails to impugn [70] such instrument within that period, *held*, that he will not be precluded from availing himself of the longer period allowed for the recovery of immoveable property, provided that he can prove that such instrument is null and void so far as his interests are concerned.

[F., 57 P.R. 1891 ; 31 C. 111 (129)=7 C.W.N. 688 ; 56 P.R. 1903=93 P.L.R. 1903 (F.B.) ; 74 P.R. 1904=2 P.L.R. 1905 ; Appl., 14 M. 101 (102) ; Appr., 19 C. 629 (634) ; Expl., 122 P.L.R. 1902 ; 23 A 459 (462)=21 A.W.N. 147 ; Cited, 56 P.R. 1894 ; Cons., 23 C. 460 (468) ; R., 6 C.L.J. 448 ; 16 M. 311 (316) ; U.B. R. (1892-96) Vol. II, 475 ; 11 C.P.L.R. 49 (51) ; 24 B. 260 (284) (F.B.) ; 1 Bom. L. R. 799 ; 84 P.R. 1902=116 P.L.R. 1902 ; 30 C. 433 (438) ; 8 Bom. L.R. 675 ; 19 Ind. Cas. 235=202 P.L.R. 1913.

THIS is a suit brought to have the sale of certain lands in execution of a decree declared void, and to recover the property. The facts of the case are as follows :—

The plaintiff, Bhikya Lal Misser, is the son of one Babua Misser (defendant No. 2) and grandson of one Debidut Misser, who in the year 1864, executed a deed, whereby he left his self-acquired property to the plaintiff and his two brothers Mokund Lal Misser and Nursingdut Misser, all then minors, and appointed Babua to be their guardian. On the 19th May 1873, Babua, in his capacity of guardian, borrowed the sum of Rs. 16,998 from Raghubar Dyal Sahu and Tribeni Lal Sahu (defendants

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*Appeal from Original Decree No. 176 of 1884, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 13th of March 1884.

No. 1) and executed a bond for that amount. In that bond, it was set out that certain properties of the infants were about to be sold in execution of a decree for Rs. 10,119-8-6 ; and in the Court below it was not disputed that there was such necessity pressing on the estate as justified Babua in borrowing so much. The bond further set out that the minors were in present need of Co.'s Rs. 6,876-7-6 to meet certain necessary expenses, and the expenses of an appeal then pending before the Privy Council. The bond not having been discharged, a suit was instituted upon it, and eventually a decree was made against the present plaintiff and his two brothers (one of whom was then of full age), in execution of which the properties now in suit were sold. This decree, so far as Bhikya Lal Misser was concerned, was made *ex parte.*

In 1880 Bhikya attained his majority, and in 1883 brought a suit in the District Court of Mozufferpore to have the sale set aside, and to be put in possession of the property sold, on the ground that the bond of May 19th, 1873, was fraudulent and collusive on the part of Babua Misser, inasmuch as about Rs. 7,000 of the sum of Rs. 16,998 borrowed by him were a personal debt due by Babua, which in fact were never paid as part of the consideration money.

The case was heard by Mr. A. C. Brett, District Judge of Mozufferpore, on the 13th March 1884. A point of limitation was [71] raised but was decided on the evidence in favour of the plaintiff. On the main point of fraud and collusion the District Judge found that Babua was certainly indebted to the obligees, and that plaintiff's evidence, which went to show that these debts had been incorporated into the bond, was preferable to that tendered by the defendants.

A decree was accordingly made in favour of the plaintiff, against which the defendants No. 1 have preferred the present appeal.

Mr. *W. C. Bonnerjee*, and Baboo *Abinash Chunder Bannerjee*, for the appellants.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Demakali Mookerjee* and Baboo *Ram Churn Mitter*, for the respondents.

The following judgments were delivered by the Court (FIELD and O'KINEALY, JJ.) :—

JUDGMENTS.

FIELD, J.—The plaintiff in this case is one Bhikya Lal Misser, who is the second son of Babua Misser. He has an elder brother, Mokund Lal Misser, and a younger brother, Nursingdut Misser. The father of Babua Misser, Debidut Misser, on the 5th of February 1864, executed a document, whereby passing over his own son Babua Misser, he divided the bulk of his property between his three grandsons, Bhikya Lal Misser, Mokund Lal Misser and Nursingdut Misser. He was able to do this, because the property so disposed of was self-acquired. He gave to Babua Misser by the same deed certain plots of land which were ancestral, but which formed only a small portion of the whole property in his possession.

On the 19th of May 1873 Babua Misser, professing to act as guardian and manager of his three sons, borrowed Rs. 16,998, and executed a bond for this amount in favour of Raghubar Dyal Sahu and Tribeni Lal Sahu. This bond recited that Babua Misser had borrowed this sum of Rs. 16,998 from Raghubar Dyal Sahu and Tribeni Lal Sahu for the purpose of paying off certain decrees, and thus protecting the estate of the minors, and for the purpose of meeting other personal

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necessities and of defraying the expenses of a certain appeal which was pending before the Privy Council. The amount of the bond not having [72] been discharged a suit was brought thereupon, and on the 18th of August 1876 a decree was made in that suit against Mokund Lal Misser, who was then of age, and Bhikya Lal Misser and Nursingdut Misser, minors. The plaintiffs in that suit were Raghubar Dyal Sahu and Tribeni Lal Sahu, in whose favour the bond had been executed. In execution of that decree two properties were sold, namely, four annas in mouzah Bourahar and eight annas in mouzah Jiroul. The four annas share of mouzah Bourahar was mortgaged by the bond of the 19th of May 1873, and the decree of the 18th of August 1876 directed the sale of this property in satisfaction thereof. The total amount of the decree not having been satisfied by this sale, the other property, Jiroul, was sold, although it had not been specifically included in the mortgage bond.

The present suit has been brought by Bhikya Lal Misser, who was at that time a minor, in order to recover these two properties, and his general contention is that the bond and the whole of the proceedings in the suit thereupon were fraudulent and collusive; that he is not and cannot be bound thereby; and that, therefore, he is entitled to treat those proceedings and the sale as nugatory; and to recover the two properties which were given to him by the deed executed by his grandfather on the 5th of February 1864.

It is to be observed that so far as Bhikya Lal Misser is concerned the decree of the 18th of August 1876 was *ex parte*.

The first question which has been argued in this appeal is concerned with limitation. It is said that this suit is barred, because it was not instituted within three years from the date on which the sale of these properties was made under the decree. On the other hand, it is contended that, inasmuch as the object of this suit is to recover the properties, and not merely to set aside the decree of the 18th of August 1876, and the proceedings had thereunder including the sale, the twelve years' rule of limitation ought to apply.

I shall first consider whether the three years' rule is applicable to this suit. The Judge in the Court below is of opinion that the suit is not barred. He says: "The plaintiff comes in as a minor and the first issue relates to his age. I find that he was born in [73] Cheyt 1269, and the suit has therefore been instituted within three years of his attaining majority." Apparently then the Judge assumed that the three years rule of limitation was applicable. The Judge does not, however, say on what particular date in Cheyt he finds that the plaintiff was born, and his decision on the point of limitation is certainly so far unsatisfactory. This suit was instituted on the 14th of April 1883. The only evidence as to the plaintiff's age consists of the testimony of the witness, Jalpadat Jha, and the evidence supplied by the horoscope. The witness Jalpadat Jha swears positively that Bhikya Lal Misser was born on the 12th Cheyt 1269; the corresponding English date would be the 28th of March 1862. The plaintiff, therefore, attained his majority on the 28th of March 1880, and this suit having been instituted on the 14th of April 1883 was not brought within three years. Then as to the horoscope, this document describes the birth of the third son of Babua Misser as having taken place on Friday, the 12th day, in the light semibulation of Cheyt in the year 1918 of the *Sumbut*, corresponding with the year 1784 of the *Sak* era, and with the year 1269 of the common era. Now, the 12th day of Cheyt 1918 was not a Friday, and if the plaintiff's

birth took place in that year he would have been born in 1861, and therefore a year earlier than the time of birth stated by the witness Jalpadat Jha. But it has been suggested that 1918 may be an error for the year 1919, and if that were so the 12th Cheyt of that year would be a Friday, and that day would correspond with the 30th Cheyt 1783, and to the 11th of April 1862, in which case also this suit would not have been instituted within three years from the date on which the plaintiff attained his majority. There can be no doubt therefore that the Judge's finding upon the assumption that the three years' rule is applicable is based upon a misconception of the evidence, and is erroneous. The suit, if governed by the three years rule of limitation, is barred.

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But then it has been contended that the twelve years rule ought to apply, and that the case ought to be governed either by art. 142 or art. 144. A learned argument has been addressed to us in support of this view, and amongst other cases [74] that of *Raj Bahadoor Singh* v. *Achumbit Lal* (1) has been referred to. Now, that was a case of an adoption. The widow executed what was called a deed of adoption, by which she professed to adopt, and to make a gift of the property to the adopted son. But this gift was not to take effect until her death. Their Lordships of the Privy Council, referring to the argument that the suit was barred by the six years' rule of limitation applicable to a suit brought to obtain a declaration that the adoption was invalid, say: "On the above review of the document, the words of the Statute would seem scarcely applicable to it. Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit. Inasmuch as, according to the admitted construction of the document, the widow conveyed by it no more than she had, which was but a life interest, the document is innocuous, and it is immaterial to the plaintiff whether it be set aside or not." If in that case the widow had proceeded to complete the proceedings in adoption by making over the property to the adopted son, instead of executing a deed under which he was to take at her death, the case would have been altogether different. Their Lordships said that the document was innocuous, that is, it had no effect or operation so as to affect the plaintiff's rights during the widow's lifetime, and until operation was sought to be given to it upon her death. It appears to me that this decision of the Privy Council has no application to the case in which a document at once operates upon rights or property intended to be affected thereby. Articles 91, 92 and 118 are particularly concerned with instruments or transactions which, if allowed to stand unchallenged once they became known, might become important evidence against the persons whose rights they purported to affect. If those persons omit to challenge them within the shorter period of limitation allowed for doing so, they will not be precluded from having the longer [75] period of limitation allowed by the law for the recovery of immoveable property; but in this latter case they will probably have to show that the instrument or transaction which they neglected to challenge, is null and void so far as they and their interests are concerned. Where such instrument or transaction

(1) 6 I.A. 110.

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was made or done with authority, and had immediate operation given it so as to affect immoveable property, it is difficult to see how a person who omitted or neglected to have it set aside within the time allowed for a suit for doing this, can afterwards challenge its operation or effect and recover property, the title in which it, if valid, operated to transfer, such transfer being further actually carried out. In the present case, if the plaintiff is entitled to treat the proceedings in the former suit, the decree and the sale under the decree, as nullities, no doubt he would be entitled to say that he has twelve years to sue from the time when he was dispossessed by the purchaser at the execution sale. If on the contrary these proceedings were had with jurisdiction, and if the plaintiff was a party so as to be bound by the decree, I think there can be no doubt that he should have taken proceedings to set aside the sale within three years from the date on which such sale was confirmed, or within three years after his coming of age.

I must, therefore, deal with the questions raised in the subsequent portions of this appeal before I can say whether the present suit is barred by limitation or not. This leads me to a consideration of the effect of the decree of the 18th of August 1876.

In the first place there can be no doubt that the present plaintiff was properly made a party to that suit. He was made a party in his own name, and as represented by his guardian Babua Misser, who was his father. No doubt the decree was an *ex parte* decree, but the Code of Civil Procedure contains provisions under which an *ex parte* decree can be set aside; and I think that, if it was sought to set aside the decree on any ground upon which an *ex parte* decree can be set aside, resort should have been had to those provisions. It is not suggested, that any such resort was ever had. Then, seeing that the plaintiff [76] was properly made a party to the suit, I think he must be taken to be bound by the decree, that is, unless he can show that it was obtained by fraud or collusion. The rule on this point was laid down in an old case, *Gregory* v. *Molesworth* (1), where it was said: "It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action as if of full age; and this rule is general, unless gross laches, or fraud and collusion, appear in the *prochein ami*, then the infant might open it by a new bill." That case, so far as I am aware, has been followed down to the present time (see Daniel's Chancery Practice, pp. 149, 156, and 157). The practice in the Court of Chancery in England has been that if it be sought to question a decree passed against a minor on the ground of fraud or collusion, this might be done by an original bill. If it were sought to impeach a decree passed against an infant on the ground of gross laches in the *prochein ami*, on the ground that the next friend had omitted to put forward proper available grounds of defence, this was usually done by re-opening the original case upon motion or petition. This practice will be found explained in pages 156 and 157 of Daniel's Chancery Practice already referred to, see as instance of the latter courts being pursued, the case of *Houghton* v. *Fiddey* (2). In this country we have a different procedure. If an infant desires to have a decree set aside on the ground that his next friend had neglected his interests, and had not put forward on his behalf good grounds of defence, which were available,

(1) 3 Atkyns 626.

(2) L. R. 18 Eq. 573.

the proper mode of proceeding would be to apply for a review. The provisions of the Code of Civil Procedure relating to reviews are sufficiently wide to include such a case. If it be sought to set aside a decree obtained against an infant properly made a party, and properly represented in the case, and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can succeed only upon proof of fraud or collusion.

This then being in my view the proper principle applicable to the case, I have to see whether the plaintiff in the case now before us has given satisfactory proof of such fraud or collusion. His case is that the two *mahajans*, who obtained the decree [77] of the 18th of August 1876, were in collusion with his own father Babua Misser. Babua Misser is admittedly living with the plaintiff, but he has not been put into the witness-box to give his account of the transaction conducted by him personally. The bond, as already mentioned, was for the sum of Rs. 16,998. As to a large portion of this sum, namely, Rs. 10,000, there is no dispute or controversy that it was borrowed to satisfy certain decrees under which the property belonging to the family, and to the present plaintiff, had been attached; and there can be no doubt that, as regards this amount, there was real necessity then subsisting, which justified Babua Misser, as guardian of, and manager for, his minor sons, in borrowing money, executing the bond, and incurring the liability on their behalf. But the Judge in the Court below has found that as regards the remaining sum of Rs. 6,998 there was no such necessity, and that this sum represented a personal debt due by Babua Misser—a debt for which his sons could not be liable, and for the discharge of which he was not justified in executing any bond which would bind their property. No doubt, if this were so, and if the defendants in the present case were aware of these facts (and in considering this part of the case it must be borne in mind that the decree-holders were themselves the purchasers), there would be a case of fraud sufficient to justify the decree of the Court below setting aside the decree of the 18th of August 1876 and the sale held thereunder. Let us see, however, what is the evidence in support of this fraud. We have first the testimony of the witness Doman Misser. He states in his examination-in-chief that out of the amount Rs. 17,000 for which the bond was executed, Babua Misser got Rs. 10,000 only in cash; that he had a personal debt of about Rs. 6,000; that is to say, this sum was deducted on account of the previous debts. Part of this debt was due under a bond, and the rest was the personal debt of Babua Misser; and that this previous personal debt was due under a decree. In cross-examination he admitted that he had not seen the former decree and bond; and that of the former debt he only knew what both the parties said, namely, that it was personal. To the bond, which is to be found at page 23 of the [78] paper-book, there were no less than seven witnesses besides the writer. Doman Misser is not, however, one of these witnesses. We have next the witness Loke Nath Misser. He says that Rs. 10,000 were on account of the debt of the sons of Babua Misser, and that Rs. 6,000 were his personal debt. But he admits that he does not know what kind of debt this sum of Rs. 6,000 was. He says that it was on account of a bond and decree, and that when Babua Misser wanted to borrow money he told him that he got the loan from nowhere, and that Raghubar and Tribeni would lend money provided he included his personal debt in the bond. In cross-examination he admitted that the bond or the decree was not shown to him, and that he

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was not present at the time of the payment of the money. This man also is not one of the witnesses whose names appear on the bond. Lastly, we have the witness Balbhudder Misser. He says that Babua Misser borrowed upwards of Rs. 10,000 to liquidate the debts of his sons, and that he included in the bond the balance Rs. 6,000 on account of his personal debt; that Raghubar Dyal declined to lend money unless the personal debt, amounting to Rs. 6,000, was included in the bond. He says in his cross-examination that the whole of the amount of Rs. 6,000 was due under a decree, thereby contradicting the previous witness, who says that there were both a bond and decree. This man also is not one of the witnesses to the bond. It is quite obvious that none of these three witnesses had any personal knowledge of the transaction upon which depended this alleged antecedent personal debt of Rs. 6,000, and that they profess to state merely the result of conversations had and admissions made in their presence. I have already observed that Babua Misser has not been put into the witness-box. I may now make a further observation that not one of the witnesses to the bond has been called, and that there is nothing to show that they are dead or out of the way, or for other reasons could not have been produced. In the absence of that direct evidence of the transaction, which might reasonably be expected, I think that, in accordance with principle, it wouldbe exceedingly dangerous, especially in this country, to rely upon verbal statements of oral admissions. I may refer to the **[79]** observations of their Lordships of the Privy Council in the case of *Lala Sheo Pershad* v. *Juggernath* (1); and the observations of an able Irish Chief Justice (Pennefather) in the case of *Lawless* v. *Queale* (2), which, though made with reference to a different class of admissions, are not without weight and application in the present case.

It has been contended that the three decrees, which are to be found at pages 32, 34 and 36 of the paper book, are evidence that Babua Misser was indebted. There is nothing to show whether these decrees were or were not satisfied. There is nothing to connect them with the sum of Rs. 6,878 with which I am now dealing. The District Judge has made a calculation by which he arrives at the conclusion that the share in these decrees to which the obligees of the bond of the 19th of May 1873 were entitled, would come to the sum of Rs. 6,878. But, as I have already observed, there is no evidence to show that the amount due under these decrees was part of the amount for which the bond was actually executed. We are not aware whether these decrees were at the time barred by limitation or not. There is no information on the subject upon the record, and the learned pleader who conducted the case for the respondent was not able to give us any information. If they were barred by limitation, it is not likely that Babua Misser would have given a bond including the amounts due under those decrees. If they were not barred by limitation, it would be reasonable to expect that the *mahajuns* having obtained a bond would have been required to certify, and would have certified satisfaction of the decrees to the extent of their share. It is not shown that anything of the kind was done. This then being the evidence on the part of the plaintiff to establish a case of fraud, I am compelled to say that it is in my opinion altogether insufficient. On the other hand we have the evidence of Ram Golam Sahu who swears that the whole amount of Rs. 16,998 was paid in cash, and he further swears that no portion of the money was deducted on account of any former debt. He says that this large sum was required for protecting

(1) 10 I. A. 74. (2) 8 Irish L. R. Com. Law 382.

the properties of the minors by satisfying the decrees under which [80] these properties had been attached, for meeting the expenses of the Privy Council appeal, and for celebrating the marriage of Mokund Lal. The marriage of Mokund Lal is not expressly stated in the original bond as one of the objects for which the money was borrowed, although it may well come under the head of necessary family expenses. That there was a Privy Council appeal at that time pending is admitted, and it was, as pointed out by the District Judge, decided by the Privy Council two days before the execution of the bond of the 19th of May 1873; and we have the evidence of Goberdhone Lal, a *mukhtar*, that Babua Misser had paid over to him Rs. 1,000 towards defraying the expenses of this appeal. Looking then at the whole of the evidence, I think it impossible to say that the plaintiff has satisfactorily shown that this sum of Rs. 6,998 was a debt contracted by Babua Misser personally, a debt for which his sons could not be made liable.

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I think, therefore, that the plaintiff has failed to establish any case of fraud upon which he would be justified in recovering from the defendants the property sold in execution of the decree of the 18th of August 1876. He is, therefore, bound by that decree and by the sale had thereunder. This being so, he was bound to bring his suit to set aside that sale within three years of attaining his majority, and not having done so, his suit is barred by limitation. We must, therefore, reverse the decree of the District Judge, and dismiss this suit with costs in both Courts.

O'KINEALY, J.—In this case I am of the same opinion as my learned colleague.

The case is shortly this: The father of the present plaintiff executed a mortgage deed and mortgaged the property of his minor sons to the present defendants. Subsequently a suit was brought upon the mortgage deed, in which the minors were properly represented. In that suit a decree was obtained, which was drawn up in regular form, and at the sale in execution of that decree the decree-holders themselves purchased the property. When Mokund Lal, who was one of the minors, came of age, he re-opened the case, but subsequently acquiesced. We have then a judgment regular as to form in which one of [81] the sons subsequently acquiesced. Under this decree execution issued. Now the plaintiff comes into Court and says: "I charge my father and the decree-holders in that case with fraud, and the mortgagees, who are also the purchasers of the property, are bound to hand the property over to me."

We had a learned discussion on the question of limitation. But before limitation can be applied in this case the facts must be ascertained. On the one hand it is said that the sale was made without jurisdiction, and that it was a case of fraud. The man whose property has been sold says: "Babua Misser was nothing but a trustee for me; he could not pass the property; I do not seek to set aside the sale, the property is mine absolutely." I can understand such a case, and the limitation applicable would be twelve years. On the other hand, if it is necessary to set aside the sale in order to follow the property, the limitation applicable is, I think, not twelve but three years. Now in the present case I am of opinion that no fraud has been proved. The oral evidence in support of the admission alleged to have been made by Babua Misser before the execution of the mortgage deed is, in my opinion, utterly insufficient to

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support a case of of fraud. Therefore, as in my opinion no fraud was committed, the decree is good, the execution is good, and the plaintiff cannot reach the property without setting aside the sale in execution of the decree, and as he cannot set aside the sale, he is out of Court.

I. therefore, concur in the opinion that has already been expressed by my learned colleague, and I think that this suit ought to be dismissed with costs.

Appeal allowed.

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12 C. 82.

[82] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

RADHA GOBIND KOER (*Defendant*) *v.* RAKHAL DAS MUKHERJI (*Plaintiff*).* [25th June, 1885.]

Landlord and Tenant—Ejectment—Notice to quit—Evidence—Title of auction-purchaser at sale for arrears of revenue—Proceedings in suit at instance of defaulting proprietor—Subsequent suit by auction-purchaser as against him—Right of occupancy—Effect of purchase of land by zemindar upon right of occupancy acquired by ryot.

There is no authority for the proposition that a notice to quit to a ryot other than an occupancy ryot must terminate at the end of a cultivating year or be a three months' notice. Such ryot is only entitled to a "reasonable" notice, and such as will enable him to reap his crop. What is a "reasonable" notice is a question of fact to be decided in each case, having regard to its particular circumstances and the local customs as to reaping crops and letting land.

An auction-purchaser at a sale for arrears of Government revenue does not derive his title from the defaulting proprietor, and proceedings between the defaulting proprietor and third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction-purchaser as against him.

The right of occupancy is a right given to a ryot continuing only so long as the ryot pays rent for the land he holds, and though it cannot be affected by a wrongful eviction, still when the zemindar acquires the land by purchase and takes possession, even in the *benami* name of a third party, seeing that he cannot pay rent to himself, the right is gone and cannot subsequently be revived.

[F., 12 C. 93 (95) ; 26 C. 761 (764) ; 34 C. 868 (871); **Rel. on.**. 15 Ind. Cas. 869=17 C. W. N. 340 (341) ; R , 13 C.P.L.R. 1 (4) ; 24 B. 591 (597)=2 Bom. L.R. 386 ; 9 C.W.N. 383 (386) ; 8 C.P.L R. 74 (76).]

IN this case the plaintiff sued for *khas* possession of certain lands on establishing his *mal* title thereto, and at the same time offered to allow the defendant to occupy them as his tenant on payment of a proper amount of rent, and to grant him a *patta* in return for a *kabuliat.*

The lands in suit consisted of a zemindari called Nundipur, and the plaintiff alleged that it had been sold for arrears of Government revenue in 1281 (1874-75) under the provisions of Act XI of 1859, and purchased on the 4th Choitro (17th March [83] 1875) of that year, by the Maharajah of Burdwan who on the third Assin 1283 (18th September 1876) granted him, the plaintiff, a *putni* lease. The plaint went on to state that the lands in suit had formerly been the zamindari of one Sham Lal Ghose, who had either let them out or cultivated them in *nijjote*, and the defendant was in

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* Appeal from Appellate Decree, No. 810 of 1884, against the decree of T. D. Beighton, Esq., Judge of Burdwan, passed in review, dated the 8th cf February 1884, reversing his own decree, dated the 9th of May 1883, and of Baboo Bhupati Rai, Subordinate Judge of that district, dated the 11th of March 1881.

occupation of them without any right or title; that even if the defendant had any right to them, he the plaintiff was entitled to eject him, and with that object he had served a notice on the 26th Magh 1286 (8th February 1880) requiring him to give up possession or to take a *pottah* at a fair rent.

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The defendant did not comply with the terms of that notice, and the plaintiff, therefore, instituted this suit on the 26th June 1880.

The defendant stated that the lands in suit consisted of 36 plots. As regards plots 1 to 19 he alleged that he was in possession of them by paying rent therefor inasmuch as the plaintiff on the 24th Pous 1284 (7th January 1878) served a notice on him for assessment of rent, and took certain money deposited by him on account of rent, and that, therefore, as regards those plots, the plaintiff was now estopped from suing to eject him. And he further alleged that the Maharajah of Burdwan had previously received rent from him for them and recognised him as tenant.

He further stated plots 1 to 11 had formed a portion of the holding of his maternal great-grandfather Komola Kant Koer; on Komola Kant Koer's death they came into the possession of Baidya Nath Koer his grandfather, who held them jointly with Nund Kumar Koer his brother while alive, and alone after his death, under right of inheritance, and on the death of Baidya Nath Koer his mother Jugut Monmohini Dasi got possession, and on her death he, the defendant, succeeded and had held possession since.

As regards plots 12 to 19 he stated that they had formerly stood in the name of Gunga Gobind Koer, and had been acquired by purchase by Baidya Nath Koer on the 6th Falgun 1222 (1816) under a *kobala* in the name of one Madhub Chunder [84] Koer, and that they had descended to him in the same manner as plots 1 to 11.

In respect of these two plots the defendant claimed to have acquired a right of occupancy, and that as the relationship of landlord and tenant existed between him and the plaintiff, the latter was not entitled to eject him.

As regards plots 20 to 36, the defendant claimed them as lakheraj, and alleged that they had descended to him from his grandfather Baidya Nath Koer. The defendant further alleged that in the year 1270, while he was a minor, one Sham Lal Ghose, a talukdar, had unjustly ousted his mother from the properties now in suit, and that on his mother's death his guardian, Nobin Chunder Koer, in 1873 brought a suit against Shama Sundari Dasi, guardian of Onath Bundhu Ghose, the minor heir of Sham Lal Ghose, then deceased; that such suit was referred to arbitration, and a decree was passed on the award of the arbitrators, by virtue of which the defendant recovered possession of the property. And he pleaded that the present suit was barred under s. 13 of the Civil Procedure Code by reason of that suit having taken place between him and the predecessor in title of the plaintiff.

Lastly, he pleaded that the notice of the 26th Magh 1286 (8th February 1880) served on him by the plaintiff was insufficient.

The first Court held that the auction-purchaser at a revenue sale does not represent the late proprietor, and therefore that the suit was not barred under s. 13 by reason of the arbitration proceedings and decree thereon; that the relationship of landlord and tenant existed between plaintiff and defendant as regards plots 1 to 19, and that the defendant had acquired a right of occupancy therein, and that consequently the plaintiff was not entitled to eject him and obtained *khas* possession.

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As regards plots 20 to 36, the Court held that it was for the plaintiff to prove that the land was *mal*; that the decree upon the arbitrators' award, though not a bar, was still admissible in evidence against the plaintiff as to the character of the defendant's title to the land, and that the evidence, oral and documentary, in the case clearly proved that these plots were the defendant's [85] ancestral lakheraj property. Upon these findings the plaintiff's suit was dismissed.

The lower appellate Court held that the decision in the arbitration proceedings was not a bar to the suit, and that the proceedings and decree were not admissible in evidence against the plaintiff upon the authority of the decision in *Moonshee Buzlool Rahaman* v. *Pran Dhan Dutt* (1); *Goluck Monee Dossee* v. *Huro Chunder Ghose* (2); *Kooldeep Narain Singh* v. *Government of India* (3); and the Full Bench decision in *Gujju Lall* v. *Fatteh Lall* (4). And it reversed the decision of the lower Court upon the finding that the defendant had acquired a right of occupancy in plots 1 to 19. Upon the question as to whether plots 20 to 36 were or were not lakheraj, the lower appellate Court confirmed the decision of the Court below.

The lower appellate Court passed a decree declaring that the defendant had no right of occupancy in the lands claimed as *mal*; that the plaintiff was not, however, entitled summarily to eject him; and confirming the defendant's title to the lands described as lakheraj.

Subsequently the plaintiff applied for a review of that decree in order to have the words restricting his right to eject the defendant from the *mal* lands struck out of the decree, and upon that application the District Judge held that it was for the defendant to prove that the notice to quit was unreasonable; that no evidence had been offered as to the condition of the crops or custom of the country, but that the defendant had confined himself to setting up a right of occupancy in which he had failed; and that in the absence, therefore, of any evidence, he could not hold that the notice was unreasonable. The decree was accordingly amended.

Against that decree the defendant now preferred a special appeal to the High Court, upon the following grounds amongst others:—

That the notice to quit was insufficient and was bad, in that it did not terminate with the end of the year.

That the lower Court was wrong in throwing the onus of proving its insufficiency on him.

[86] That the Court below had erred in holding that the arbitration proceedings and judgment thereon were not admissible in evidence, and that the defendant had not acquired a right of occupancy in the *mal* land.

The plaintiff filed a cross-appeal against the findings that plots 20 to 36 were the defendant's lakheraj lands.

Baboo *Rashbehari Ghose*, Baboo *Jogesh Chunder Dey* and Baboo *Kali Charn Banerji*, for the appellant.

Baboo *Hem Chunder Banerji*, Baboo *Bhairub Chunder Banerji* and Baboo *Bassunt Coomar Bose*, for the respondent.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

JUDGMENT.

The plaintiff in this case is the *putnidar* of a taluk called Nundipur, from which he seeks to eject the defendant. It appears that the estate

(1) 8 W. R. 222. (2) 8 W. R. 62. (3) 11 B. L. R. 71. (4) 6 C. 171.

formerly belonged to one Ramlochun Ghose, who, in 1203 (1796), sold it by a *kobala* to one Komola Kant Koer. Komola Kant Koer was succeeded by Baidya Nath Koer, whose name was recorded as proprietor. The property remained in the possession of the Koers up to the year 1270 (1863), when it was sold for arrears of revenue, and purchased by one Sham Lal Ghose, and the Koers were ousted. The defendant was then a minor. His guardian Nobin Chunder Koer subsequently brought a suit to recover possession of the property against Shama Sundari Dasi, the guardian of Onath Bundhu Ghose, the heir of Sham Lal Ghose. This suit was referred to arbitration, and the arbitrators by their award found that six bighas of lakheraj land were excluded from the plaintiff's claim ; but that the rest of the lakheraj land, including all the lands in dispute in the present suit, belonged to him, and that the *mal* lands also belonged to him, and in 1280 (1873) he was put into possession.

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In 1283 (1876) the estate was again sold for arrears of revenue and was purchased, free from incumbrances, by the Maharajah of Burdwan, who let it in *putni* to the present plaintiff. The plaintiff alleges that the lands now in dispute are *mal* lands within the zemindari, and that they were held by Sham Lal in *nijjote*. On the 26th Magh 1286 (8th February 1880) the plaintiff served the following notice to quit on the defendant :—

[87] " You are in possession of 43 bighas without any legal grounds. You have no right or title to occupy the said land, and I am entitled to eject you from it. You are therefore informed that you must within thirty days of the service of this notice on you, quit the land, or you may, if you like, enter into an engagement with me and execute a *kabuliat* with me, agreeing to pay a proper rent. If you do not do either, I shall institute a suit to eject you."

The present suit was instituted on the 13th Assar 1287 (26th June 1880).

The defendant stated that the zemindari consisted of 36 plots, of which plots 1 to 11 belonged to a holding in the name of Komola Kant Koer ; that plots 12 to 19 were originally held by one Gunga Gobind Koer who sold them to Baidya Nath Koer on the 6th Falgun 1222 (1816) in the *benami* name of Madhub Chunder Koer. At that time it is alleged by the defendant that Gunga Gobind Koer had acquired a right of occupancy in these plots, and the defendant contended that, as he and his ancestors had held possession of these plots for more than twelve years, he had acquired a right of occupancy in them. Plots 20 to 36, the defendant stated, were lakheraj lands.

The Subordinate Judge dismissed the suit. He held that the decree in the arbitration suit did not operate under s. 13 of the Civil Procedure Code as a bar to the present suit, but he held that the plaintiff had recognized the relation of landlord and tenant existing between himself and the defendant as to plots 1 to 19, and that the defendant had a right of occupancy in those plots ; and further that the plots 20 to 36 were the defendant's lakheraj.

The District Judge modified this decree. He held that the decision in the arbitration suit did not operate as *res judicata*, and was not admissible in evidence against the plaintiff. He further held that the defendant had not acquired a right of occupancy in the lands claimed by him as *mal*, and he reversed the Munsif's decree on this point.

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The first question that arises is as to the sufficiency of the notice. For the plaintiff it was contended in the first place that the defendant was a trespasser, and that therefore no notice at all was necessary. Apparently before the *putni* was granted the [88] Maharajah received rent from the defendant. And after the *putni* was granted the plaintiff served the defendant with notice of enhancement, but nothing further was done. The District Judge finds that the defendant never attorned to the plaintiff or paid him rent. We think, however, that the tenancy acknowledged by the Maharajah continued, and that the defendant cannot now be treated as a trespasser.

We were not referred to any precise authority on the question as to what notice a tenant not having a right of occupancy is entitled to. It was argued for the defendant that three months' notice must be given, and that the notice must be to quit at the end of the month of Cheyt. We do not think that the cases to which we have been referred bear out this argument. In *Janoo Munder* v. *Brijo Singh* (1) all that was decided was that such a tenant is entitled to a reasonable notice to quit, and that the notice served being a three months' notice was reasonable. But it does not decide that a less notice is unreasonable. And in *Surjomonee Dossee* v. *Pearee Mohun Mookerji* (2), it was decided that where the holding of a ryot is of such a nature that he cannot be ejected without a reasonable notice to quit at the end of the year, he is entitled to have a suit for ejectment dismissed on the ground that he has had no such notice. This case also does not decide what is a reasonable notice.

In *Jubraj Roy* v. *Mackenzie* (3) the notice was to quit within thirty days at a time when the crops were ripening. The Subordinate Judge held that the notice had been given at an improper time and his decision was affirmed. Sir Richard Garth, C.J., said: "I think the notice should have been a reasonable one to terminate the tenancy at the end of the fresh year. The Subordinate Judge probably knows better than we do what would be a reasonable notice to quit in that part of the country." Prinsep, J., said: "It is unfortunate that the law should not have defined when a tenant, having no permanent right, can be called upon to vacate his holding, and what notice should be given to him; but I think that, following the rule for notices of enhancement, the notice served on the 25th February and giving thirty [89] days' notice has neither been served at a proper time of the year, nor has it given a sufficient time. I do not mean to say that a notice to quit may not be served at any time during the year, but it must give a sufficient interval to the tenant to vacate, and if served in the middle of the year when it would disturb all cultivation, it would not be a proper notice, unless it give a time for leaving the tenure when the cultivation shall have come to an end." In *Ram Rutton Mundul* v. *Natro Kally Dassee* (4) a ten days' notice was held to be insufficient. The question was also considered in the cases of *Prosunno Coomaree Debea* v. *Rutton Bepary* (5) and *Jugat Chunder Rai* v. *Rup Chand Chango* (6), and in both of these cases the Court abstained from laying down any precise rule. In the first case Sir Richard Garth, C. J., says: "The truth is, that the terms of a holding as between landlord and tenant must always be matter of contract either express or implied. If they enter into an express agreement of tenancy either written or verbal, such agreement generally defines the terms of his holding. If, on the

(1) 22 W. R. 548. (2) 25 W.R. 331. (3) 5 C.L.R. 231.
(4) 4 C. 339. (5) 3 C. 696. (6) 9 C. 48 = 11 C.L.R. 143.

other hand, a tenant is let into possession without any express agreement and pays rent, he becomes a tenant-at-will, or, from year to year; or in other words, holds by the landlord's permission upon what may be the usual terms of such a holding by the general law, or by local custom, and in such a case he is, of course, liable to be ejected by a reasonable notice to quit." In the other case the Court (McDonell and Field, JJ.,) said: "What is reasonable is a question of fact which must be decided in each case according to the particular circumstances, and the local customs as to reaping crops and letting land." In this last mentioned case the notice expired within seven days of the close of the year, and it was not held to be bad upon that account.

There is not, therefore, so far as we are aware, any authority for the proposition that a notice to quit to a ryot other than an occupancy ryot must terminate at the end of the cultivating year, and must be a three months' notice. The cases do not, it seems to us, go further than this, that such a ryot is entitled to a **[90]** reasonable notice to quit, to such a notice as will enable him to reap his crop; and that what is a reasonable notice is a question to be decided in each case upon a consideration of the particular circumstances and the local customs as to reaping crops and letting land.

In this case an issue was raised as to whether the notice was reasonable. The Subordinate Judge did not come to any finding on the issue, but the District Judge says that no evidence was given to prove that the condition of the crops on the land or the custom of the country was such that the defendant was entitled to a longer notice, and he finds that the notice was reasonable. Under these circumstances, we do not think we should interfere with his decision on this point.

The next ground of appeal was that the lower Court was in error in refusing to admit as evidence against the plaintiff the judgment and award in the arbitration suit. In order that a decree in a previous suit may operate in a subsequent suit as *res judicata*, the previous suit must have been between the same parties or persons through whom they claim. Then the question is whether an auction-purchaser at a sale for arrears of revenue can be said to claim through the defaulting proprietor? The case of *Tara Prasad Mitra* v. *Ram Nrisingh Mitra* (1), to which we were referred on behalf of the appellant, is not, we think, an authority to show that he does. It is an authority for saying that the purchaser of a *putni* tenure sold at the suit of the landlord is not entitled to set at naught all decisions arrived at against the defaulting *putnidar*, and that he can only acquire rights higher than an ordinary purchaser by private contract to the precise extent to which such privileges are conferred by express terms of law; that is to say, he is not entitled to claim the extraordinary privileges conferred by the Revenue Sale Law upon an auction-purchaser at a sale for arrears of revenue. And the case of *Moonshee Buzlool Rahaman* v. *Prandhan Dutt* (2) is a distinct authority against the appellant. There the Court said: "The plaintiff, as purchaser of the rights of Government in the taluk, is not privy in estate to the defaulting **[91]** proprietor. He does not derive his title from him, and is bound neither by his acts nor by his laches. This is the doctrine, which, with reference to the sale laws and to public policy as regards the Government revenue, our Courts have invariably enforced, and adopted in all these cases. The plaintiff, as auction-purchaser, is bound by no limitation

(1) 6 B. L. R. Ap. 5=14 W. R. 283. (2) 8 W. R. 222.

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which would not bind or affect the Government." We think, therefore, that the District Judge was right in refusing to admit the proceedings in the arbitration suit as evidence against the plaintiff.

Then it was argued that the District Judge was wrong in holding that the defendant had not acquired a right of occupancy in the lands claimed as *mal, viz.*, plots 1 to 19. As to plots 1 to 11, which were purchased by Komola Kant Koer in 1203, it was argued that the defendants had been wrongfully evicted in 1270 by Sham Lal Ghose, and that on the authority of *Luteefunissa Bibee* v. *Pulin Behari Sein* (1), and *Mahomed Gazee Chowdry* v. *Noor Mahomed* (2), the period during which he was so evicted would not be such an interruption of his possession as would prevent him from acquiring a right of occupancy, and that he was entitled to compute such period towards the twelve years required to establish the right. And as to plots 12 to 19 which had been sold in 1222 by Gunga Gobind Koer to Baidya Nath Koer in the *benami* name of Madhub Chunder Koer, it was argued that Gunga Gobind Koer had acquired a right of occupancy before the sale to Baidya Nath who was the proprietor, and that this right of occupancy remained in abeyance, and came into force again after the sale to the Maharajah of Burdwan in 1283.

Now as to plots 1 to 11 it is clear that any right acquired by the occupant of land cannot be affected by a wrongful eviction. The question then is, whether the defendant was occupying as ryot at any time before the purchase by the Maharajah. In 1283 Komola Kant Koer became the zemindar of these plots. He was not a ryot. And the case of *Boolchand Jha* v. *Luthoo Moodee* (3) shows that a zemindar cannot by cultivating his own land, acquire a right of occupancy. That right is given to [92] one who occupies as a ryot only; *Woomanath Tewarie* v. *Koondun Tewarie* (4). Therefore up to 1270, when the zemindari was first sold for arrears of revenue, no right of occupancy could have been acquired in respect of those plots. In 1280 the defendant was restored to possession, and could only have been restored to the rights which he had when dispossessed, namely, those of a zemindar. If he had not begun to acquire a right of occupancy when dispossessed, the period during which he was evicted cannot be counted towards the acquisition of such a right.

Then as to plots 12 to 19, the District Judge held that the alleged right of occupancy acquired by Gunga Gobind Koer merged in the zemindari right when Gunga Gobind sold to Baidya Nath in 1222. It was argued on the authority of *Woomesh Chundra Goopto* v. *Rajnarain Roy* (5), that the doctrine of merger does not apply in this country.

It is not, however, necessary to consider this point. It is not clear that what Gunga Gobind sold was a right of occupancy. But assuming that it was, we think that upon the sale it came to an end. The sale was to the zemindar. The right of occupancy is one given to a ryot only, and it continues only so long as the ryot pays rent on account of the land he holds. The zemindar cannot pay rent himself, and if, as already pointed out, a zemindar cannot by cultivating his own land acquire a right of occupancy, it is difficult to see how such a right can be kept alive when the zemindar obtains possession of the land in respect of which the right accrued.

Then it was argued that the tenure was kept alive, as the purchase was made in the *benami* name of Madhub Chunder Koer. But the reasons

(1) W.R. F.B. 91. (2) 24 W.R. 324. (3) 23 W.R. 387.
(4) 19 W.R. 177. (5) 10 W.R. 15.

already given for coming to the conclusion that a right of occupancy cannot be kept alive unless there is some person, occupying the land and paying rent to the zemindar apply, we think, equally to a *benami* purchase. There is no evidence to show that Madhub Chunder Koer was more than a mere *benamidar* that he ever occupied the land and cultivated it, and paid rent to the zemindar. We think, therefore, [93] that the defendant has failed to prove that he has any occupancy rights in the lands claimed as *mal.*

The appeal must therefore be dismissed with costs.

The cross appeal is dismissed without costs.

Appeal dismissed.

Cross appeal dismissed without costs.

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12 C. 93.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

BIDHUMUKHI DABEA CHOWDHURAIN AND ANOTHER (*Plaintiffs*) *v.* KEFYUTULLAH (*Defendant*).* [31st July 1885.]

Landlord and Tenant—Ejectment—Notice to quit, what is reasonable—Second appeal, what constitutes a question of law open upon.

It is not necessary that the period allowed in a notice to quit by a landlord to his tenant should terminate at the end of the year, but the notice must be in respect of the date of determination of the tenancy as well as in other respects a reasonable notice.

A notice to quit served on the 26th of Pous, and allowing two months to the tenant to vacate his holding, such period thus expiring on the 26th Falgun, when it appeared that cultivation began in the months of Magh and Falgun, and that they were the months for letting out land in the district, *held* not to be a reasonable notice.

It is a question of law for the Court to decide on second appeal, whether there is evidence before the Court, on which a Court could properly arrive at any given conclusion of fact.

[F. 26 C. 761 (764); L.B.R. (1883-1900) 543 (544).]

IN this case the plaintiff sought to eject the defendant, who was a tenant-at-will, from his holding after service on him of a notice to quit.

The notice was served on the 26th Pous (9th January), and allowed the defendant two months' time in which to give up his jote. The defendant pleaded that the notice was illegal and served at an improper time, and that it was the practice in that part of the country to commence the work of cultivation from the month of Falgun.

The first Court found that the notice was served, but inasmuch as the time fixed by it did not expire at the end of the year, it was not served according to law, and that the defendant [94] could not therefore be evicted under it. It therefore dismissed the suit.

The lower appellate Court confirmed that decision, upon the ground that the notice being dated the 26th Pous, and being one for two months expiring on the 26th Falgun (9th March), was illegal because s. 106,

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*Appeal from Appellate Decree, No. 2126 of 1884, against the decree of Baboo Ram Coomar Pal, Rai Bahadur, Subordinate Judge of Sylhet, dated the 21st of July 1884, affirming the decree of Baboo Kalipada Mukerji, Munsif of Habigunge, dated the 21st of January 1884.

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Act IV of 1882, required such a notice to be for a period of six months expiring on the last day of the year.

The plaintiffs now preferred a special appeal to the High Court.

Baboo *Rasbehari Ghose* and Baboo *Kasi Kant Sen*, for the appellants.

Mr. *Sandel*, for the respondent.

The judgment of the High Court (WILSON and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

This is an appeal from a decision of the Subordinate Judge of Sylhet, affirming the decision of the Munsif of Habigunge. The suit was to eject a tenant from his holding. Various questions arose in the case. Ultimately it was held as a matter of fact in both Courts that the defendant was a tenant not entitled to occupancy right, but a tenant liable to be ejected on proper notice.

One of the issues raised was, whether notice had been served upon the defendant, sufficient to determine the tenancy of a tenant not having occupancy right.

The notice given was a two months' notice served on the 26th of the month of Pous. It therefore expired on the 26th Falgun.

The first Court held that the notice was insufficient on this ground. "Notices were indeed served, but their terms did not expire at the end of the year. I therefore find that the notices were not served according to law, and therefore the tenant cannot be evicted under such a notice."

The lower appellate Court held that the notice was insufficient because it said: "On going through the notice served by the plaintiffs, I find that it was a notice for two months served ; it was given on the 26th day of Pous, hence the time allowed by the notice expired on the 26th day of Falgun. On a perusal of s. 106, Act IV of 1882 (that is, the Transfer of Property Act), I find that the notice to eject a tenant [95] holding for one year should be for a term of six months, and that the last day of that term should correspond with the last day of the year. That being so, the notice under consideration being contrary to the above section, was in my opinion illegal."

The ground taken by the first Court, *viz.*, that the notice must necessarily, and as matter of law, terminate with the year, is opposed to the most recent authorities. It is enough to refer to the case of *Jagut Chunder Rai* v. *Rupchand Chango* (1) and to *Radha Gobind Koer* v. *Rakhal Das Mukherji* (2). In this latter case the law on the subject is discussed in some detail, and the judgment negative, the view that it is absolutely necessary that a notice should terminate at the end of the year. The notice must be in respect of the date of determination of the tenancy, as well as in all other respects a reasonable notice.

Then again the ground taken by the lower appellate Court is not correct for an obvious reason. Notice was given on the 26th Pous in the year 1288 B.S. (1881-82), and it expired on the 26th Falgun in the same Bengali year, and the Transfer of Property Act did not come into operation until a subsequent date. The Act, therefore, cannot affect the case, even assuming that the section referred to, *viz.*, s. 106 of the Transfer of Property Act could apply to such a holding as the one in question. But we think that the decree should be sustained on another ground.

(1) 9 C. 48=11 C.L.R. 143. (2) 11 C. 82.

A notice must be a reasonable notice. *Prima facie*, no doubt, it is a question of fact whether a notice under the circumstances of a particular case is reasonable, and one to be dealt with by a Court dealing with facts and not by this Court on second appeal. But, on the other hand, it is a question of law for this Court to determine on second appeal whether there is evidence before the Court on which a Court could properly arrive at any given conclusion of fact. If there be no evidence which can properly support a finding, we ought not to send the case back in order that the lower Court may consider the question. In the present case notice was served on the 26th Pous to quit on the 26th Falgun. The plaint alleged that cultivation begins in the month of Falgun. The written statement denied that in terms, [96] and stated substantially that cultivation begins in the month of Pous. In the grounds of appeal filed in the lower appellate Court, the plaintiff admitted that cultivation begins in the months of Magh and Falgun, and that those are the months for letting out. It is admitted that there is no evidence on the record to throw further light on the question. Under those circumstances, we think that it would be impossible to hold that a two months' notice given on the 26th Pous, and ending the 26th Falgun, could be a reasonable notice to the defendant for him to turn out of that holding in time to allow somebody else to come in, and cultivate in the month of Magh, or intime to enable the defendant to have a reasonable chance of obtaining some other holding before cultivation begins. We think, therefore, that on this ground, although not on the grounds stated by the lower Courts (in which we are unable to agree) the notice is not a reasonable notice.

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The appeal will be dismissed with costs.

Appeal dismissed.

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12 C. 96.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

TEJ PROTAP SINGH (*Defendant*) *v.* CHAMPA KALEE KOER, WIDOW OF AMAR PERTAP SINGH (*Plaintiff*).*
[15th June, 1885.]

Hindu Law, Joint family—Mitakshara law—Separation of joint family, how effected —Agreement for partition, Effect of—Right of survivorship.

Two brothers, members of a joint Mitakshara family, executed an *ikrarnama* (agreement) whereby, after reciting that the declarants had remained joint and undivided, and in commensality up to a certain date, and that portions of their properties, both moveable and immoveable, had been partitioned between them, they provided for the partition of the remaining joint properties by certain arbitrators appointed in that behalf.

Held, that this agreement of itself amounted to a separation of the brothers as a joint family, and extinguished all rights of survivorship between them.

Sheo Doyal Tewaree v. *Judoonath Tewaree* (1), and *Babaji. Parshram* v. *Kashibai* (2) distinguished.

Ambika Dat v. *Sukhmani Kuer* (3) commented upon.

[R., 24 B. 182 (188).]

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*Appeal from Original Decree No. 89 of 1884, against the decree of Baboo Abinash Chunder Mitter, Rai Bahadur, Second Subordinate Judge of Mozufferpore, dated the 29th of March, 1884.

(1) 9 W. R. 61. (2) 4 B. 157. (3) 1 A. 437.

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[97] THIS was a suit by a Hindu widow for recovery of her husband's share in ancestral and self-acquired properties, on the allegation, that her husband was separate in food and estate from his brother (the defendant) at the time of his death. Among the evidence there was an *ikrarnama* which purported to have been executed by the two brothers, and the material portion of it ran as follows: "We, the declarants, remained joint and undivided, and in commensality up to 3rd Kartic 1287 F. S. From the 4th Kartic aforesaid we separated in mess, (and in everything) and we have got the household furniture and moveable properties, that is, brass and silver utensils, as well as silver and gold articles and woollen clothing, &c., and brick and mud-built houses divided (between ourselves) through the medium of Krishna Bullubh Ojha . . . . and we have had the house and courtyard in front of the door and land at the back of the house, and *filkhana* and stable partitioned, through the mediation of Baboo Suraj Perkash Sing. . . . . Now it is necessary and desirable to have the detached pieces of land and mouzah Jitpure, &c., and other mouzahs appertaining to the districts of Chumparun, Sarun, and Tirhoot, all the immoveable properties, and portion of the moveable properties, which have been left to be partitioned, and elephants, &c. . . . . it is impossible to effect partition and division unless arbitrators are appointed by us, the declarants. Of our own accord and free will, therefore, we, the declarants, do appoint Babu Suraj Perkash Singh and Babu Raghubans Singh as arbitrators."

The material issue in the suit was, whether the plaintiff's husband had been separate from his brothers.

The Subordinate Judge observed that in his view the *ikrarnama* furnished sufficient evidence of separation, and that the separation of title and interest was quite sufficient for the purpose of separation of a joint-family, though no actual division by metes and bounds was made. The intention of persons that their condition as co-parceners should cease was sufficient to establish partition. Under the circumstances the Subordinate Judge held that the defendant was not entitled to succeed to his brother's estate, and decreed the plaintiff's claim.

[98] On appeal by the defendant to the High Court it was contended that the *ikrarnama* (agreement) between the brothers did not operate as a separation of the joint-family.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Dwarikanath Chuckerbutty* for appellant.

Baboo *Hem Chunder Banerjee*, Baboo *Abinash Chunder Banerjee* and Baboo *Pran Nath Pundit* for respondent.

JUDGMENT.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was delivered by

WILSON, J.—This is a suit brought by the plaintiff, a Hindu widow, to recover her husband's property in the capacity of heir.

The defendant is the only brother of the deceased.

The two brothers, undoubtedly, at one time, were the members of a joint Hindu family, governed by the Mitakshara law. If the brothers at the time of the death of the deceased were separate, the plaintiff, his widow, is his heir, and is entitled to recover. If at that date the two brothers were joint, then the widow is not entitled to recover as heir, but the whole property survived to the defendant. And the sole

question to be decided is, whether the two brothers were joint or separate at the date of the death of the plaintiff's husband.

There is no question that, down to the early part of the month of Kartick 1287, which would correspond to about the middle of November 1879, the two brothers were joint. But soon after that, on the 18th February, 1880, a document was executed by the two brothers. That document commences thus: "Whereas we, the declarants, remained joint and undivided and in commensality up to 3rd Kartick 1287, F. S. From 4th Kartick, aforesaid, we separated in mess (and in everything), and we have got the household furniture and moveable properties, that is, brass and silver utensils, as well as silver and gold articles and woollen clothing, &c., and brick and mud built houses divided (between ourselves) through the medium of Krishna Bullubh Ojha, inhabitant and part proprietor of mouzah Talebpore, pergunnah Mahsi, and we have had the house and *foolwari* and courtyard in front of the door, and land on the back of the [99] house and *filkhana* and stable, &c., partitioned through the medium of Babu Suraj Perkash Singh, our full uncle on the 30th Pous of the present year." Thus they began by asserting that they had separated on a certain date. And then they go on to say that they have divided certain portions of the joint property, and then they go on to deal with the properties which had still to be partitioned, and they say: "It is impossible to effect partition and division aforesaid, and settlement of the matters above adverted to, unless arbitrators are appointed by us, the declarants." And then they go on to appoint Babu Suraj Perkash Singh, Babu Raghubans Narain Singh and Krishna Bullubh Ojha as arbitrators, and "declare and give in writing that the aforesaid arbitrators shall take down our statement regarding our claims, and inspect the list of the things and properties, and with good faith and honesty settle the matters and divided the properties in equal moieties by casting lots and give an award. To the award and the decision, and partition of the arbitrators aforesaid, we and our heirs and representatives have not, nor shall have in any way, any objection and dispute to make." That document was registered a few days afterwards, namely on the 20th February, 1880.

Shortly before that document was executed on the 7th November, which is considerably after the date on which it is stated in the deed that the brothers separated, another document, *viz.*, a power-of-attorney, was executed by the defendant, the elder brother, in favour of his own son. This was a general power-of-attorney of the usual kind, and the defendant himself says that it was in the place of a previous power-of-attorney, whereby similar power was given to the younger brother, the plaintiff's husband. Now that is in accordance with the idea of separation and partition.

If those documents stand alone, it is quite clear that the parties made up their minds to separate, and that they considered that part of the property had been partitioned and held in severalty, and intended to partition the rest. They would thus be conclusive in favour of the plaintiff. How is that met? It is met by saying that shortly after that document was executed, their uncle Suraj Perkash Singh mentioned in the deed, came [100] from his own home, which is about twenty *koses* distant, to the home of these two brothers, that he heard of a quarrel having arisen between them, and that he was told not of the partition deed, but of the *mookhtarnama* which had given offence to the younger brother. He says he adjusted the quarrel between the two brothers, the *mookhtarnama* was abandoned and given over to the younger

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brother, the quarrel was made up, and they went on the same friendly terms as before. So while they were making him their confidant, they never told him of this partition deed at all.

Another witness called was one of the arbitrators mentioned in that deed, Krishna Bullubh Ojha. He says that he never heard of any deed of that nature, never heard that there had been any partition contemplated; that he was never asked to arbitrate, and never acted as an arbitrator. The Judge of the Court below has given, we think, satisfactory reasons for rejecting this evidence. In addition to these, the principal witness is the defendant himself, whose evidence in many respects is unsatisfactory.

On the other hand, there is a certain amount of oral evidence not perhaps of a very valuable kind. But there is evidence of an indisputable character, and it is this: Long after this partition deed had been executed, and long after the time when it is said that the brothers had made up their quarrel, and had begun again to live on friendly terms together in commensality and in joint estate, we find both the brothers taking active steps to carry out the partition. We find that in July, 1880, the elder brother, the defendant himself, made an application to have his name separately registered in the account of revenue with regard to his individual share in mouzah Bazidpore, and that application is the more important, because we see from the application itself that the joint share of the two brothers, two annas, had already been partitioned from the remaining fourteen annas, and what he asks for is the separation of one anna share, on the ground that difficulties have arisen in paying revenue together with his co-sharer, and there is apprehension about the property being put up to sale in consequence of default in payment of revenue by his co-sharers. The younger brother also took steps to carry out the partition, **[101]** because we find that on the 6th January, 1881, he made an application for partition of his own individual share of mouzah Saguni, &c., his share being two annas, out of the whole sixteen annas, and two annas out of the remaining fourteen annas, being put down as the share of his brother Tej Protab Singh. After the death of the younger brother, those proceedings were referred to again. We find that the defendant petitioned on the 21st August, 1882, for a postponement of the proceedings, and an order was made accordingly. Some further steps were taken, and ultimately the proceedings were abandoned. We find, therefore, that both the brothers, long after the time when it is said that they had made up their quarrel, and one brother certainly down to the death of the deceased, took active stpps to partition. There is therefore satisfactory, and indeed overwhelming, evidence on the one side, as against the extremely unsatisfactory oral evidence given on the other.

It follows, therefore, that there was this agreement for partition, that the parties never adandoned it, and that they continued to take steps to carry out partition. The lower Court has arrived at a conclusion on the facts which appears to us to be entirely correct.

But then a question of law was argued before us : it was said that an agreement of this nature for partition and separation does not operate as a separation, unless it has been carried into effect by actual partition and actual enjoyment in severalty by the share-holders of their separated properties. We think that that contention in law is not sound. The most important authority on the subject by which we are bound is the well-known case of *Appovier* v. *Rama Subba Aiyan* (1). The law is thus laid down at

(1) 11 M. I. A. 75.

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pages 89 and 90: "According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the reciept of rent and claim to take from the Collector or Receiver of the rents, a certain definite share. The proceeds of undivided property must be brought, according to the theory of an [102] undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided."

The same matter was considered in two later cases before the same tribunal. One is *Joy Narain Giri* v. *Girish Chunder Myti* (1). That was a case not upon an agreement, but upon a decree, and the law is thus laid down at page 232: "It appears to their Lordships that the decree which has been read is in effect to give to Shib Pershad Giri a separate share of the property of the grandfather. It gives him in terms possession of the eight-annas which he claimed of the real estate; it gives him mesne profits from the day of the alleged separation, that is, from the time when he left the house in which he had been living with his cousin, and it gives him also a half of the personal property. That being so, their Lordships are of opinion that, although the suit is not actually in terms for a partition, yet that the decree does effect a partition at all events of rights, which is effectual to destroy the joint estate under the doctrine laid down in the case which has been quoted of *Appovier* v. *Rama Subba Aiyan* (2)."

In a still later case *Chidambaram Chettiar* v. *Gauri Nachiar* (3), the same tribunal, in dealing with a decree of the nature of a partition decree, said this (page 181): "For these reasons their Lordships are of opinion that the judgment of the 24th of August 1871 must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate from [103] that date, if they had not previously become so. If that be so, the case, though the actual division of the property was not complete, falls within the principle of *Appovier* v. *Rama Subba Aiyan* (2)."

Now, these authorities seem to us to establish this, that an agreement for separation and partition, or a decree for separation and partition, if according to its terms it purports to be an agreement or a decree for present separation and present division in interest and right, operates to make the parties from that time separate, although the actual partition by metes and bounds and separate possession and enjoyment be postponed until the agreement or the decree is fully carried into effect. Now, in the present case, we feel no hesitation about the construction of the agreement. It is an agreement asserting a past separation—a separation actually in effect at the time of the deed, and a division of rights at the time of the deed, and providing for giving effect to this by

(1) 5 I.A. 228 = 4 C. 434. (2) 11 M.I.A. 75. (3) 6 I.A. 177 = 2 M. 83.

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a subsequent partition of so much of the property as had not been divided.

There are certain authorities which have been cited on the other side. The first in date is the case of *Sheo Doyal Tewaree* v. *Judoo Nath Tewaree* (1). The judgment was delivered by Dwarka Nath Mitter, J., and we see no inconsistency between that case and the view we take in the present case. The subject dealt with in that judgment was the interest which a mother or grandmother takes under a partition between her sons or grandsons.

In such a case the mother or grandmother has no vested title so long as her sons or grandsons are joint. She acquires her title only by virtue of partition. And, as we understand that judgment, it decides no more than this, that in order to complete the title of the mother or grandmother which she acquires by partition, the partition must be completed, that there must be not only a decree for partition, or an agreement for partition, but a decree or an agreement carried into effect.

The second case is the case of *Babaji Parshram* v. *Kashibai* (2). In that case there had been a decree for partition, and it was not carried into effect; and the learned Judges held that the effect was not a present separation, but they came to that conclusion [104] on the construction of the decree. They regarded it, not as a decree intended to create a present separation, but as a decree which contemplated a partition, and that when the partition was carried out, separation should result. Therefore the view which the learned Judges took in that case is not inconsistent with the view we take in this case.

There was one more case cited, the case of *Ambica Dat* v. *Sukmani Kuar* (3). In that case the defendants asserted separation; and what Turner, J., says is this: "It is for the defendants to make out a sufficient case showing partition, but with the exception of the fact that there was a quarrel between Maneshar Ram and Dhaneshar Ram in 1854, and that they then defined their interests in the property which they then held, and which at their deaths came to be recorded in the same way in their sons' names, there is really no reliable evidence. There is nothing definite to show the very important fact that the definement of shares was ever followed by separate enjoyment of profits.

"The fact that there was a definement of shares followed by entries of separate interests in the revenue records in some estates only is an important piece of evidence towards proving separation of title and interests, but it will not necessarily amount to such separation; it must be shown that there was an unmistakeable intention on the part of the shareholders to separate their interests, and that the intention was carried into effect."

Now that language taken alone might possibly leave the impression that it was necessary to create a separation that the partition contemplated should first be actually carried into effect. If that were so, it appears to us that the language would be scarcely consistent with the decisions of the Privy Council by which we are bound. In that case unfortunately the report does not state what the nature of the agreement was with which the Court had to deal. And we think that we must assume that it was an agreement of such a nature that it did not clearly and

(1) 9 W.R. 61. (2) 4 B. 157. (3) 1 A. 437.

unmistakably declare an intention of present separation. We think, therefore, that in point of law, as well as in point of fact, the decision of the Court below is right, and that this appeal must be dismissed with costs.

Appeal dismissed.

12 C. 105.

[105] APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

HALODHAR SHAHA AND OTHERS (*Some of the Plaintiffs*) v. HAROGOBIND DAS KOIBURTO AND ANOTHER (*Two of the Defendants*).*
[4th June, 1885.]

Civil Procedure Code, 1882, *ss.* 232 *and* 244—*Execution of decree—Assignee of decree—Regular suit—Questions for Court executing decree.*

Three out of six decree-holders sold their share in the decree to *A*, who thereafter made an application to the Court under s. 232 of the Code of Civil Procedure. This application was dismissed on the ground that *A*'s purchase was made *benami* for some of the judgment-debtors. In a subsequent suit brought by *A* and the persons who were said to be the real purchasers, it was contended that a separate suit was barred under the provisions of s. 244, cl. (*c*) of the Code of Civil Procedure.

Held, that *A* was not a party to the suit in which the decree was passed, nor the representative of any such party, and that the suit was not barred.

[F., 14 M. 478 (479); R. 20 A. 539 (542) = 18 A.W.N. 145; 3 O.C. 32 (34); D. 16 A. 483 (491).]

IN this case the defendants were owners of 16 annas of a zemindari in which the 4th and 5th plaintiffs, with others hereafter called talukdars, held a taluk. The defendants Nos. 1, 2, 3, held a six annas share of the zemindari, the defendants Nos. 4, 5 and 6 held the remaining ten annas share.

In 1876 and 1877 the defendants obtained four decrees for arrears of rent against the talukdars, and on the 28th of February 1878, the defendants Nos. 4, 5 and 6 sold their share of the rent decrees to the plaintiffs Nos. 1, 2 and 3. It was found by the Court of first instance in the present case, and this finding was accepted by the lower appellate Court, that that sale was made *benami* for the plaintiffs Nos. 4 and 5, two of the talukdars against whom the decrees had been obtained. Applications were then made by the plaintiff No. 1, supported by the defendants Nos. 4, 5 and 6, for the substitution of his name on the records of the four rent suits instead of the names of the defendants Nos. 4, 5 and 6; but these applications were disallowed.

In the early part of the year 1880 the defendants Nos. 1, 2, 3, took out execution of the rent decrees and attached certain properties [106] of the plaintiffs Nos. 4 and 5. These latter, in order to save their properties from sale, deposited in Court a sum of Rs. 1,306-13-9. On the 23rd of

* Appeal from Appellate Decree No. 274 of 1884, against the decree of Baboo Beni Madhav Mitter, Subordinate Judge of Tipperah, dated the 17th December 1883 reversing the decree of Baboo Nil Madhav De, Second Munsif of Bramonberiah, dated the 30th of September, 1882.

1885 JUNE 4. — APPELLATE CIVIL. — 12 C. 105.

December 1878, the defendant No. 1, in execution of a decree obtained by him, bought the ten annas share of the rent decrees, and thereafter the defendants Nos. 1, 2, 3, applied for payment out to them of the sum of Rs. 1,306-13-9 above mentioned. The present suit was brought to recover a ten annas share of the Rs. 1,306-13-9, and a further sum of over Rs. 222 afterwards deposited in the execution proceedings by the plaintiffs Nos. 4 and 5, making in all the sum of Rs. 1,039-10-11. The Court of first instance decreed the plaintiffs' claim, but this decision was reversed on appeal and the suit dismissed, on the ground that the Civil Courts were prohibited from entertaining it by the provisions of s. 244 of the Civil Procedure Code. The plaintiff appealed to the High Court.

Baboo *Trailokho Nath Mitter*, for the appellants.

Baboo *Kali Mohun Dass*, for the respondents.

JUDGMENT.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—The facts of the case are somewhat complicated, but the real question which we have to decide upon this appeal is a sufficiently simple one. Defendants Nos. 1 to 3 and 4 to 6 jointly obtained four rent decrees against Halodhar, Monmohini and others. The interest of defendants 1 to 3 was that of 6 annas, and that of 4 to 6 was 10 annas. Rashoraj Shaha, plaintiff No. 1, in the present case, purchased the ten annas interest in the decrees of defendants Nos. 4 to 6, and he applied under the provisions of s. 232 of the Civil Procedure Code to have his name put upon the record and to execute the decree. That application was refused under the provisions of cl. (*b*), s. 232, it being found that Rashoraj was merely a *benami* purchaser on behalf of Halodhar and Monmohini, two of the judgment-debtors under the decree. Subsequently defendant No. 1, or defendants Nos. 1 to 3, as has been otherwise stated, obtained a money-decree, on the 6th March 1878, against defendants Nos. 4 to 6, that is, the owners of the ten annas interest; and in execution of that money-decree defendant No. 1 or defendants Nos. 1 to 3 brought to sale and himself [107] or themselves purchased the ten annas interest in the rent decrees belonging to defendants Nos. 4 to 6. Thereupon the defendant No. 1 executed the rent decree and realized the amount due thereunder. Halodhar and Monmohini having had to pay some Rs. 1,500 odd, the present suit is instituted by Halodhar, Monmohini, Rashoraj, a *benami* purchaser, and other persons said to have an interest, in order to recover the sum of Rs. 1,500 odd, which was thus realized from Halodhar and Monmohini. The Subordinate Judge has held that the suit is not maintainable, being barred by the decision of the question under s. 232; and that it was barred by reason of the provisions of clause (*c*) of s. 244 of the Code of Civil Procedure. What is now to be decided is, whether the question determined in the proceeding under s. 232 was decided between the parties to the suit, or their representatives. Obviously it was not decided between the parties to the suit, because Rashoraj was no party; and we think also that it is impossible to say that the question was decided between the representatives of the parties to the suit. Rashoraj had, indeed, purchased the interest of the ten annas decree-holders, but inasmuch as his application under s. 232 of the Code of Civil Procedure was refused and his name not put upon the record, we think it impossible to say that he ever became a representative of any party to the suit, within the meaning of clause (*c*) of

s. 244. We think, therefore, that the Subordinate Judge was in error in holding that the present suit is barred by the former proceeding. 1885 JUNE 4.

We, therefore, reverse the decree of the lower appellate Court, and remand the case to him for trial upon the merits. APPELLATE CIVIL.

Costs to abide the result. 12 C. 105.

Appeal allowed and case remanded.

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12 C. 108.

[108] APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

CHANDRA BHUSAN GANGOPADHYA (*Plaintiff*) v. RAMKANTH BANERJI AND ANOTHER (*Defendants*).* [1st July, 1885.]

Civil Procedure Code, 1882, *ss.* 281 *and* 283—*Limitation Act* (*XV of* 1877) *sch. II, art* 11—*Claim to attached property—Regular suit.*

The order contemplated by s. 281 of the Code of Civil Procedure is an order made after investigation into the facts of the case, and it is only when the order is made after such investigation that the limitation of one year is applicable to a subsequent suit under s. 283 of the Civil Procedure Code.

[F., 1 C.W.N. 24 (28); 87 P.R. 1904=119 P.L.R. 1904; Appr., 26 B. 266 (270); R., 18 M. 265 (266); 18 M. 316 (319); 22 B. 875 (883); 13 C.P.L.R. 69 (70).]

THIS was a suit respecting a one-third share of a certain piece of land, which share formerly belonged to one Rajcoomar Dass. The plaintiff purchased the share on the 11th of June 1878 in execution of a decree against Rajcoomar Dass. The defendant purchased the share of Rajcoomar in August 1880 at a sale in execution of another decree against Rajcoomar Dass. When the share was attached in execution of this latter decree the plaintiff put in a claim which was disposed of by the Court in the following manner on the 25th January 1880: "The boundaries of the attached property given by the decree-holder differ from those mentioned in the claimant's *kobala*. Consequently, the sale of the property contained within the said boundaries is not likely to affect the interest of the claimant. Hence ordered that the prayer be rejected." The present suit for possession of the share was instituted on the 28th of April 1882.

The defendant pleaded that the suit was barred by limitation, in that it had not been instituted within one year from the date of the order rejecting the plaintiff's claim in January 1880. But the Court of first instance, after considering the order then made, and the rulings in *Syed Mohamed Afzul* v. *Kanhyal Lal* (1), *Shaik Khoda Buksh* v. *Purmonund Dutt* (2), *Rutnessur Koondoo* v. *Majeda Bebee* (3), *Radhanath Banerjee* v. *Jodunath Singh* (4), [109] and *Kaminee Debia* v. *Issur Chunder Roy Chowdhry* (5), overruled the plea of limitation. This decision was reversed on appeal by the District Judge, on the ground that the order of the 25th January 1880

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* Appeal from Appellate Decree, No. 587 of 1884, against the decree of C. A. Kelly, Esq., Judge of Nuddea, dated the 16th of January 1884, reversing the decree of Baboo Bhagwan Chandra Chatterjee, first Munsif of Krishnagore, dated the 29th of July 1882.

(1) 2 W. R. 263. (2) 5 W. R. 213. (3) 7 W.R. 252.
(4) 7 W.R. 441. (5) 22 W.R. 39.

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amounted to an order disallowing the claim under s. 281 of the Code of Civil Procedure. The plaintiff appealed to the High Court.

Baboo *Doorga Das Dutt*, for the appellant.

Baboo *Bipro Das Mukherji* and Baboo *Josodanundun Poramanick*, for the respondents.

JUDGMENT.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—We think the Judge in the Court below is wrong in this case. We have heard the order, dated 25th January 1880 and we think it cannot be treated as an order under s. 281 of the Code of Civil Procedure. The order contemplated by that section is an order made after the investigation mentioned in s. 278. Section 280 commences "if upon the said investigation the Court is satisfied, &c." Section 281 begins, "if the Court is satisfied, &c." "Satisfied" clearly means satisfied upon the investigation. There was no investigation in this case, the Munsif having declined to make any investigation, remarking that the parties would not be prejudiced.

We think, therefore, that the one year's rule of limitation does not apply to the present case. We set aside the decree of the Court below, and remand the case for trial on the merits.

Costs will follow the result.

Appeal allowed and case remanded.

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12 C. 109.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

IBIN HOSEIN (*Plaintiff*) *v.* HAIDAR AND ANOTHER (*Two of the Defendants*).* [2nd July, 1885.]

Cause of action—Slander—Defamation—Verbal abuse—Special damage.

A suit to recover damages for verbal abuse of a gross character may be maintained without proof of consequential damage.

[Appr., 10 A. 425 (448) = 8 A.W.N. 157; R., 12 C. 424; 3 C.L.J. 140 (141); 26 C. 653 (F.B.) = 3 C.W.N. 551; 34 C. 48 = 4 C.L.J. 388 (389).]

[110] IN this case the judgment appealed from is as follows:—

"The plaintiff says that when he was in a temple engaged in contemplation after prayer, the defendants came up to him and abused him in the common native fashion calling *bhanchut, sala, harmzada*; that he feared that something dreadful (*wakna sungin*) might happen and therefore kept silent; that he is a person of much respectability, whilst the defendants are drunken tailors; that their conduct has caused him loss of honour (*izzut*) in the eyes of his acquaintance; that he would estimate the damage to his reputation at Rs. 1,000, but as the defendants are not in affluent circumstances he is content to ask for Rs. 200. The learned Munsif has given a decree against the defendant for Rs. 30 with costs.

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* Appeal from Appellate Decree, No. 1333 of 1884, against the decree of A. C. Brett, Esq., Judge of Mozufferpore, dated the 28th of May 1884, reversing the decree of Moulvi Mahomed Nurul Hosein, Munsif of Tajpore, dated the 12th of March 1883.

"I consider that the Munsif is wrong in law and wrong in his facts. From the evidence it is clear that a quarrel arose because the parties abused each other's religious tenets. Then there was mutual abuse. As to the law I hold that no suit for damages will lie for simple abuse without consequential injury. There is absolutely no proof that plaintiff's friends have thought one iota less of him because defendant called him a bastard. If suits of this sort were allowed, the Courts would be flooded with cases. I reverse the decision of the lower Court and dismiss the suit with costs.

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The plaintiff appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Saligram Singh*, for the appellant.

JUDGMENT.

The judgment of the High Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD.—We do not agree with the Judge below that this suit is not maintainable. It is a suit to recover damages for abusive language of a very vile character, alleged to have been used by the defendant to the plaintiff. We do not propose to lay down as a general rule that the use of every kind of abusive language is actionable. But we think that language, which, having regard to the definition of "*defamation*" in the Indian Penal Code, is calculated to injure the reputation,—language, which having regard to the respectability and position of the person abused [111] is calculated to outrage his feelings, lower the estimation in which he is held by persons of his own class, and so bring him into disrepute, is actionable. We think there is no doubt that the language alleged to have been used in this case comes within this principle. In so deciding we follow several rulings of this Court, namely, *Moulvie Gholam Hossin* v. *Hur Govind Das* (1); *Shaikh Tukee* v. *Shaikh Khoshdel Biswas* (2); *Kali Kumar Mitter* v. *Ramgati Bhattacharjee* (3); *Gour Chunder Putteelundee* v. *Clay* (4); and *Srikant Ray* v. *Satcori Shaha* (5); in the note to which last other cases decided by other High Courts are quoted. We, therefore, set aside the judgment of the lower Court dismissing the plaintiff's suit and remand the case for trial upon the merits. The question of damages of course will have to be dealt with by the Judge below on the evidence.

The appeal is decreed with costs, which will be costs in the cause.

Appeal allowed.

(1) 1 W.R. 19. (2) 6 W.R. 151. (3) 6 B.L.R. App. 99.
(4) 8 W.R. 256. (5) 3 C.L.R. 181.

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APPELLATE CIVIL.

12 C. 111.

12 C. 111.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

BROJO LAL SINGH (*Plaintiff*) *v.* GOUR CHARAN SEN AND OTHERS (*Defendants*).* [19th August, 1885.]

Limitation Act (XV of 1877), sch. II, arts. 132 *and* 147—*Mortgagor and mortgagee—Suit to follow mortgaged property.*

A mortgaged his property to *B* in 1867, by a simple mortgage. In 1868 *A* sold the property to *C*. In 1870 *B* brought a suit on his mortgage against *A* only and obtained a mortgage decree. In 1883 *B* brought a suit against *C* to enforce his lien against the mortgaged property. *C* pleaded that the suit was barred by limitation, under cl. 132 of the Limitation Act, Act XV of 1877.

Held, that the suit was governed by art. 147, sch. II of Act XV of 1877, and therefore was not barred by limitation.

[Overruled, 14 C. 730 (F.B.).]

ON the 24th July 1867, Brojo Nath Gupta mortgaged mouzah Dowlutpur to Kristo Churn Das, to secure the repayment, on the **[112]** 24th of August 1867, of money borrowed by the former from the latter. The mortgage was a simple mortgage. On the 1st of February 1868, Brojo Nath Gupta sold and conveyed mouzah Dowlutpur to Gour Charan Sen and Prankrishna Deb. In the present suit this sale was attacked as being a *benami* transaction, but the lower appellate Court said on this point: "I find that the sale of the 1st of February 1868 was made *bona fide* and for valuable consideration, and that it was followed by the possession of the purchasers. On the 4th of July 1870, Kristo Churn Das brought a suit on his mortgage against Brojo Nath Gupta, and obtained a mortgage decree. In execution of this decree, and on the 14th of September 1871, the right, title and interest of Brojo Nath Gupta in the mortgaged property was put up for sale, and purchased by one Kanai Lal Khettri in the name of his servant Kristo Ram Dass. On the 25th of January 1872, the purchaser got formal possession through the Court, and by an order made on the 29th of February 1872, his possession was confirmed. He never succeeded in getting actual possession. The plaintiff, who is the son of the purchaser, instituted the present suit on the 11th of September 1883. The plaint was inartificially drawn, but the lower appellate Court, treating the suit as one brought by the plaintiff to enforce his lien by separate suit against the property in the hands of the purchasers, dismissed it as barred by limitation under Act XV of 1877, sch. II, art. 132. The plaintiff appealed to the High Court.

Baboo *Srinath Dass* and Baboo *Aukhil Chunder Sen*, for the appellant.

Baboo *Rash Behari Ghose* and Baboo *Hari Mohun Chuckerbuti*, for the respondents.

JUDGMENT.

The judgment of the High Court (PRINSEP and O'KINEALY, JJ.) was delivered by

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* Appeal from Appellate Decree, No. 1543 of 1884, against the decree of J. Kelleher, Esq., Judge of Sylhet, dated the 15th of July 1884, modifying the decree of Baboo Ram Coomar Pal, Rai Bahadur, Subordinate Judge of that District, dated the 27th of February 1884.

PRINSEP, J.—The point for our decision in this appeal is simply whether the suit falls under art. 132 or art. 147 of sch. II of the Limitation Act, 1877. The suit has been tried in both the Courts as a suit by which the purchaser of the rights of the mortgagee endeavours to bring the mortgaged property to sale by [113] enforcing his lien, the mortgage being a simple mortgage. It appears to us that a suit of this description falls within the terms of art. 147, and that the suit was consequently not barred. Many other points apparently arise, which on second appeal we are not competent to decide, and in directing the trial of the appeal before the lower appellate Court, we think that all those points may be raised and properly decided there. The costs will abide the result.

1885 AUG. 19. — APPELLATE CIVIL. — 12 C. 111.

Appeal allowed.

12 C. 113.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

UPENDRA LAL MUKHOPADHYA (*Plaintiff*) v. THE COLLECTOR OF RAJSHAHYE AND ANOTHER (*Defendants*).* [2nd June, 1885.]

Limitation Act (*XV of* 1877), *sch. II, art.* 120—*Suit to recover deposit.*

Where *A* made a deposit as security for the discharge of his duties as Manager of an estate under the Court of Wards, which deposit was liable for all sums not accounted for by *A*; and a suit was, after his dismissal from his appointment, brought for the recovery of the deposit; *held*, that the period of limitation allowed was certainly not less than six years, and began to run not from the date of his dismissal, but from the time when the account of charges due against the deposit was made and sent in to him.

[F., 6 C.L.J. 535; R., 13 O.C. 286; 18 C. 234 (241).]

THIS was a suit for the recovery of a sum of money deposited with defendant No. 1, the Collector of Rajshahye, by one Raj Kristo Banerji, as security for the proper performance of his duties as Manager of an estate belonging to defendant No. 2, at that time under the management of the Court of Wards. Plaintiff, who claims under a *kobala* executed by the heirs of the said Raj Kristo, alleges that the latter was released by the Government from all liability in December 1879, but that the deposit has never been returned to him.

Defendant No. 1 denied that Raj Kristo had been released, and also pleaded that the suit was barred by limitation. On the second point the Subordinate Judge held that art. 120 applied, and that the suit was not barred. On the merits, however, he dismissed the suit with costs. On appeal the Officiating Judge held [114] that the suit was barred under art. 62, on the ground that Raj Kristo was removed from his appointment in 1875, and the suit was not brought till 1882, whereas the money became due as soon as he was discharged, and the suit ought, under the above article, to have been brought within three years from that date.

The appeal was therefore dismissed.

Plaintiff appealed to the High Court.

*Appeal from Appellate Decree, No. 47 of 1884, against the decree of R. H. Greaves, Esq., Judge of Rajshahye, dated the 28th of September 1883, affirming the decree of Baboo Gonesh Chunder Chowdhuri, Subordinate Judge of that District, dated the 25th of September 1882.

1885 JUNE 2. — APPELLATE CIVIL. — 12 C. 113.

Baboo *Rash Behari Ghose* and Baboo *Harendra Nath Mukerji*, for the appellant.

Baboo *Anoda Proshad Banerji*, Baboo *Mohesh Chunder Chowdri* and Baboo *Kishore Mohun Rai*, for the respondents.

The High Court (FIELD and O'KINEALY, JJ.) delivered the following judgments :—

JUDGMENTS.

FIELD, J.—The plaintiff in this case is the assignee of the heirs of one Raj Kristo Banerji, who was employed upon the establishment of the Court of Wards. He brings this suit to recover certain money which was deposited by Raj Kristo Banerji as security for the due discharge of the duties of his office. The suit is brought against the Collector as representing the Court of Wards, and against Surnomoyi Debya, widow of the late Madhub Chunder Sanyal, who now represents the estate which was formerly under the management of the Court of Wards, and upon the establishment for the management of which Raj Kristo was employed.

It is contended before us on behalf of the lady that the plaintiff has no cause of action as against her, and we concur in this contention We think, therefore, that the suit as against her must be dismissed with costs both in this Court and in the lower Courts.

The suit as against the Collector, the Judge below was held to be barred by limitation. We are unable to concur in this finding. The contract under which the money was deposited has not been put in and proved specifically. We are, therefore, not exactly informed as to what the express stipulations were, subject to which the money was deposited. The Collector's contention was, however, that he was entitled to deduct from the deposit all sums for which Raj Kristo Banerji had not accounted ; and his case [115] is that in March 1878 an account was drawn up, and upon that account it appeared that Raj Kristo was liable to account, and had not accounted, for certain sums, which very nearly covered the amount of the deposit ; and that in accordance with the terms of the security contract he was entitled to deduct, and had deducted, these sums from the amount of the deposit.

Upon this allegation we think that the cause of action arose in March 1878, when the account was prepared. And we think that the period of limitation applicable to the case is certainly not less than six years, according to the provisions of art. 120, sch. II of the Limitation Act. It may be—and authority is not wanting for this view—that the amount was a deposit, which comes under art. 145, and that the plaintiff had thirty years from the date of the deposit. But we think it unnecessary in this case to decide this question in the affirmative, because we are satisfied that no specific rule is applicable which would reduce the period of limitation to less than six years as provided for by art. 120.

Under the circumstances we are of opinion that the Court below was wrong in dismissing the suit against the Collector on the ground of limitation. We set aside the order of dismissal, and remand the case for trial on the merits.

Costs to abide result.

O'KINEALY, J.—I also am of opinion that the suit is not barred.

Appeal allowed and case remanded.

12 C. 115.

1885 JUNE 18.

APPEL-LATE CIVIL.

12 C. 115.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

HEM CHUNDRA CHOWDHARI (*One of the Defendants*) v. CHAND AKUND (*Plaintiff*).* [18th June, 1885.]

Right of Occupancy—Bengal Act VIII of 1869, *s.* 6—*Suit to recover land—Non-payment of rent.*

Where a ryot had been in possession of land, but had been dispossessed, and for some years previous to suit had failed to pay rent, *held* that at the time of the institution of a suit for recovery of possession, he had no subsisting title, and consequently his suit must fail.

[Expl., 15 C. 17 (18); D. 14 C. 751 (753).]

[116] THIS was a suit to recover possession of land. The plaintiff had a right of occupancy in the land in question, till some time in the year 1284 (1877-78), when he appears to have been sent to jail for some reason, and he alleges that, while he was in jail, his family were driven away by the defendants who took possession themselves, since which time it appeared that he had not paid rent.

Defendants, *inter alia*, pleaded that the suit was barred by limitation, inasmuch as it had not been brought within one year from the date of dispossession. On this point the Munsif found in favour of plaintiff, and on the merits gave him a decree for a portion only of his claim, dismissing the suit as to the rest with costs.

On appeal the Subordinate Judge found that plaintiff had been in possession of all the land in question for more than twelve years previous to dispossession, and the defendants had only been in possession for five years, and decreed plaintiff's suit with costs. Defendants appealed to the High Court, on the grounds that the suit was barred by one year's limitation, and that by ceasing to pay rent for some years he had lost his right to be restored to possession.

Baboo *Jogesh Chundra Rai*, for the appellant.

Baboo *Mokund Nath Rai*, for the respondent.

JUDGMENT.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—The facts of this case are stated in the judgment of the Court below. This must be treated as a suit to recover possession of land on proof of title, otherwise it would be barred by the law of one year's limitation. In order to succeed, the plaintiff must prove his title. It has been found as a fact that, when he was sent to jail, he had a right of occupancy, but it has also been found as a fact that he has neglected or omitted to pay his rent for five or six years. Section 6 of Beng. Act VIII of 1869 provides as follows: "Every ryot who shall have cultivated or held land for a period of twelve years shall have right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same." Inasmuch

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* Appeal from Appellate Decree No. 1269 of 1884, against the decree of Baboo Parbati Kumar Mitter, First Subordinate Judge of Mymensingh, dated the 3rd of May 1884, reversing the decree of Baboo Krishnadhun Chowdhuri, Rai Bahadur, Munsif of Jamalpur, dated the 30th of April 1883.

1885 JUNE 18. — APPELLATE CIVIL. — 12 C. 115.

as the plaintiff has omitted [117] to pay rent for five years, it is impossible to say that he had on the day he instituted this suit a title therein subsisting, that is, a right of occupancy then existing in himself. Under the circumstances we set aside the decree of the lower Court and restore the decree of the first Court with costs in this Court and the lower appellate Court.

Appeal allowed.

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12 C. 117 (P.C.)=12 I.A. 205=9 Ind. Jur. 433=4 Sar. P.C.J. 646.

PRIVY COUNCIL.

PRESENT :

Lord Blackburn, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On appeal from the High Court at Fort William in Bengal.*]

TULSHI PERSHAD SINGH AND OTHERS (*Defendants*) *v.* RAMNARAIN SINGH (*Plaintiff*). [13th, 17th, 18th March, and 13th June, 1885.]

Pottah, Construction of—Meaning of the words "istemrari mokurari" in connection with grant of lands—Intention of parties.

The words "istemrari mokurari" in a pottah granting land do not, of themselves, denote that the estate granted is an estate of inheritance. Not that such an estate cannot be so granted unless, in addition to the above words, such expressions as "ba farzandan," or "naslan bad naslan" or similar terms are used. Without the latter, the other terms of the instrument, the circumstances under which it has been made, or the conduct of the parties, may show the intention with sufficient certainty to enable the Courts to pronounce the grant to be perpetual; the above words not being inconsistent therewith, though not themselves imparting it.

Held, accordingly, that where the words "mokurari istemrari" were used in connection with a grant in a pottah [as it was also held in another case where the instrument was termed "mokurari ijara pottah" (1) that the question was whether the intention of the parties that the grant should be perpetual had, or had not, been shown with sufficient certainty in any other way, *e. g.*, by the other terms, by the objects, or circumstances, of the grant, or by the acts of the parties. And held that in the present case the intention was not so shown.

[**F.**, 8 A. 569; **Rel. upon**, 30 C. 883 (892); **R.**, 9 A. 591 (598); 20 A. W. N. 27; 15 M. 199; 21 M. 503 (506); 26 M. 202 (209) (P. C.); 11 M. L. J. 160 (163)=23 A. 324 =28 I. A. 65 (P. C.); 8 O. C. 61 (63); 30 C. 20; 7 C. W. N. 314; 17 C. L. J. 459 (460) =15 Ind. Cas. 137; 18 C. L. J. 31 (35)=20 Ind. Cas. 93.]

APPEAL from a decree (31st July 1882) of the High Court, affirming a decree (4th January 1881) of the Subordinate Judge of Bhagulpur.

The question involved in this appeal was, whether an *istemrari mokurari* pottah, granted by Raja Nirbhai Singh, grandfather of [118] the respondent and his predecessor in the raj estate, to his son-in-law Kumar Surnam Singh on the 7th of Bhadur 1257 Fasli, corresponding to the 29th August 1850, enured on the death of Surnam Singh to the benefit of his sons, the present appellants, giving them the inheritance, or was, as the High Court had decided, only for the life of the original grantee.

Surnam Singh, in 1832, married Srimati Babui Nawab Koeri, daughter of Raja Nirbhai Singh, and in that year obtained from his father-in-law a grant by pottah of mouza Chandersali, *asli* and *dakhili*,

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(1) 8 C. 664=9 I. A. 33.

principal village and dependent hamlets, subject to an annual rent of Rs. 201. These lands were within pargana Girdhawar, the ancestral estate of the Raja's family, which family lived under the Mitakshara *shasters*, giving the law to the district, modified by a custom according to which the family estate descended to the eldest male member.

In 1844 Nawab Koeri died; and her husband having afterwards married wives of other families, by them had issue, the present appellants.

Some alteration of village divisions having been effected, in *thakbast* proceedings in 1846, a new pottah, dated 11th Baisakh 1254, F. (April 1847), was granted to Surnam Singh, at the increased rent of Rs. 651. And in 1257 F. (1850), in lieu thereof, another pottah was granted by the Raja, with the approval of his eldest son Kumar Mohendronarain Singh, testified by his signing it. This pottah, dated 29th August 1850, contained the following:—" I am Raja Nirbhai Singh, malik and zemindar of pargana Girdhawar, zilla Bhagulpur. Whereas the whole sixteen annas of mouza Chandersali, *asli* with *dakhili*, together with *jumma*, forest-rights, fisheries, &c., situated in pargana Girdhawar, was granted as an *istemrari mokurari*, under the deed, dated 11th Cheyt 1239, at the annual rent of sicca rupees 201 to Kumar Surnam Singh, by me the malik and zemindar; in accordance wherewith the said mokuraridar has been holding possession of the mokurari estate, and paying rent for the same." The pottah then recited that some of the village divisions had been grouped into separate villages, and that the rent reserved had been raised to Rs. 651, adding the words, " I have granted a second *istemrari mokurari* pottah for the [119] consolidated estates in the name of Kumar Surnam Singh." After a clause for payment of the rent fixed, giving power to the zemindar and malik to attach the estate of the mokuraridar upon default, and to realize the amount due, it concluded as follows: " The mokuraridar shall not resume any lakheraj land existing from before, and shall carry out all the orders passed by the authorities; and I the malik and my heirs shall not dispossess the said mokuraridar from the mokurari estate ; if we do we shall make good the amount claimed by him without any objection whatever. Should he refuse to pay the rent fixed, his refusal shall be held null and void by the Courts. For this reason these few words are written in the form of an *istemrari mokurari* pottah, that it may be of use when required."

Surnam Singh died on the 10th June 1879, whereupon the present suit was brought by Raja Ramnarain Singh, son of Mohendronarain Singh, and grandson of Nirbhai, against his sons, all but one of whom were minors and represented by Tulshi Pershad Singh their guardian. The suit was brought on the ground that, as the pottah of 1850 contained no express words of inheritance such as " be farzandan," or " naslan bad naslan," the grantee took thereunder only a life estate. It was also alleged that according to the custom of the Raja's family, hereditary grants for maintenance were made only to the male members of the family ; the females having no right by custom to any estate of inheritance, and that a grant made to a daughter's husband, such as the grant now in question, would be only for the life of the son-in-law.

The defendants insisted that the pottahs granted to their father were " istemrari mokurari," and therefore hereditary and perpetual, and they denied the existence of any such family usage as had been alleged.

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(P.C.)=
12 I.A. 205=
9 Ind. Jur.
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Sar. P.C.J.
646.

The Subordinate Judge having fixed an issue on the question whether the pottah was for life or in perpetuity, examined, in the first place, the decisions as to the effect of those words, before and after the year 1850; and then considered the evidence on the record, as to the form of the various grants by successive Rajas from the time of the plaintiff's grandfather, Raja Nirbhai Singh, down to the plaintiff, made to male members of the family, and to [120] daughters' husbands respectively, as also some made to widows and other females.

As to the decisions before and after 1850, with regard to the effect of the words "istemrari mokurari," the Subordinate Judge expressed his opinion to be, that so long as the Sudder Court was in existence (*i.e.*, down to 1862, the Judges of that Court held that the use of those words alone conferred only a life interest, unless an intention to create a permanent interest was to be gathered from the proved conduct of the grantor or his heirs, and that after the abolition of the Sudder Court, the High Court "in some cases" decided that those words alone "prove *prima facie* that the pottah is for perpetuity," but that such *prima facie* interest might be cut down to a life interest by evidence that in the particular zemindari or locality it was customary that grants containing those words only conveyed a life interest, and that when intending to grant a permanent and hereditary interest, words of inheritance were added. And the Subordinate Judge arrived at the conclusion that, in the pottah in question, the grantor should be considered to have used, in 1850, the words "istemrari mokurari" in the sense attributed to them up to that time by the Sudder Court, and also that the evidence before him, as to the various grants made to male members of the family and to sons-in-law respectively showed that in this family, where hereditary interests were intended to be granted, words of inheritance were added, and that the use of the words "istemrari mokurari" alone conferred only a life estate.

A decree was accordingly made for the plaintiff. An appeal from it to the High Court was dismissed by a Divisional Bench (TOTTENHAM and BOSE, JJ.), the part of their judgment which is material to this report being as follows :—

"The Privy Council, while holding that with or without the use of particular words evidence of long possession and of succession by heirs may establish the hereditary nature of a tenure, have declined, and that quite recently, to affirm that the words "mokurari istemrari" must imply any hereditary title. See *Bilasmoni Dasi* v. *Sheo Pershad Singh* (1) and *Lilanund Singh* [121] v. *Monorunjun Singh* (2). In this last case their Lordships were dealing with an appeal against the decisions of this Court in *Munorunjun Singh* v. *Lilanund Singh* (3) and *Lilanund Singh* v. *Munorunjun Singh* (4). It was held that the words might mean either permanent during the life of the person to whom the grant was made, or permanent as regards hereditary descent. It is, therefore, fully established at the present day that the words contained in the defendants' pottah do not *per se* convey to them an estate of inheritance. Were they so understood when the pottah was granted? It is true that the cases mentioned by the lower Court were posterior in date to the original grant of 1832 (1239 F.S.); but it has been shown that the decisions on which the defendants rely did not go so far as to establish any hereditary title from such words alone. And we may observe that the original pottah is not what we now

(1) 9 I. A. 33 (38)=8 C. 664.
(2) 13 B. L. R. 124=I. A. Sup. Vol. 181.
(3) 3 W. R. 84.
(4) 5 W. R. 101.

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have before us. We are now dealing with a pottah substituted in 1257 F. S. (1850) for the original pottah, and extending the area and the rental. The terms used are the same as in the original pottah; but whatever may have been the accepted meaning of these words in 1832, there can be no doubt whatever that in 1850 it was well understood that the Sudder Dewani Adalat did not recognize them as conferring more than a life-interest to the grantee. If the respondent intended in 1832 to grant, and did grant, a heritable estate to Surnam Singh, and if he intended to renew and enlarge that grant in 1850, he would surely have put in the words without which it was well known at the latter date that the Sudder Dewani Adalat would not recognize an estate of inheritance.

"We think it clear, therefore, that the pottah in question does not upon the face of it necessarily create a title enuring to the heirs of the grantee. And as regards the conduct of the plaintiff, we find that he instituted the suit within a year after the death of Surnam Singh, so that evidently he had no intention to let the tenure be the inheritance of the defendants.

"We think that no *onus* lies upon the plaintiff in the first instance, the admitted death of Surnam Singh, and the terms of [122] the pottah itself, which expressly protects the mokuraridar himself, not his heirs and successors, sufficiently starting the case.

"With regard to the evidence as to the custom of the family, it decidedly preponderates in favour of the plaintiff; and the probabilities seem to point strongly in the same direction.

"The alleged custom is, that younger sons and brothers of the head of the family are provided for by mokurari grants descendible to their posterity; while daughters are maintained by grants made to their husbands for life. The grant now in question was made to a son-in-law of Raja Nirbhai Singh. And the renewed pottah with which we are dealing was granted to him several years after the death of the lady in respect of his marriage with whom the original grant had been made. It seems most improbable that perpetual alienations from the Raj property in favour of those who marry female members of the family should be the custom of any family; for obviously such a process would in a few generations reduce the largest estate to nothing. And from the various pottahs filed, we find that grants to sons or brothers do contain the words 'generation to generation,' while in no single instance shown us have these words been inserted in a grant to a son-in-law. We have said enough to show the principal reasons why we think the decree of the lower Court is right, and we accordingly dismiss the appeal with costs."

On this appeal,—

Mr. *J. Graham*, *Q. C.*, and Mr. *R. V. Doyne*, for the appellant argued that the use of the words "istemrari mokurari" imported perpetuity and hereditary succession, inasmuch as the etymological meaning of the words must prevail, in the absence of evidence showing that such meaning was controlled by the cicumstances of the cases, or by the intention of the parties. The burden of proof was in such a case on the plaintiff to show that the grant was not hereditary in character. The judgment of the High Court to the effect that the words did not *per se* denote the conveyance of an estate of inheritance, did not state precisely the result of the rulings on the question. It seemed to have been generally held that the words, taken literally and in their strict sense, indicated perpetuity, although they might, under some circumstances, where evidence was given to show

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[123] that the grant was not intended to be of that character, be consistent with duration only for life.

In *Lakhu Kowar* v. *Roy Hari Krishna Singh* (1), a case which appeared to be directly in point, it was held that these words "must be taken in themselves to convey an hereditary right in perpetuity."

In the appeal of *Lelanand Singh* v. *Thakoor Monorunjun Singh* (2), where it was held by this committee that it was doubtful whether the words "mokurari istemrari" meant permanency during the life of the person to whom the estate was granted, or permanency as regarded hereditary descent, it was held that, when the usage proved was that the estate should be hereditary, hereditary it would be. The High Court, in the cases from which that appeal was made, had in giving judgment distinctly said that the words denoted "a perpetual holding at a fixed *jumma*" (3) and (4).

Reference was made to Reg. VIII of 1793; *Joba Singh* v. *Nujeeboolah* (5); *Tulsinarain Sahee* v. *Baboo Modnarain Singh* (6); *Amiroonnissa Begum* v. *Hetnarain Singh* (7); *Bilasmoni Dasi* v. *Raja Sheo Pershad Singh* (8); *Dhunput Singh* v. *Goomun Singh* (9).

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. T. Woodroffe*, for the respondent, were not called upon.

On a subsequent day, 13th June, their Lordships' judgment was delivered by—

JUDGMENT.

SIR R. COUCH.—The respondent (the plaintiff in the suit) is the grandson of Raja Nirbhai Singh, who was the owner of the zemindari of Girdhawar, an ancient impartible estate, which descended according to the law of primogeniture. The appellants [124] (the defendants) are the sons of Kumar Surnam Singh, who married Srimati Nawah Koeri, one of the daughters of Nirbhai Singh. In 1852 Nirbhai Singh died, leaving one son, Raja Mohendronarain Singh, who succeeded to the estate, and having had five daughters, two of whom died before him. Nawah Koeri died in 1884. Raja Mohendranarain Singh died in 1869, leaving four sons, of whom the plaintiff, Ram Narain, is the eldest, and two daughters. Ram Narain succeeded to the zemindari.

The only question in the suit is, what is the construction of a pottah, granted on the 29th of August 1850 by Nirbhai Singh to his son-in-law Kumar Surnam Singh, of certain mouzas which were part of the zemindari of Girdhawar. Surnam Singh died on the 10th of June 1878, and on the 29th of March 1880 the plaintiff filed his plaint to recover possession of the mouzas, in which he alleged that the pottah was granted in lieu of a former pottah, dated 11th Bysack 1254 Fasli (11th April 1847), which was granted in lieu of the first pottah, dated the 11th Cheyt, 1239 Fasli (27th March 1832); that the first pottah was granted at a smaller *jumma* than that specified in the second, and was granted on account of paternal affection, and kindness to Surnam Singh, the husband of his daughter, for the assistance, maintenance, and support of his daughter, and her husband; and that the pottah was to remain in force only during the lifetime of the grantee. The defendants, in their written statement, alleged that Surnam Singh was a member of a family of the Rajput

(1) 3 B.L.R. A. C. 226.
(2) 13 B.L.R. 124 = I.A. Sup. Vol. 181.
(3) 3 W. R. 84.
(4) 5 W.R. 101.
(5) 4 Sel. Rep. (1827) 271, New Ed. 343 = 7 I. D. (O.S.) 256.
(6) S.D.A. (1848) 752.
(7) S.D.A. (1853) 649.
(8) 9 I.A. 33 = 8 C. 664.
(9) 11 M. I. A. 434 (462).

caste, and Nirbhai Singh was inferior to him in family and caste, and that on account of his marriage with Nawah Koeri, and of his living at Girdhawar with his wife and children, Nirbhai Singh on the 11th Cheyt 1239 F. granted to him an *istemrari mokurari* tenure, *i.e.*, for perpetuity, at an annual *jumma* of Rs. 201. They denied that the grant was for his lifetime, and submitted that it was for perpetuity to be enjoyed generation after generation. The pottahs of 1847 and 1850 are in the proceedings, but that of 1832 is not. By that of 1847 the annual *jumma* was raised from Rs. 201 to Rs. 651, for a reason which is there stated. That of 1850 was made to settle some dispute as to a word in that of 1847. It is not necessary **[125]** to state the terms of either of these pottahs. They both contain the words "istemrari mokurari," the meaning of which is disputed, and it appears from the recital in that of 1847 that the original pottah contained those words.

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The case was heard in the first instance by the Subordinate Judge of Bhagulpur, who in his judgment, after stating that the issue was whether the pottah of 1850 to Kumar Surnam Singh, the ancestor of the defendants, was for life or for perpetuity to be enjoyed generation after generation, proceeded to refer to the decisions of the Sudder Dewani Adalat, which are noted in the margin of the judgment. One of these was in 1848, another in 1853, and another in 1860. He says that it was held in these cases that in *mokurari* deeds merely the use of the words "istemrari mokurari," without any such words as "ba farzandan" (with children), or "naslan bad naslan" (generation after generation), or any similar words having the same meaning, will not signify perpetual tenure to be enjoyed by heirs; on the contrary, it will mean life interest. He then refers to two decisions of the High Court at Calcutta, which was established in 1862, when the Sudder Dewani Adalat was abolished. The former of these was in 1869, *Lakhu Kower* v. *Roy Hari Krishna Singh* (1). The latter was in 1877, and not having been reported, an attested copy of the judgment is in the record of this appeal. These decisions are opposed to those of the Sudder Dewani Adalat, the High Court holding that the words "istemrari mokurari," without any others, must be construed as a lease in perpetuity at a fixed rent, which would descend to the heirs of the lessee. With reference to these decisions, the Subordinate Judge seems to be of opinion that in 1850 the parties to the pottah must have known the meaning of the words "istemrari mokurari" to be the same as was then held by the Sudder Dewani Adalat, *i. e.*, for life, and as the pottah contained only those words, without any word to denote that it was for perpetuity to be enjoyed generation after generation, it was taken as a *mokurari* for life. He then refers minutely to the documentary evidence. This consisted of *mokurari* granted by Nirbhai Singh to his three brothers, his brother-in-law who **[126]** married his only sister, and his five sons-in-law, and two others relatives, and also of *mokurari* granted by Mohendronarain. It is not necessary to refer to this evidence, as it can only prove a custom of the family of Nirbhai Singh, and what was understood in his family to be the meaning of "istemrari mokurari" when used without any other words. The effect of it is stated by the Subordinate Judge to be that when a pottah was granted to one of the male members of the family who would become heirs according to the *shastra*, in addition to the words "istemrari mokurari," the words "with children," or other words having similar meaning,

(1) 3 B.L.R.A.C. 226.

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were inserted, and when it was granted to a son-in-law or other relative, no other words but "istemrari mokurari" were used. The Subordinate Judge concluded by finding that the pottah in this case created "a life *mokurari* and not a perpetual *mokurari* to be enjoyed generation after generation," and made a decree in favour of the plaintiff.

The defendants appealed to the High Court at Calcutta. That Court in its judgment, after distinguishing the cases relied upon for the defendants (and, their Lordships think, rightly), says that in the latter years of the Sudder Dewani Adalat it was repeatedly held that an istemrari lease conveyed no hereditary right unless expressly given by such words as "ba farzandan" or "naslan bad naslan" but there have been cases in the High Court in which the words "mokurari istemrari" were held to convey a hereditary right. It then refers to two cases before this Committee, and says: "It is therefore fully established at the present day that the words contained in the defendant's pottah do not *per se* convey to them an estate of inheritance." And after referring to the evidence of the custom of the family, the Court dismissed the appeal.

It is necessary now to consider the decisions which have been referred to. The earliest reported case appears to be *Tulsee Narain Sahee* v. *Modnarain Singh* (1). There a *mokurari, istemrari* pottah had been executed in favour of two brothers, who were both dead, and the principal appellant was the heir of both. He claimed to succeed to the possession of the lands **[127]** and the suit was brought to try the question. The Judge of the Sudder Dewani Adalat said:—

"The principal Sudder Ameen, admitting the pottah to be genuine, has decided against the appellants on the second plea of the respondent, that the heir cannot claim what the deed guaranteed only to the individuals named in it. The decision is founded on the commonly understood purport of deeds so worded, as shown by precedents referred to in the judgment. It has been repeatedly ruled by the Court generally that the permanence (*istemrari*) expressed in these pottahs has reference only to the term of existence of the grantee, and that to render them hereditary the addition of "ba furzundan" (including children or descendants,) or "nuslun bad nusl" (from generation to generation), is necessary. My own knowledge confirms the correctness of this, and upon this and the following precedents of the Court, amongst the many which doubtless might be produced, I affirm the decision appealed against."

Three precedents are then mentioned, one of the 27th May 1817, another of the 2nd April 1827, and a third of the 28th September 1835.

The next reported case is *Ameeroonnissa Begum* v. *Hetnarain Singh* (2). It is described as a suit to resume an *istemrari mokurari* lease, on the grounds that the lease was not hereditary, and that the original lessee being dead, his heirs had no right to retain the tenure, and it came before three Judges of the Sudder Dewani Adalat. The judgment refers to the decisions of the 20th September 1835 and 2nd April 1872, and says (p. 654):—

"The appellant urges that the term 'mokurari' applies to the fixed amount of *jumma*, and 'istemrari' to the right of succession in perpetuity, or to the duration of tenure. But such is not the interpretation of the term 'istemrari' according to local custom, as shown by the decisions quoted, though the strict meaning of the word in lexicography certainly is (perpetuation.)"

(1) S.D.A. Rep. (1848) 752. (2) S.D.A. Rep. (1853) 648.

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Another decision was on the 22nd May 1860, by three Judges of the Sudder Dewani Adalat, two of whom became Judges of the High Court. An atttested copy of the judgment is in the record. The suit related to the pottah granted by Nirbhai Singh to his brother-in-law, Kumar Dewan Singh, and was brought against his son by Mohendronarain Singh. It is said in the judgment that the plaintiff set forth that his father, Nirbhai Singh, on the 21st Kartick 1213 F. gave to Kumar Dewan Singh, the father of the defendant, a perpetual [128] lease (*mourasi istemrari)* of the villages Jogi and Nirbund, and on the death of the grantee he claimed to resume possession. The defendant answered that the deed under which he held was, as stated by the plaintiff, one of the 21st Kartick 1213, for a *jumma* of Rs. 21, but that so far from being restricted to the life of the first grantee, it had in express words the terms "to sons and generation after generation, and descendants after descendants." The Principal Sudder Amin held that the document put forth by the defendant was not the genuine lease, and decreed for the plaintiff. The judgment of the Sudder Dewani Adalat, after deciding that the deed put in by the defendant was not the real lease, says :—

"Lastly, it is urged that the plaint admits that a *mourasi istemrari* lease was given to the defendant's father on the 21st of Kartick 1213, and that as these terms are equivalent to hereditary and perpetual terms the lease must descend from father to son. But it has been definitely ruled in the case of *Ameeroonnissa Begum* v. *Hetnarain Singh*, S D.A. Decisions for January 1853, p. 648, that an *istemrari* lease does not convey any hereditary right unless such terms as 'ba furzandan' or 'nuslan-bad nuslan' are contained in the body of the deed ; and this precedent has always been followed."

The word "mourasi" must be used by mistake for "mokurari," as there was evidence in the present suit that the grant by Nirbhai Singh was an *istemrari mokurari*, and the Principal Sudder Amin in his judgment describes the claim as for recovery of possession by setting aside the "istemrari mokurari sanad."

The first decision of the High Court on this matter is in *Lakhu Kowar* v. *Roy Hari Krishna Singh* (1). The suit was brought by the successor of the grantor of a *mokurari istemrari* pottah against the widow of the grantee and others, the plaintiff alleging that it was only a life tenure, and the defendants that it was an hereditary tenure in perpetuity The Sudder Amin dismissed the suit on the ground that istemrari meant perpetuity and nothing else. On appeal to the Additional Judge of Tirhoot this decision was reversed, and the defendant appealed to the High Court. The decision of the Sudder Court in 1853 was relied upon for the respondent, but the Court said it was a very peculiar one, and proceeded, to a considerable extent, at least, on evidence which [129] tended to qualify the wording of the pottah, and to show that it was not intended to convey an hereditary title. They reversed the decision of the Additional Judge on the ground appearing in the following passage of the judgment which was delivered by one Judge, the other concurring :—

"Then as to the meaning of the words themselves. It cannot, I imagine, be for a moment contended that the words *mokurari istemrari* do not in their lexicographical sense mean 'something that is fixed for ever.' No doubt there is a custom which adds to these words 'generation

(1) 3 B.L.R. A. C. 226.

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after generation,' but this is by no means an universal custom, and the extra words are etymologically redundant. Moreover, if the pottah were merely for the life of the grantee, what could be easier than to say so, and what was the object of using words that could be applied in their ordinary sense only to hereditary rights. I should say that when a grantee holds under a pottah worded in this way he has at least made out the very strongest *prima facie* case, and that the onus of showing that by the custom of the district pottahs conferring hereditary title always contained and were obliged to contain the words "bafarzandan," "naslin bayd naslin," or similar phrases, would be heavily upon the person seeking to set aside the lease."

The decisions of the Sudder Court previous to 1853 were not referred to. The ground of them appears to have been that the words, when used in a pottah, had a customary meaning. This is distinctly said in the case in 1853, *Ameeroonnissa Begum* v. *Hetnarain Singh*, p. 654. If this had been noticed it might have been thought that the customary meaning of the words, rather than the lexicographical, ought to be regarded, and the former would be their ordinary sense when used in a pottah.

In the other case in the High Court in 1877, this decision seems to have been treated as having settled the question. The Court say :—

"Having regard to the ordinary meaning of the words 'mokurari istemrari,' and to the construction which this Court has put upon them in the case of *Lakhu Kowar* v. *Roy Hari Krishna Singh* (1), it appears to us that an 'istemrari mokurari' pottah containing no words of inheritance on the one hand, nor any words that the lessee is only to have an estate for life, on the other, must be construed as a lease in perpetuity at a fixed rent, which would descend to the heirs of the lessee."

In *Lelanund Singh* v. *Munorunjun Singh* (2) where **[130]** settlement could be determined by a zemindar dispensing with the ghatwali services, this Committee said: "The words 'mokurari istemrari' are used; and although it may be doubtful whether they mean permanent during the life of the person to whom they were granted, or permanent as regards hereditary descent, their Lordships are of opinion that, coupling those words with the usage, the tenures were hereditary. The doubt thus stated is not removed by the lexicographical meaning of the words.

After this review of the decisions, their Lordships think it is established that the words "istemrari mokurari" in a pottah do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual. It was held by this Committee, in a case where the instrument was called "the mokurari ijara pottah"—*Belasmoni Dasi* v. *Sheo Pershad Singh* (3)—that this was the question. Such an intention was not shown in this case, and in the argument before their Lordships the appellant relied solely upon the terms of the pottah. As has been said, their Lordships, having regard to the customary meaning of the

(1) 3 B.L.R.A.C. 226=12 W.R. 3. (2) I.A. Sup. Vol. 181=13 B.L.R. 124.
(3) 9 I. A. 33=8 C. 664.

words, as established by the decisions which have been noticed, are of opinion that they do not convey an estate of inheritance in this case, and they will humby advise Her Majesty to affirm the decree of the High Court and to dismiss the appeal. The costs of it will be paid by the appellant.

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Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow* and *Rogers*.

Solicitor for the respondent: Mr. *T. L. Wilson*.

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12 C. 131.

[131] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

NEWAJ (*Defendant*) v. MAKSUD ALI AND OTHERS (*Plaintiffs*).*
[10th August, 1885.]

Minor, Suit by—Next friend—Certificate under Act XL of 1858, *s.* 3—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 440.

Section 440 of the Civil Procedure Code, read with s. 3 of Act XL of 1858, does not make the receipt from the Court of a written permission to sue compulsory upon the next friend of an infant plaintiff.

[R., 14 C. 754 (756).]

THIS was a suit for the recovery of land. Zaminoodi (plaintiff No. 1) and Maksud Ali (No. 2) were the nephews, and Manik Jan (No. 3, a minor, represented in this suit by plaintiff No. 2) was the daughter of one Moonshi deceased, as whose heirs they allege that they held possession of the said land from the time of his death, but were dispossessed by the defendants in the year 1287 (1881). The first, and, for the purposes of this report, the only material issue raised, was whether plaintiff No. 2 could legitimately act as next friend of the minor. On this point the Munsif said: "Maksud Ali is the son of the uterine brother of the infant's father. This being so, the institution of this suit by him, as next friend of the infant, has not been wrong. Besides he has been acting for the benefit of the minor. It has not, therefore, been improper for him to act as the next friend of the minor. On the merits the plaintiffs' suit was decreed. On appeal the Subordinate Judge of Tipperah upheld the Munsif's decision, though of opinion that he would have done better to have given a written permission. Defendant then appealed to the High Court.

Baboo *Hari Mohun Chakarbati*, for the appellant.

Munshi *Serajul Islam*, for the respondents.

JUDGMENT.

The judgment of the Court (NORRIS and GHOSE, JJ.) was delivered by

GHOSE, J.—We see no ground to interfere in this case. The suit was instituted by the plaintiffs Nos. 1 and 2 and a [132] third plaintiff,

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* Appeal from Appellate Decree, No. 2325 of 1884, against the decree of Baboo Dwarka Nath Bhuttacharji, Rai Bahadur, Additional Subordinate Judge of Tipperah, dated the 30th of August 1884, affirming the decree of Baboo Kristo Prosad Chowdhuri, Rai Bahadur, First Munsif of Muradnagore, dated the 8th of August 1883.

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the minor daughter of one Moonshi, who was represented by her next friend, the plaintiff No. 2; and the object of the suit was to recover possession of the lands in suit upon the ground that they belonged to the said Moonshi; and that upon Moonshi's death they had devolved upon the plaintiffs.

The defendant in the Court of first instance, amongst other things, pleaded that the plaintiff No. 2 was not the proper person to represent the interests of the minor plaintiff; but the Court of first instance overruled that objection; and upon the question of title, it held that the property belonged to Moonshi and was in Moonshi's possession up to his death.

The lower appellate Court has substantially confirmed the findings of the first Court.

The learned vakil for the defendant-appellant contends before us in the first place that, inasmuch as no written permission was granted to the plaintiff No. 2 to represent the minor, the suit ought to have been dismissed.

We are of opinion that this ground cannot be sustained. Section 440 of the Code of Civil Procedure, read in connection with s. 3 of Act XL of 1858, does not, as contended for by the vakil, enjoin such a written permission being granted by the Court to the next friend of a minor, when the latter is a plaintiff. The suit in the present case, as already stated, was instituted in the name of the minor by her next friend, the plaintiff No. 2; the plaint was duly received by the Court, and the suit was allowed to proceed. It is, therefore, to be presumed that the Court accepted the plaintiff No. 2 as a fit person to represent the interests of the minor. But more than this we find that the Court of first instance dealt with the question whether the plaintiff No. 2 was a proper guardian of the minor, and whether he should be allowed to prosecute the suit on her behalf, and decided both questions in the affirmative. In this state of things, we are of opinion that this ground cannot be maintained.

The learned vakil for the appellant next contends that the lower appellate Court has decided the case upon an altogether different issue from that upon which the first Court decided it.

We are of opinion that this ground also cannot be maintained. Both the lower Courts have substantially found that [133] the property belonged to Moonshi, and that upon his death it devolved upon the plaintiffs. Whether, upon Moonshi's death, the property devolved upon all the three plaintiffs, or upon the minor plaintiff alone, is a question which has not been, and which need not have been, gone into in the present case. That is a question which may hereafter be raised, if occasion should arise, as between the plaintiff No. 3, the minor daughter, and the plaintiffs Nos. 1 and 2, the nephews of Moonshi. We are, therefore, of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

12 C. 133.

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CRIMINAL REVISION.

12 C. 133.

CRIMINAL REVISION.

Before Mr. Justice Wilson and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF DINONATH MULLICK.
DINONATH MULLICK *v.* GIRIJA PROSONNO MOOKERJEE.*
[24th August, 1885.]

Recognizance to keep the peace—Criminal Procedure Code (Act X of 1882), *s.* 107—*Power of District Magistrate to call on person residing in another district for security.*

A Magistrate has no jurisdiction to take proceedings under s. 107 of the Criminal Procedure Code, against a person not personally within his jurisdiction. *In the matter of the petition of Jai Prokash Lal* (1), and *In the matter of the petition of Rajendro Chunder Roy Chowdhry* (2) followed.

Even assuming there was jurisdiction, it was not a case where the Magistrate should have called upon the petitioner to appear personally, he residing at a distance, there being no special circumstance making his personal attendance necessary, and the Magistrate having power under s. 116 to allow him to appear by a pleader.

[F. 14 A. 49=11 A.W.N. 132 ; 23 B. 32 ; D., 24 C. 344 (347).]

THE petitioner Dinonath Mullick, through an agent, made an application to the Deputy Magistrate of Bongong to the effect, that, as a breach of peace was apprehended on the part of Girija Prosonno Mookerjee and his servants, on their attempt to put up by force a bund on the *khal* belonging to the petitioner, they [134] might be required to enter into recognizances to keep the peace towards him. A similar application was also subsequently made on the part of Girija Prosonno Mookerjee and his men to obtain security to keep the peace towards the petitioner and his servants. The Magistrate, after calling on the police for a report, directed both parties and their respective partisans to appear before him on 6th August to show cause why they should not be bound down to keep the peace under s. 107 of the Criminal Procedure Code.

Notice was thereupon issued on the petitioner (among others) calling upon him to appear personally before the Deputy Magistrate and to show cause why he should not be bound down to maintain peace.

On or about the 3rd or 4th of August 1885, the petitioner made an application with a medical certificate to the Deputy Magistrate that he might be excused from personally attending on the ground of illness, but that application was refused, and a warrant was issued against the petitioner for his personal attendance in the Court of the Deputy Magistrate at Bongong, under which warrant he was arrested, but released on bail.

The petitioner stated that he resides at No. 81, Upper Circular Road in Calcutta, and never went to his zemindari, where breach of peace was apprehended, the said zemindari being in the district of Jessore and under the management of his naib. He prayed that the proceedings of the Deputy Magistrate might be set aside, and that he might be allowed to appear by his mooktear on the following grounds :—

(1) That the proceedings of the Deputy Magistrate at Bongong were illegal and irregular.

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* Criminal Revision No. 333 of 1885, against the order of Baboo Trolukya Nath Sen, Deputy Magistrate of Bongong, dated the 3rd August 1885.

(1) 6 A. 26. (2) 11 C. 737.

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12 C. 133.

(2) That the order of the Magistrate under the circumstances of the present case directing his personal attendance was illegal and unjust.

(3) That under s. 107 of the Criminal Procedure Code a Magistrate has no jurisdiction to issue process on a person not residing within the limits of the district.

Mr. *Pugh* and Baboo *Boidonath Dutt*, for the petitioner.

Mr. *Pugh*, for the petitioner, contended that under s. 107 of the Criminal Procedure Code the Magistrate had no jurisdiction to issue process on a person not residing within the limits of [135] his jurisdiction, and cited *In the matter of Jai Prakash Lal* (1) and *In the matter of the petition of Rajendro Chunder Roy Chowdhry* (2).

The judgment of the Court (WILSON and GHOSE, JJ.) was as follows:—

JUDGMENT.

WILSON, J.—The petitioner in this case is Baboo Dinonath Mullick. He has obtained a rule to show cause why certain proceedings taken by the Deputy Magistrate of Bongong, under s. 107 and the following sections of the Criminal Procedure Code, should not be set aside so far as they affect the petitioner. The principal ground on which it is contended that those proceedings are illegal is this: it is said that under s. 107, the Deputy Magistrate had no jurisdiction to take such proceedings against a person who was not in any sense personally within the jurisdiction of that Deputy Magistrate.

The construction of the section taken by itself may not be wholly free from doubt. It is not very clearly worded: and it might perhaps be capable of two constructions. It might perhaps be read as meaning that where a Magistrate receives information that any person, wherever that person may be, is likely to commit a breach of the peace within the local limits of such Magistrate's jurisdiction, he may take proceedings. On the other hand the jurisdiction of the Magistrate is ordinarily confined within local limits, and this is a personal jurisdiction, that is to say, not a jurisdiction for punishing offences, but a jurisdiction for restraining persons from committing offences. It may well be said that the section should be read, with reference to that primary rule, that the Magistrate's jurisdiction is local; and that the words, "where a Magistrate receives information that *any person* is likely to commit a breach of the peace within the local limits of his jurisdiction," apply only to any person subject to his jurisdiction. Speaking for myself personally I should from the words themselves alone be disposed to think that the narrower construction of the words is the correct one. It is, we think, certainly the one most in accordance with convenience. The wider construction would empower any Magistrate in any part of India, who receives an *ex-parte* information that a breach of the peace is likely to be committed within his jurisdiction by [136] any person in any part of India, to require the attendance of that person from any part of India in his Court. That would be a very great hardship and a wholly unnecessary hardship, because the last part of the section provides that, whenever a breach of the peace is likely to be committed, proceedings may be taken against any person in the district in which he is. Considerations of convenience therefore are in favour of the narrower construction.

The authorities also support that view. We have been referred to two cases: the first case is *In the matter of the petition of Jai Prakash*

(1) 6 A. 26. (2) 11 C. 737.

Lal (1), in which the point was considered by a Full Bench of the Allahabad Court, and they came to the conclusion that the Magistrate has no jurisdiction to take such proceedings against a person who is not within the local limits of his jurisdiction. The same question appears to have been considered by a Division Bench of this Court in a case for revision under s. 435, Code of Criminal Procedure, *In the matter of the petition of Rajendro Chunder Roy Chowdhry* (2), and the same construction appears to have been put upon the section. We think it right to follow these decisions. On that ground in our judgment the whole of the proceedings, so far as they affect Baboo Dinonath Mullick, are without jurisdiction and must be set aside.

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We think it right to add that had we come to the conclusion that there was jurisdiction, we should still be of opinion that that jurisdiction had not been judiciously exercised. We can find no sufficient materials before the Deputy Magistrate tending to involve Baboo Dinonath Mullick himself in any matter pointing to a breach of the peace. Therefore proceedings ought not to have been taken against him.

Further, having regard to the fact that the person against whom proceedings were taken was at a distance, and that there was no special circumstance making his personal attendance necessary, it appears to us that it would have been a very unwise exercise of jurisdiction to require him to appear personally, seeing that the Magistrate had power under s. 116 to allow him to appear by a pleader.

The whole of the proceedings of the Deputy Magistrate will be set aside so far as they affect the petitioner.

Proceedings set aside.

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12 C. 137.

[137] CRIMINAL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

ASKAR MEA *v.* SABDAR MEA.* [17th September, 1885.]

Criminal Procedure Code (Act X of 1882), *ss.* 133, 135—*Application for order to remove obstruction—Disputed title—Jurisdiction of Criminal Court.*

Where, an application is made under s. 133 of the Criminal Procedure Code, calling on a person to remove an obstruction, and such person *bona fide* raises a question of title:

Held, that the case then becomes one for a Civil Court. The section contemplates only an enquiry as to the existence or non-existence of the obstruction complained of, not an enquiry into disputed questions of title.

[F., 12 C. 696; Rat. Unrep. Cr. Cases 378; 22 B. 988; 4 Bom. L. R. 687; R., 17 C. 562; D. 9 M. 463=10 Ind. Jur. 374.]

THIS was a reference from the Deputy Commissioner of Sylhet, under s. 438 of the Criminal Procedure Code.

The application was under s. 133 of the Criminal Procedure Code, for the opening of a road alleged to be public, and to have been closed by Sabdar Mea and others. An order was issued under s. 133 of the Criminal

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* Criminal Reference No. 162 of 1885, made under s. 438 by G. Stevenson, Esq., Deputy Commissioner of Sylhet, dated the 3rd of September 1885.

(1) 6 A. 26. (2) 11 C. 737.

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Procedure Code, calling on them to remove the obstruction, or to appear and show cause why it should not be removed.

Sabdar Mea showed cause by petition, in which he alleged, among other things, that the road was not a road at all, much less a public one, and applied that a Jury might be appointed. The Assistant Commissioner, Mr. Pope, ignoring apparently the application for a Jury, proceeded to take evidence, and directed that the road should be opened.

The Deputy Commissioner, in referring the case, submitted that the procedure of the Assistant Commissioner was defective in law on (among others) the following ground :—

"According to the High Court Rulings cited under s. 133 of Prinsep's Edition of the Criminal Procedure Code [compare also the ruling in *Basaruddin Bhuia* v. *Bahar Ali* (1)], the Assistant Commissioner had no power to go further into the case once the plea that the road was not a public one was set up.

[138] No doubt the result, as stated by the Assistant Commissioner is practically to render this part of the Code a dead letter. But such is the interpretation of the law."

The Court (PIGOT and O'KINEALY, JJ.) delivered the following

JUDGMENT.

We think the Magistrate is right in the reference made ; and direct that the order be set aside.

We do so on the ground that, in this case a *bona fide* question seems to exist, as to whether there ever was a public road in the place in question. When such a question arises it is one for the Civil Courts, as the case of *Basaruddin Bhuia* v. *Bahar Ali* (1) decides.

The enquiry contemplated by those sections of the Criminal Procedure Code is an enquiry into the existence or non-existence of the obstruction complained of—not an enquiry into disputed questions of title.

Order set aside.

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12 C. 138.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

GONESH CHANDRA PAL (*Defendant No. 1*) *v.* SHODA NUND SURMA AND ANOTHER (*Plaintiffs*).* [9th June, 1885.]

Regulation XVII of 1806, *s.* 8—*Foreclosure, Right of—Demand from mortgagor.*

Under the terms of Regulation XVII of 1806, a demand from the mortgagor or his representative is a condition precedent to the right to take foreclosure proceedings.

THIS was a suit for possession of certain landed property on the allegation that it had been foreclosed under the provisions of Regulation XVII of 1806. The Munsif held that the foreclosure proceedings were void, because (1) there was no evidence given before the District Judge of

*Appeal from Appellate Decree, No. 733 of 1884, against the decree of Baboo Ram Coomar Pal, Rai Bahadur, Subordinate Judge of Sylhet, dated the 29th of January 1884, reversing the decree of Baboo Shyam Kishore Sen, Rai Bahadur, Munsif of that district, dated the 18th of August 1883.

(1) 11 C. 8.

service of notice on the mortgagor, and (2) there was no evidence of a demand having been made from the mortgagor prior to the institution of the foreclosure proceedings. [139] *Behari Lall* v. *Beni Lall* (1). He, however, treated the case as one for foreclosure and possession under the Transfer of Property Act, and allowed six months' time to the mortgagor to redeem the property.

The lower appellate Court, without going into the question of demand, held that the fact of the notice having been returned as duly served, was all that was necessary in the foreclosure proceedings, and inasmuch as it was sufficiently proved in the present suit that the notice had been "*bona fide* and legally served," the Subordinate Judge decreed the plaintiffs' claim.

The principal defendant appealed to the High Court.

Baboo *Joygobind Shome*, for the appellant.

Baboo *Turuk Nath Dutt*, for the respondent.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

Two points have been argued before us: *first*, it was contended that the Subordinate Judge was wrong in holding that the conditions of the law as to foreclosure had been sufficiently complied with so far as notice was concerned.

It has been found by both Courts that notice was issued and duly served. But it is said that that is not enough; that there ought to have been some inquiry before the Court, through which the foreclosure notice was served, as to the sufficiency of the service of notice, and some record of its finding; whereas no evidence of the service of notice was tendered before that Court, and the case was "struck off," as it is described. We think that the lower appellate Court was right in the view taken by it.

But another point was raised and that is this, that under the Regulation it is necessary, in order to lay a foundation for the foreclosure proceedings, that demand shall have been made from the mortgagor or his representative. The words of the Regulation are, "he shall (after demanding payment from the borrower or his representative) apply for that purpose."

It has been held by the Allahabad High Court—and we think correctly—in the case of *Behari Lall* v. *Beni Lall* (1) [140] that demand is a condition precedent to the right to take foreclosure proceedings.

In the present case the Munsif found that there was no demand. The lower appellate Court does not dissent from that finding and does not notice the point. But it is clear that no demand was alleged, nor was any issue raised about it. It is admitted that there is no evidence of any demand, and, as pointed out by the Munsif, it is practically impossible, having regard to the peculiar circumstances of the case, that there could have been any demand. And in the grounds of appeal to the lower appellate Court, not a trace of it is shown. We think it unnecessary, therefore, to send the matter back to the lower appellate Court to determine whether there was a demand. It is clear that no demand was made. On this ground, therefore, the decree of the lower appellate Court will be reversed and the plaintiffs' suit dismissed with costs in all the Courts.

Suit dismissed.

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(1) 3 A. 408.

1885
AUG. 11.

APPELLATE CIVIL.

12 C. 140= 10 Ind. Jur. 296.

12 C. 140=10 Ind. Jur. 296.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

BRINDABUN CHANDRA KURMOKAR (*Plaintiff*) *v.* CHUNDRA KURMOKAR, GUARDIAN OF THE MINOR JUGGAT LAKHI AND ANOTHER (*Defendants*).* [11th August, 1885.]

Hindu Law, Marriage—Restitution of conjugal rights—Consent of lawful guardian—Presumption of validity of marriage—Non-performance of ceremonies.

The ceremony of *Nandimukh* or *Bridhi-shradh* is not an essential of Hindu marriage, nor would the want of consent by the lawful guardian necessarily invalidate such marriage.

In a suit for restitution of conjugal rights, the fact of the celebration of marriage having been established, the presumption, in the absence of anything to the contrary, is that all the necessary ceremonies have been complied with.

[Appl., 14 M. 316 (321); R., 22 D. 509 (512); 22 B. 812 (817); 15 C.P.L.R. 46 (48); 9 M. 466 (470); 22 B. 509 (512); 118 P.L.R. 1903=49 P.R. 1903; D., 28 C. 37 (49).]

THIS was a suit by a Hindu for restitution of conjugal rights in respect of his minor wife. The mother of the girl, it would appear, had, on the death of her husband, gone away to live with [141] her brother, and soon after presented an application to the Judge of the district for the lawful custody of her infant daughter, and an injunction to restrain her husband's relations from disposing of the child in marriage. Pending the application the girl was made over to the mother, with an order that, until final disposal, the girl should not be bestowed in marriage. Eventually the girl was ordered to be restored to her paternal uncle, and while steps were being taken for the execution of the order, she was given away in marriage to the plaintiff by the mother. The paternal uncle, however, obtained the custody of the girl and hence the suit.

The Munsif held that the marriage was fraudulent, that the ceremony of *Nandimukh* had been omitted, and there was no evidence of the taking of the seven steps, which is the most material of all the nuptial rites, and consequently dismissed the suit.

The Subordinate Judge, on the other hand, found that the marriage was real, that the bride was given away by the mother, and nuptial rites performed by the priest, but adopting the view of the Munsif on the other grounds affirmed the decision.

The plaintiff appealed to the High Court.

Mr. *Roy* and Baboo *Durga Mohan Das*, for the appellant.

Baboo *Grish Chunder Chowdhry*, for the respondents.

The judgment of the Court (NORRIS and GHOSE, JJ.) was as follows:—

JUDGMENT.

This was a suit for restitution of conjugal rights, and the only question we have to determine is, whether the marriage set up by the plaintiff is valid according to Hindu law.

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* Appeal from Appellate Decree, No. 1181 of 1884, against the decree of Baboo Bein Madhub Mitter, First Subordinate Judge of Backergunge, dated the 14th of April 1884, affirming the decree of Baboo Chunder Nath Ghose, Third Munsif of Burrisal, dated the 27th of December 1882.

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The Court of first instance dismissed the suit, being of opinion that there was no real marriage, and that it was not valid according to Hindu law.

The Sub-Judge in appeal has confirmed the decree of the Munsif, though upon somewhat different grounds. He holds, as we understand his judgment, that the marriage was real, the gift of the bride was made by the mother, and the nuptial rites were recited by the priest, but he is, notwithstanding, of opinion that [142] the marriage is not valid; *first*, because the *Nundimukh*, or *Bridhi-shradh* was not performed at the house of the bride, and, *second*, because "there is no evidence on the record to prove that the bride was made to walk seven steps."

There was a further question raised in the lower Courts between the parties, which was whether the marriage was valid, the girl having been given away by her mother without the consent of her uncle. But the Courts held that, although the uncle was the preferential guardian of the minor for the purpose of marriage, yet the mere fact of his consent having not been obtained would not invalidate the marriage, if it was otherwise legally contracted and performed.

We may dispose of this part of the case by stating that we agree with the lower Courts in the view adopted by them. There can be no doubt that the uncle of the girl had a right in preference to the mother, under the Hindu laws, to give the girl away in marriage, but the mother, the natural guardian, having given her away, and the marriage, having not been procured by fraud or force, the doctrine of *factum valet* would apply, provided, of course, the marriage was performed with all the necessary ceremonies—a matter which we shall presently determine—*Modhoosoodun Mookerjee* v. *Jadub Chunder Bonerjee* (1).

We now come to deal with the two grounds which have been relied upon by the Sub-Judge in holding that the marriage was not valid.

As regards the first of those two grounds, we may say that, although the *Bridhi-shradh* is invariably performed on the occasion of a marriage and such other occasions of rejoicing, with a view that the departed ancestors might partake in *spirit* of the rejoicing and render the ceremony auspicious by their blessing, it (the *shradh*) is not regarded by the Hindu laws such an essential ceremony, that the non-performance of it renders a marriage invalid.

As regards the other ground, we are of opinion that it being found by the Sub-Judge that there was a marriage, that the mother made a gift of the bride, and that the nuptial rites were recited by the priest, he ought to have presumed, in the absence of anything to the contrary, that the marriage was good in law [143] and that all the necessary ceremonies were performed—*Inderan Valengy Pooly Taver* v. *Rama Sawmy Pandia Talaver* (2) and Taylor on Evidence, Vol. I, p. 176, fifth edition of 1868.

No doubt, as the lower appellate Court observes, the taking of seven steps by the bride is the most material of all the nuptial rites, for the marriage becomes complete and irrevocable on the completion of the seventh step. But we are of opinion that upon the facts found by the Sub-Judge, he ought to have presumed that the seven steps were taken and completed by the bride and that the marriage was a valid one.

(1) 3 W. R. 194.

(2) 13 M. I. A. 141 = 3 B.L.R. P.C. 1.

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We are, therefore, of opinion that there was a marriage as provided by Hindu law between the plaintiff and the minor Juggat Lakhi, and that the plaintiff is entitled to the restitution of conjugal rights as prayed for.

We accordingly direct that the decrees of both the lower Courts be set aside, and the appeal be decreed, but under the circumstances of the case we are of opinion that each party should bear his own costs in all the Courts.

Appeal allowed.

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12 C. 143 (P.C.)=12 I.A. 142=9 Ind. Jur. 403=4 Sar. P.C.J. 663=Rafique and Jackson's P.C. No. 92.

PRIVY COUNCIL.

PRESENT:

Sir B. Peacock, Sir R.P. Collier, Sir R. Couch, and Sir A. Hobhouse.
[*On appeal from the Court of the Judicial Commissioner of Oudh.*]

SRI KISHEN AND OTHERS (*Defendants*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*). [16th, 17th and 18th June, 1885.]

Guarantee, Contract of—Construction of contract guaranteeing conduct of person employed as agent of the guarantor—Liability for loss resulting from such agent's misconduct towards his employer.

Upon the construction of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor. *Held*, that the loss, to be recoverable in a suit against the guarantor, must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement. The khezanchi of a District Treasury guaranteed the Government against loss arising from the misconduct of the stamp darogah, [144] appointed as his agent. The latter became a party to frauds by putting off upon the public, forged stamps, in addition to the genuine ones issued from the Treasury, into which, however, all the proceeds of sales were paid. The darogah, on whose indent the stamps were issued, made the proceeds appear to correspond in his accounts with the value of the stamps issued to him; but under cover of the above payment, he misappropriated certain genuine stamps.

Held, that although the guarantor might not be responsible in respect of the forgery of the stamps, yet he was responsible on his agreement by reason of the misappropriation of the genuine stamps, and the false accounts rendered; and that losses, which in the first instance were caused by the forgery, were brought within the scope of the agreement by the fact of such misappropriation and false accounting.

APPEAL from a decree (2nd May 1883), of the Judicial Commissioner of Oudh, modifying a decree (29th May 1882) of the District Judge of Lucknow.

The suit out of which this appeal arose was brought by the Deputy Commissioner of Lucknow, representing the Government against Mohun Lal, Khejanchi of the Lucknow District Treasury, and father of the present appellants, who were represented by Sri Kishen, their next friend, Mohun Lal having died pending this appeal.

The liability of Thakur Baldeo Baksh, joined as a defendant, did not come into question in this appeal, which related to the effect of an agreement entered into by Mohun Lal on 11th June 1869, as follows:—

"Whereas I, Mohun Lal, have been appointed Sadar Treasurer in the district of Lucknow. I hereby acknowledge my responsibility for all

public moneys, notes, deposits, stamp paper, postage labels, and other property of Government, committed to my charge, or to that of agents appointed by me, or on my nomination, whether at the Sadar or Mofussil Offices of the district; and I hereby engage to keep safely, and to render true account of the same, in due conformity to official rules.

"I further engage to be responsible for my substitute, appointed with my consent, during my temporary absence at any time, should and loss or deficiency arise from non-production of accounts, or by misconduct or negligence of myself, of my temporary substitute, or of agents appointed by me, or on my nomination, above mentioned; and whether such loss [145] or deficiency relate to the public moneys, notes, deposits, stamp paper, postage labels or other property of Government, committed to the charge of myself, my substitute or agents, as aforesaid, I hold myself responsible to make good such loss or deficiency myself, or through my sureties, without delay or any pretext whatever."

In 1879, Hingun Lal, who had been appointed stamp darogah in the Lucknow Treasury on the nomination of Mohan Lal, was with others convicted by the Sessions Court of Lucknow under ss. 255, 258, and 109 of the Indian Penal Code. By a fraud, to which the stamp darogah and the licensed stamp vendors were parties, forged stamps, in addition to the genuine stamps issued from the Treasury, were supplied to the public. The proceeds were paid in full direct into the Treasury by the stamp vendors.

The mode in which the stamp darogah acquired wrongful gain was stated in the sixth paragraph of the plaint (referred to in their Lordships' judgment), as follows: Hingun Lal, having the means of ascertaining how much of this payment in full was the proceeds of forged stamps from the stock of genuine stamps passing through his hands, the issue being made upon his indent, misappropriated stamps of various values, but, in the aggregate, corresponding to the exact amount realized by the sale of forged stamps, disposing of them to his own profit. And the claim made was in the alternative, for an account of the sale proceeds of the stamps issued to the stamp darogah, or in default of that being rendered, for Rs. 18,100 due on the 11th June 1869, being the value of one hundred and forty Court-fee stamps of Rs. 100 each, and of general stamps to the value of Rs. 4,100, traced as misappropriated in the above manner.

At the hearing before the District Judge it appeared that the payments made directly to the Treasury by the stamp vendors concealed this misappropriation, and in some instances the darogah had exchanged forged stamps of higher values for a corresponding number of genuine stamps of lower values. Also, in his monthly accounts, he had made the payments into the Treasury by the stamp vendors exactly equal the value of the stamps issued by the Treasury to him, excepting those that remained unsold.

[146] The District Judge found that the accounts gave details of stamps of an aggregate value with that of those issued and that a sum equal to that aggregate value was paid in. This amount in reality represented a greater number of stamps than had actually been issued, but gave cover to the misappropriation of genuine stamps sufficient to make the amount even. A decree was made for Rs. 11,700.

On appeal the Judicial Commissioner maintained the above judgment, but on a cross-appeal, raised the amount to Rs. 18,100, showing that the evidence supported the claim to the full amount, for which he accordingly gave a decree.

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Mohan Lal appealed, and a cross-appeal, as to interest and costs, was filed.

For the appellant Mohan Lal, Mr. *J. G. W. Sykes* argued that the stamp darogah was not his agent within the meaning of the agreement of 11th June 1869, referring to changes in the establishment of the Treasury Office in 1873. Mohan Lal was only responsible for the value of stamps committed to the care of the stamp darogah, and this had been made good to the Treasury.

True it was that this had been done with money, the proceeds of counterfeit stamps; but the latter at the time when sold were the property of the stamp vendors; and the Treasury having accepted the payments as made, and the accounts rendered, the accounts, for all purposes regarding the liability of Mohun Lal, must be considered as closed. Nor could Mohun Lal be held responsible for the criminal act of the stamp darogah. Abetment of forgery was not within the agreement, nor connected with the business of the agency, assuming the agency to exist. It was a misconstruction of the agreement of the 11th June 1869 to regard it as an agreement by Mohun Lal to protect the Government against loss to the general stamp revenue. It was only an agreement to answer to the Lucknow Treasury Officers for the property committed to the charge of agents appointed by him. Again, no loss had been shown to have arisen from any non-production of accounts.

For the respondent, the Secretary of State for India in Council, Mr. *J. D. Mayne* and Mr. *C. C. Macrae* were called [147] upon in reference to the question whether the loss to the respondent had been rightly attributed to the misappropriation, and thus connected with the acts of the stamp darogah in the course of his employment. They argued that no true accounts had been rendered as they would have shown the misappropriation of the stamps. It could not be insisted that the Treasury should credit, against the debit of the value of genuine stamps misappropriated, sums received in consequence of the sale of counterfeit stamps. Such sums had been paid by the stamp vendors, but they could not have been considered assets as between the Government of India and the Lucknow Treasury, if accounts had been taken between them. No agent could take credit in accounts between him and his principal for proceeds obtained, as sum of this money had been obtained, by the stamp vendors. There was thus an actual loss, sufficiently connected with the acts of the stamp darogah, by the misappopriation and the false accounts. As to the latter, it could not be doubted that they were false within the meaning of the agreement, when it was considered what would have been the effect of a true account.

Reference was made to Story on Agency, paras. 231-234 ; and *The Guardians of Mansfield Union* v. *Wright* (1).

JUDGMENT.

Their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—The basis of this suit is an agreement which was entered into on the 11th June 1869 between Mohun Lal and the Government of India—the Secretary of State in Council represents the Government—on the occasion of Mohun Lal being appointed Sadar Treasurer in the district of Lucknow. The material words on which the claim

(1) L. R. 9 Q. B. D. 683.

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is founded are these: "Should any loss or deficiency arise from non-production of accounts, or by misconduct, or negligence of myself, of my temporary substitute, or of agents appointed by me, or on my nomination." Then:—"I hold myself responsible to make good such loss." What has happened is this. There have been extensive forgeries of stamps by subordinate officers of the Treasury of Lucknow. Against Mohun Lal himself there is no charge; he is perfectly innocent. But it is sought to make him liable by reason of the misconduct of his subordinates, and particularly [148] of Hingun Lal, who was first the accountant, and then the darogah of stamps in the Treasury of Lucknow. The course of proceeding by those who committed the forgeries seems to have been as follows: Hingun Lal received out of the Treasury stamps for sale, according as he indented upon the Treasury for them. He did not sell them himself, or ought not to have sold them himself, direct to the purchasers, but distributed them to certain persons who were licensed vendors of stamps, who dealt directly with the public, received the money from the public, and whose duty it was to pay that money over to the Treasury. In some cases it appears that the purchasers paid direct to the Treasury, but either from the purchasers or from the vendors the Treasury ought to get the whole value of the stamps issued by it to Hingun Lal. It seems that there were daily accounts stated between the Treasury and the vendors, but between the Treasury and Hingun Lal the accounts were stated monthly, and, of course, at the end of every month it was necessary to show that the money received by the Treasury was the exact value of the stamps which had been issued, excepting such as were not then sold and were accounted for as not sold. Hingun Lal colluded with the licensed vendors. They caused stamps to be forged either by making entirely new ones, or by altering some genuine stamps to larger amounts. The vendors sold those forged stamps, and they paid the whole of the proceeds into the Treasury. Then Hingun Lal, having got real stamps from the Treasury took for himself and his accomplices so many as were exactly equivalent to the payments made into the Treasury. He accounted every month, so adjusting his accounts as to make the proceeds paid into the Treasury for the forged stamps by the licensed vendors exactly square with the value of the stamps issued by the Treasury to him, excepting so far as the same remained unsold. This seems a very curious and circuitous method of committing a crime, and it is not clear to their Lordships why it was followed—probably because they are not familiar with the working of the Treasury; but the Courts below, who are familiar with these local matters, are of opinion that, without that circuitous process, it was impossible that the fraud could have remained for any length of time undetected. In point of fact it went on for several years, certainly [149] for five years, but the exact period of time is not material. Then it was discovered, and the forgers were convicted and punished.

Now a claim is brought against Mohun Lal which is stated in the sixth paragraph of the plaint, on the two grounds of the misappropriation of the stamps by Hingun Lal, and of the misconduct of Hingun Lal by falsifying his accounts and so causing loss to the Government. The plaint states that the stamps misappropriated by Hingun Lal amounted in value to Rs. 18,100 or more.

In order to recover upon that agreement the plaintiff must show that there is a loss or deficiency arising by the misconduct of an agent appointed by Mohun Lal, or on his nomination.

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Upon that issue several defences are offered. First it is said that Hingun Lal was not the agent of Mohun Lal. Hingun Lal was employed in the Treasury from the year 1859 onwards, and it is admitted on the part of the appellant that up to the year 1873 Hingun Lal was the agent of Mohun Lal: he was appointed by him, was paid by him and, it may be assumed, was dismissible by him. But in the year 1873 the Government appointed Hingun Lal to a definite office, that of accountant in the Treasury, and instead of Mohun Lal paying him, thenceforward the Government paid him. It is contended that the change so altered Hingun Lal's position, that it made him the agent of the Government instead of the agent of Mohun Lal. The question is not of agency generally, but whether Hingun Lal was an agent within the purview of this agreement? Both Courts below have found that he was, and as far as regards the issue whether Mohun Lal nominated Hingun Lal, their finding ought to be taken as conclusive under the usual rule, that being a pure matter of fact. Whether Hingun Lal was agent within the purview of this agreement is a matter of law. Their Lordships are of opinion that the Courts below have come to a right conclusion upon the evidence, and that, although it is not proved beyond possibility of doubt, it is sufficiently proved, in the first place, that Mohun Lal nominated him, and in the second place, that the change which took place was not such as practically to alter the relations between Mohun Lal and Hingun Lal, considering them as principal and [150] subordinate. In point of fact there is reason to believe from Mohun Lal's own letter which he wrote on the occasion that no such alteration could have been in his contemplation. It was he who applied for the change, and he applied for it on the ground that his work had increased, and his security was onerous to him, and he begged that he might be relieved from the payment of the staff, including Hingun Lal, and also that his salary might be increased so as, he says, to be up to the standard of the security filed by him. The salary was increased, and, as he made no further application, we may fairly assume that he considered it adequate to the security that he gave.

Taking Hingun Lal to be the agent of Mohun Lal within this agreement, has there been misconduct on his part within the agreement? Of course there has been the very grossest and most glaring misconduct, because he has committed forgery, but the suit is not founded on the forgery, and probably no suit could be founded on the forgery, because the misconduct contemplated by this agreement must be some misconduct connected with the business of the agency, and forgery is in no way connected with the business of the agency. For instance, if Hingun Lal, after receiving the stamps issued out of the Treasury to him, had absconded with them that afternoon, that would have been misconduct chiefly connected with his business as agent of Mohun Lal, and such a case would have fallen within the agreement.

There is no doubt that on this part of the case a good deal of difficulty has been introduced from the circumstance that what may be called the root of the misconduct was the forgery, which would not directly afford ground for suit. But in two respects there is misconduct which is directly connected with the agency of Hingun Lal, that is to say, the misappropriation of the stamps which he represented to have been sold, and the false accounts which he rendered month by month, and in which he represented those stamps to have been sold by the vendors.

Then comes the question whether, there being misconduct within the meaning of the agreement, the loss or deficiency has arisen in

consequence of that misconduct? As respects the misappropriation, there is, no doubt, the difficulty that has just been mentioned of the forgery being calculated to cause loss in [151] the first instance, and of its being necessary to disentangle the two things. It seems to have been very much argued in the Court below, and the point has been mooted here, not by the appellant's counsel, but by this Board, and very carefully and ably argued at the Bar by the respondent's counsel, whether it was possible to attribute the loss to misappropriation of the stamps, and after much doubt their Lordships are of opinion that the Courts below have rightly connected the loss with the misappropriation; that, supposing the accounts to be now taken between the Government on the one side, and the Treasurer of Lucknow on the other side, the Treasurer cannot claim to be allowed in account those moneys which were produced by the forged stamps, and which were used by Hingun Lal to cover his conversion to his own use of the genuine stamps that were issued to him.

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The case on that point is strengthened very much by the false accounts. Hingun Lal represented in his monthly accounts that the whole of the genuine stamps which he represented as sold, had been sold by the licensed vendors. In point of fact either they never were sold by the licensed vendors, or they had not at that time been sold, and if his accounts had told the truth upon those points, then the forgery must have been discovered at once, and it is impossible that during series of years the Government could have lost the money that it did lose by the forgeries.

That being so, the only other question is as to the amount to be recovered, and on that point there is a difference between the two Courts. With respect to the sum of Rs. 11,700 the two Courts agree. But there is a further sum, making in the whole Rs. 18,100, the amount claimed, which the Judicial Commissioner has allowed, so far varying the decree of the Court below.

It is not necessary now to go into the evidence upon that point, because it is clearly shown in the judgment of the Judicial Commissioner that the reason for the District Judge giving judgment only for the lesser amount was that he made a slip in construing the evidence. He had thought that there was a contradiction in the evidence, because one passage of it shows the large amount of stamps allowed by the Judicial Commissioner to have been sold, while in another a lesser amount is stated. There is, however, no contradiction, because the two [152] statements refer to two different periods of time, and the claim made in this suit embraces the longer period. Therefore the Judicial Commissioner was perfectly right in allowing the larger amount.

That being so, their Lordships are of opinion that the appeal of Mohun Lal should be dismissed with costs.

With respect to the cross appeal, their Lordships think that the decree ought not to be varied in respect of the costs before the Judicial Commissioner, and that the cross appeal should be dismissed with costs.

Their Lordships will humbly advise Her Majesty in accordance with that opinion.

Appeals dismissed.

Solicitor for the appellants: Mr. *William Buttle.*

Solicitor for the respondent: Mr. *H. Treasure.*

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APPEL-
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CIVIL.

12 C. 152.

12 C. 152.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

NARAIN PATTOR (*Plaintiff*) *v.* AUKHOY NARAIN AND OTHERS (*Defendants*).* [5th August, 1885.]

Specific performance—Contract—Agreement to sell land by guardian of minor contingent upon the permission of the Court—Specific Relief Act (*I of* 1877), *s.* 26.

A certificated guardian of certain minors entered into an agreement with the plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary, being obtained to the transaction, and a portion of the purchase-money was paid by the plaintiff. The Court sanctioned the sale, but at a higher price than that agreed on between the plaintiff and the guardian, and the latter sold to a third party. The plaintiff thereupon sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement.

Held, that the contract was not one which could be specifically enforced, and that s. 26 of the Specific Relief Act did not apply. The contract as it stood was never a complete contract at any time, as it was contingent upon the [153] permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties.

THIS was a suit to enforce specific performance of a contract to sell land made by a certificated guardian of two minors, the contract being made contingent upon the leave of the Court being obtained.

The facts of the case are sufficiently stated in the judgment of the High Court.

Baboo *Troyluckho Nath Mitter*, for the appellant.

Mr. *C. Gregory* and Baboo *Jadub Chunder Seal*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

This was a suit to enforce the specific performance of a contract to sell certain property to the plaintiff for the sum of Rs. 763. It was alleged that Rs. 600 out of the sum agreed upon as the price had been paid in advance, and the plaint contained an alternative prayer that should the Court be of opinion that the contract could not be enforced, a decree may be made for a refund of the Rs. 600 with interest. The defendants in the suit were two minors represented by their mother and guardian. The mother of the minors was the person alleged to have made the contract with the plaintiff, and to be acting as guardian of the minor sons. She had been appointed guardian under Act XL of 1858, and had therefore no power to sell the property of the minors without the consent of the Court. This fact was recognized in the agreement, and the contract to sell was subject to the consent of the Court being obtained. The terms of the agreement were reduced to writing in a document called a *shuttanamah*. An application was made to the Court for sanction. In the meantime the plaintiff sought to have the *shuttanamah* registered. On this the mother of the minors denied execution, and

*Appeal from Appellate Decree, No. 377 of 1885, against the decree of H. Gillon, Esq., Officiating District Judge of Midnapore, dated the 29th January 1885, affirming the decree of Baboo Nilalohit Mukerji, Additional Munsif of Nemal, dated the 20th of May 1884.

the Sub-Registrar was compelled to refuse registration. The District Registrar, however, on appeal ordered the document to be registered. In the meantime, the Court having sanctioned the sale of the property in question, not for Rs. 763 but for Rs. 800, the mother of the minors sold to the defendant No. 2. The plaintiff [154] has sued both parties, that is, the minors represented by their mother and the purchaser, for the specific performance of the contract to sell the property to him at the price originally fixed.

The first Court decided the case against the plaintiff upon the merits.

The lower appellate Court was of opinion that specific performance of the *shuttanamah* could not be had. It found that the defendant had no power to carry out the contract in its original state; that the Court sanctioned the sale only at a price higher than that agreed to by the plaintiff; and that the defendant was not competent to sell the property to him at a price less than that fixed by the Court. The Judge further considered that the specific performance sought by the plaintiff was barred by certain clauses of the Specific Relief Act, namely clause (*e*) of s. 21, and clause (*b*) of s. 27. The plaintiff appears to have suggested that s. 26 of the Act, would permit the Court to give a decree for the performance of the contract with a variation, that is, as to the price to be paid by the plaintiff. The lower appellate Court held that s. 26 did not apply to the case. I ought to say here that as to the alternative relief prayed for in the plaint, namely as to the refund of the consideration money advanced by the plaintiff, the lower appellate Court states that the pleader for the plaintiff before him admitted that in this suit he could not expect to get that relief, inasmuch as the defendants in this suit were the minors and the purchasers, whereas the refund of the money must be sought against the mother personally, not in her capacity as guardian, and as against the minors only in respect of such part of the sum as may have been used for their benefit.

The appeal was, therefore, dismissed by the lower appellate Court.

In this second appeal the vakeel for the appellant has contended that the Judge was wrong in law in holding that s. 26 of the Specific Relief Act did not apply to the case, and that the plaintiff was barred by clause (*e*) of s. 21, and clause (*b*) of s. 27. It has also been contended that the Court should have decided the matter as to the alternative relief sought in the plaint.

It is not necessary for us to express any opinion as to whether the suit was barred by clause (*e*) of s. 21 or clause (*b*) of s. 27 [155] of the Specific Relief Act, for in our opinion the Judge was quite right in saying that the contract as it stood could not be enforced, and that s. 26 had no application to the case. The contract, such as it was, was not a complete contract at any time. It was contingent upon the permission of the Court. The Court's permission did not extend to the whole contract as set out in the *shuttanamah*. The defendants, therefore, could not be compelled to carry out the terms of the original agreement, nor could they have insisted upon the plaintiff's carrying out the terms sanctioned by the Court. Section 26, upon which the vakeel for the appellant relies, sets out cases in which contracts cannot be specifically enforced except with a variation; and there are five particular cases set out in which a contract may be enforced subject to a variation, such variation being in favour of the defendant, and the section in our opinion assumes that the parties or vakeels representing them are agreed as to the existence

1885 AUG. 5. — APPELLATE CIVIL. — 12 C. 152.

of the contract but not agreed as to specific terms. The section provides that, when fruad or mistake of fact, or misrepresentation has induced the defendant to sign an agreement, that agreement can only be enforced on the terms which the defendant intended to agree to. There is no provision of law of which we are aware which entitles the plaintiff to claim a variation in the terms of his contract, when he finds that the contract itself cannot be carried out. In the present case the plaintiff by his plaint sought to enforce the original contract without any variation. It seems to us, therefore, that the Judge was right in holding that the agreement in the *shuttanamah* could not be enforced as it stood, and that s. 26 would not entitle the plaintiff to enforce it with a variation.

As regards the alternative prayer for a refund of the Rs. 600 advanced by the plaintiff, we think that upon the fact stated by the Judge that the plaintiff's pleader did not press for a decision on that question in this case, it cannot be said in second appeal that the lower appellate Court was wrong in law in not coming to a decision upon it. Strictly speaking the Judge was perfectly correct in law in not going into that point in the present suit framed as it was.

The appeal is dismissed with costs.

Appeal dismissed.

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12 C. 156.

[156] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

NILMONY MOOKHOPADHYA (*one of the Defendants*) *v.* AIMUNISSA BIBEE AND OTHERS (*Plaintiff*).* [13th August, 1885.]

Evidence Act (*I of* 1872), *s.* 44—*Fraud and Collusion—Decree obtained by Fraud and Collusion between mortgagor and mortgagee not binding on property in hands of purchaser, though purchase be subsequent to decree.*

A mortgaged certain property to *B*, who instituted a suit on his mortgage and obtained a decree therein. Subsequent to such decree *A* sold the property to a third party, *C*. *B* having attempted to execute his decree against the property in the hands of *C*, the latter instituted a suit against *A* and *B*, for the purpose of having it declared that the property was not liable to satisfy the decree, because the mortgage transaction was a fraudulent one and the decree had been obtained by fraud and collusion. In such suit *B* contended that *C* having purchased subsequent to the decree was absolutely bound by it.

Held, that having regard to the terms of s. 44 of the Evidence Act, it was prefectly open to *C* to prove that the decree had been obtained by fraud and collusion.

Bhowabul Singh v. *Rajendra Protab Sahoy* (1), distinguished.

[R., 27 C. 11 (24)=3 C.W.N. 660; 8 Ind. Cas. 614.]

THE facts of this case were as follows: One Bhagiruth Barik died in the year 1280 (1873-74), leaving a widow, Golap Sundari, and two nephews, Motilal and Krishnadun (the second defendant in this suit). On the 28th Assin 1281 (13th October 1874) an agreement was come to between these parties, by which Golap Sundari made over her husband's estate to the nephews. Subsequently litigation ensued between them, and Golap Sundari having obtained a decree took out execution and attached certain

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* Appeal from Appellate Decree No. 2906 of 1883, against the decree of G.G. Day, Esq., Officiating Judge of Nuddea, dated the 17th September 1883, reversing the decree of Baboo Umakant Chatterjee, Second Munsif of Krishnangore, dated the 17th of July 1882.

(1) 13 W. R. 157=5 B. L. R. 321.

properties, including the property now in suit, in the month of December 1876; that attachment was, however, subsequently withdrawn. On the 17th Falgun 1283 (27th February 1877) Krishnadun executed a mortgage in favour of Nilmony Mookerjee, defendant No. 1 in this suit, purporting to mortgage some eighteen properties, including that now in suit, for the sum [157] of Rs. 484, which was alleged to be due to the said Nilmony Mookerjee, the mortgage bond carrying interest at thirty per cent. In Shrabun 1284 (July-August 1877) Krishnadun executed another mortgage for Rs. 1,900, in favour of one Modusudun Nath, which contained a recital that the properties mortgaged had not been previously encumbered in any way. The Rs. 1,900 so obtained were applied to paying off Golap Sundari's decree. About the same time, namely in Shrabun 1284 (July-August 1877), a partition was come to between Krishnadun and his brother Motilal, and the property in suit along with others fell to the share of Krishnadun.

Subsequently on the 2nd September 1878, Krishnadun, in order to pay off the mortgage money due to Modusudun Nath, sold certain of the properties so allotted to him, and amongst others sold the property now in suit to Ashruf Sheik, the predecessor of the plaintiffs, for the sum of Rs. 725.

Previous to the sale to Ashruf Sheik, Nilmony had obtained a decree on the 16th April 1878 against Krishnadun on his mortgage dated the 17th Falgun 1283 (27th February 1877) in a suit instituted in 1878, and in execution of that decree he attached the property purchased by Ashruf Sheik. The plaintiffs preferred a claim in these execution proceedings, but were unsuccessful, and they accordingly instituted this suit seeking for a declaration that they were entitled to possession of the property in suit; that the mortgage in favour of Nilmony and the decree obtained thereon were fraudulent transactions; and that it might be declared that the property purchased by Ashruf Sheik was not liable to satisfy that decree, or at all events that they were entitled to have the amount of that decree *rateably* distributed over all the properties subject to the mortgage.

Nilmony alone contested the suit, and claimed that his mortgage took priority, and that he was entitled to execute his decree in the way he sought. He maintained that the transaction was not a fraudulent one.

The first Court held that, though there were a number of circumstances tending to throw suspicion on the mortgage bond of 17th Falgun 1283 (27th February 1877), the onus of proving fraud lay on the plaintiffs, and as they had failed to discharge [158] that onus, they were not entitled to the decree they sought, and that they were certainly not entitled to have the amount due on the mortgage *rateably* distributed over all the properties comprised in it. Holding, therefore, that all they were entitled to was to redeem the mortgage, that Court dismissed the suit with costs.

The lower appellate Court reversed that decision, holding that the plaintiffs had established the fraudulent character of the transaction, and that the decree obtained by Nilmony was obtained fraudulently and collusively. The Court upheld the decision of the lower Court upon the question of *rateable* distribution of the mortgage debt. But upon its finding on the first issue that question became immaterial.

Nilmony now specially appealed to the High Court against that decision, and the only ground upon which it was sought at the hearing of the

1885 AUG. 13. — APPELLATE CIVIL. — 12 C. 156.

appeal to reverse the decree of lower Court, was that as the plaintiffs' predecessor had bought the mortgaged property subsequent to the date of the mortgage decree, they were not entitled to question the validity or *bona fides* of that decree, but were absolutely bound by it.

Baboo *Rash Behary Ghose*, for the appellant.

Baboo *Biprodas Mookerjee*, for the respondents.

The judgment of the High Court (MITTER and NORRIS, JJ.) was as follows :—

JUDGMENT.

It appears that the appellant-defendant No. 1 on the 16th of April 1878 obtained a decree against the defendant No. 2 Krishna Mohun Barik declaring his mortgage lien over the property in dispute, as well as other properties not in suit based on a bond, dated 17th Falgun 1283, alleged to have been executed in his favour by the defendant No. 2. On the 18th Bahadro 1285, corresponding with the 2nd September 1878, the defendant No. 2 sold the property in dispute to one Ashruf Sheik, ancestor of the plaintiffs-respondents before us.

In execution of the decree obtained by the appellant against the defendant No. 2, the property in dispute was attached. The plaintiffs-respondents thereupon intervened and claimed the release of the attached property. Their claim was rejected.

[159] The present suit was brought to set aside the order rejecting their claim, and it is mainly based upon the ground that the bond dated 17th Falgun 1283, and the decree thereupon, dated 16th April 1878, were fraudulent transactions resorted to by the defendant No. 2, in collusion with the defendant No. 1, in order to defeat his creditors.

The Court of first instance dismissed the plaintiffs' suit, but on appeal the District Judge, reversing the decree of the Munsif, has awarded a decree in favour of the plaintiffs, finding the facts stated above which form the basis of the suit as established upon the evidence.

The only question that has been argued before us in this second appeal is, that taken in the third ground of appeal, which is to the following effect : "For that the Court below ought to have held that the plaintiffs having bought the property subsequently to the mortgage-decree was not entitled to question the validity or *bona fides* of the said decree which was absolutely binding on the plaintiffs." In support of this contention the learned vakeel for the appellant relied upon the case of *Bhowabul Singh* v. *Rajendra Protab Sahoy* (1). We are of opinion that this contention is not sound. It is quite clear that, if defendant No. 2 could be permitted to establish by evidence that the bond and the decree in favour of the appellant were fraudulent, the plaintiffs-respondents are certainly entitled to do so.

Now s. 44 of the Evidence Act says : "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under s. 40, 41 or 42, and which has been proved by the adverse party was delivered by a Court not competent to deliver it or was obtained by fraud or collusion."

The contention of the appellants is, therefore, opposed to the express provision of s. 44 of the Evidence Act ; neither does the case cited before us support it. The facts of that case are briefly these :—The plaintiff

(1) 13 W.R. 157=5 B.L.R. 321.

Rajendra Protab Sahoy was a defendant in a suit brought against himself and three other persons. It was alleged by him that the plaintiffs sold their rights to the property in dispute to him in the name of one Bhowabul Singh, who was substituted as plaintiff. Ultimately a [160] decree was passed in favour of Bhowabul Singh against Rajendra Protab Sahoy and the other defendants in the suit. It was further alleged that, since his purchase of the property in dispute, he Rajendra Protab Sahoy remained in possession of it, although the name of his benamidar, Bhowabul Singh, was used.

The immediate cause which led to the institution of the suit was, as alleged by the plaintiff, that Bhowabul Singh, in collusion with one Chutterbhooj, caused a decree to be passed against himself in favour of Chutterbhooj, and in execution of that decree caused the property in dispute to be attached; that the plaintiff Rajendra Protab Sahoy intervened and claimed a release of it on the ground that it belonged to himself and not to Bhowabul Singh. His intervention being unsuccessful, he was compelled to bring that suit for a declaration of his right.

A Division Bench of this Court held that the decree which was obtained by Bhowabul Singh against the plaintiff Rajendra Protab Sahoy was conclusive evidence of the title of the former against the latter, and any title, supposed to have been vested in the plaintiff prior to that decree, could not be set up in support of the plaintiff's claim. The decree in question was not impeached as invalid on the ground of collusion or fraud, but on the ground that it was a sham proceeding, in which the nominal plaintiff was really another name for the real defendant. The Court observed as follows: "The plaintiff, on the other hand, denies that except under ss. 259 and 260 of the Code of Civil Procedure there is any restriction whatever on the rights of parties in this country to show the real nature of a *benami* transaction, and he contends that the rule as to the conclusiveness of decrees must be subject to the right of any of the parties to show for whose benefit the suit was carried on.

"It is on this point that our judgment chiefly turns. I think that there is no such general exception as is contended for by the plaintiff to the rule that a decree of Court is final and conclusive between the parties. It seems to me that it would lead to endless confusion if the defendant on the record could show that, so far from being really a defendant, he was the plaintiff; but so far from judgment having been recovered against him, he had really recovered judgment. Not a single instance has been [161] adduced before us of the benami system having been carried so far, and though it may be too late for this Court to abolish that pernicious system to the extent to which it is established, it is highly desirable not to introduce it where it is as yet unknown."

"It is hardly necessary to observe that the case before us stands quite apart from those cases where a third person who is not on the record at all, comes in to show that a suit was carried on really for his benefit. It also stands apart from those cases where a person on the record seeks to show that a suit was carried on really against a person who was not a party to the suit. This, though a highly inconvenient practice, has been very frequently allowed, and to such cases the present decision does not apply."

"Nor need we consider in this case the reasons why a person, against whom an adverse decree has been obtained, is allowed in some

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cases to show cause why the decree should not be executed. No such question arises here."

The last paragraph quoted above shows that the case cited does not decide, one way or the other, the question that is now before us.

We are of opinion that the ground taken before us is not valid. The appeal will be dismissed with costs.

Appeal dismissed.

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12 C. 161.

APPELLATE CIVIL.

Before Mr. Justic Mitter and Mr. Justice Macpherson.

HURRY CHARAN BOSE (*Decree-holder*) *v.* SUBAYDAR SHEIKH (*Judgment-debtor*).* [30th July, 1885.]

Execution of decree—Limitation—Application for execution of decree for arrears of rent —Proper application—Civil Procedure Code (*Act XIV of* 1882), ss. 235, 237, 245

Within the period of three years from the date of a decree for arrears of rent under Rs. 500, the judgment-creditor applied for execution of his decree without giving a list of the properties which he sought to attach, but stating that a list was filed with a previous application, and praying that that application might be put up with the present one. Subsequently upon an order made by the Court a fresh list was filed after the period of a year had elapsed.

[162] *Held*, that though the application was not in strict accordance with the provisions of s. 237 of the Civil Procedure Code, it was still an application under s. 235, and that execution of the decree was not barred, but that it must be limited to the property specified in the previous application.

Syud Mahomed v. *Syub Abedoollah* (1) followed.

[R., 17 C. 631 (638) (F.B.) ; D., 14 C. 124 (127).]

THIS appeal arose out of an application to execute a decree, dated the 14th June 1881, for arrears of rent below Rs. 500. The application was filed on the 14th June 1884, and it contained the following statement at the foot : " This decree having been executed in No. 30 of 1884, I was substituted for the decree-holder, and after notice to the judgment-debtor the execution proceedings were struck off. I pray that that record may be placed with this application, and that the immoveable property stated in that record may be attached and sold and my money may be thus realized. So much as may not be so realized by such sale, then Subaydar should be arrested and the moveables in his possession should be attached and sold." With that application no list of the properties sought to be attached was given.

Upon that petition an order was passed by the Munsif on the 18th June as follows: "The decree-holder to show good and sufficient grounds within a week for restoration of case to the file;" and on the 28th June the decree-holder filed an affidavit in support of his application. On the 12th July an order was passed that the application to execute be registered, and that the decree-holder should file a list of property before the 26th July. On the 28th July, the 26th being a holiday, the decree-holder again applied to the Munsif, and he was allowed time

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* Appeal from Appellate Order No. 58 of 1885, against the decree of T. M. Kirkwood, Esq., Judge of Zillah Moorshedabad, dated the 16th of December 1884, reversing the order of Baboo Triguna Prasanna Bose, Munsif of Lallbagh, dated the 5th of September 1884.

(1) 12 C.L.R. 279.

till the 12th August within which to file a list of the property he sought to have attached. On the 9th the list was filed, and on the 16th the objections against execution being allowed were argued, the judgment-debtor contending that the decree was barred by limitation.

1885 JULY 30. — APPELLATE CIVIL. — 12 C. 161.

The Munsif held that the filing of the list on the 9th of August was nothing more than a step taken in furtherance of the application for execution which was within time. That Court relied on the case of *Golokemony Dabia* v. *Mohesh* [163] *Chunder Mosa* (1) and distinguished the case of *Sreenath Goohoo* v. *Yusoof Khan* (2), which had been cited by the judgment-debtor in support of his contention that the decree was barred. The Munsif accordingly overruled the objections and granted the application. Upon appeal that order was reversed by the District Judge, who held that the application of the 14th June 1884 was radically defective and informal, and could not therefore be treated as an application at all within the meaning of s. 237 of the Civil Procedure Code, and that it did not become a proper application till the 9th August when it was undoubtedly barred. The District Judge considered that the Court had no power to allow amendment of a radically imperfect application unless such amendment was made within the period allowed by limitation. He accordingly reversed the Munsif's order and disallowed the judgment-creditor's application.

The latter now appealed to the High Court.

Baboo *Kashi Kant Sein*, for the appellant.

Baboo *Kally Kissen Sein*, for the respondent.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

The question which we have to determine in this case is whether the decree dated the 14th June 1881 is barred by limitation. It is a decree passed under the Rent Act, and the amount decreed is less than Rs. 500, and therefore the special limitation laid down under s. 58 of that Act will apply to this case. Now the provisions of the corresponding section of Act X of 1859 were considered in a Full Bench decision in the case of *Rhidoy Krishna Ghose* v. *Kailas Chandra Bose* (3). According to that decision the decree-holder would be in time if he makes the application for the issue of process of execution within three years from the date of the decree. In this case on the 14th June 1884, that is within three years from the date of the decree, an application for execution was filed. At foot of that application it was stated that this decree having been executed in No. 30 of 1884, the petitioner was substituted for the original [164] decree-holder and after notice to the judgment-debtors the execution proceedings were struck off. Appellant prayed that that record might be placed with this application, and that the immoveable property stated in that record might be attached and sold, and the money due under the decree realized.

For the realization of so much of the decree as was not satisfied he prayed that the judgment-debtor might be arrested, and the moveable property in his possession attached and sold.

This application was ordered to be registered on the 12th July following, but it appearing that there was no proper specification at foot of the application of the properties to be attached, as required by s. 237, the Munsif allowed this defect to be remedied by an amendment which

(1) 3 C. 547. (2) 7 C. 556. (3) 4 B. L. R. F. B. 82.

1885 JULY 30. — APPELLATE CIVIL. — 12 C. 161.

was made on the 9th August following, and a list containing a specification of the properties sought to be attached having been filed before the Munsif, he directed that the amendment be made, but the judgment-debtor contended before the Munsif that at the time when the amendment was ordered to be made the decree was barred by limitation.

The Munsif overruled this objection.

On appeal the District Judge has reversed the judgment of the Munsif. He is of opinion that the original petition of the 14th June 1884 not being in accordance with the provisions of s. 237 was no application at all, and that the Court has no power to allow the amendment on the 9th of August, as the decree had been barred by limitation before that date. Upon these two grounds the District Judge has reversed the Munsif's decision.

We are of opinion that upon both these points the decision of the District Judge is not correct. The petition of the 14th June, no doubt, was not in strict accordance with the provisions of s. 237. It did not give a sufficient description of the property of the judgment-debtor as required by s. 237 ; but at the same time it did state that a specification of the property sought to be attached existed in the previous execution case No. 30 of 1884. No doubt that was a defect, because it was not a strict compliance with the provisions of s. 237 ; but merely because there was this defect it does not follow that it was not an application at all under s. 235. In this view we are supported by the [165] decision of this Court in *Syud Mahomed* v. *Syud Abedollah*(1). That decision also is an authority for the proposition that the Court has power to allow an amendment under s. 245, although it may be that at the time when the amendment is allowed the decree is barred by limitation.

Upon both these points the decision cited above is an authority in favour of the contention of the appellant. We, therefore, set aside the judgment of the lower appellate Court and restore that of the Munsif with costs.

When the case goes back the Munsif will take care that execution does not issue against any property not mentioned in the petition of the previous execution case No. 30 of 1884.

Appeal allowed.

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12 C. 165.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

KISHORI MOHUN GHOSE (*Plaintiff*) *v.* MONI MOHUN GHOSE AND OTHERS (*Defendants*).* [12th August, 1885.]

Hindu Law—Partition by sons—Widow's Share—Will, Construction of.

On partition of the joint family property by the sons after their father's death, the widow is entitled to get a share equal to that of each of the sons, and, if she has received any property either by gift or legacy from the father, she is

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* Appeal from Appellate Decree No. 1405 of 1884, against the decree of J. Whitmore, Esq., Judge of Zilla 24-Pergunnahs, dated the 5th of May 1884, affirming the decree of Baboo Nuffer Chandra Bhatta, First Subordinate Judge of that district, dated the 30th of January, 1883.

(1) 12 C. L. R. 279.

1885 AUG. 12. APPELLATE CIVIL. 12 C. 165.

entitled to so much only as with what she has already received would make her share equal to that of each of the sons.

Jodoonath Dey Sircar v. *Brojonath Dey Sircar* (1) followed.

Where a Hindu, by his will, after bequeathing a legacy to his widow of Rs. 1,000 and appointing her executrix along with other executors, directed that his executors should divide the estate amongst his sons in accordance with the *shastras* after his youngest son had attained majority :

Held, that such direction did not amount to an absolute bequest to his sons so as to exclude the widow from being entitled to a share upon a partition between the sons.

[R., 9 C. L.J. 216=13 C.W.N. 388=1 Ind. Cas. 94; 36 C. 75=12 C.W.N. 1002=1 Ind. Cas. 523.]

ONE Ramdhon Ghose died on the 7th June 1857 leaving him surviving four sons, namely Kishory Mohun Ghose the plaintiff, and Khetra Mohun Ghose, Moni Mohun Ghose and Romoni [166] Mohun Ghose, three of the defendants, and a widow named Prosunno Moyee Dossee, also one of the defendants, and he left a will whereof he appointed his widow and two other persons respectively executrix and executors. By his will he gave the sum of Rs. 1,000 as a legacy to his widow, and he directed that his estate was to be managed by his executors and executrix until his youngest son attained his majority. The present suit was brought by the plaintiff against his three brothers, and his mother, for an account of the estate of his father, and for a direction that two of his brothers who had been managing the estate should be made to account for their dealings therewith, for a declaration that he and his three brothers were entitled to the whole estate in equal shares, and for partition and a receiver.

Both the lower Courts held that the plaintiff was not entitled to the account he sought to obtain, and the only questions argued in the present appeal were, whether by the terms of the will the testator did or did not bequeath his estate to his four sons, and if not, whether his widow was not excluded from getting any share on the partition by reason of the legacy and the fact that during his lifetime Ramdhon Ghose had made her a gift of a certain taluk, No. 1520, as *stridhan*.

The clause in the will under which the plaintiff claimed that he and his three brothers were absolutely entitled to the estate to the exclusion of the widow, provided that after the testator's death, and after his youngest son had attained the age of majority, the executors should divide the estate amongst his sons in accordance with the *shastras* ; and the plaintiff contended that, coupled with the fact that the testator had already given his widow the legacy of Rs. 1,000, this amounted to an absolute gift to the sons.

Both the lower Courts held that the taluk No. 1520 had been given to the widow as *stridhan* by the testator during his lifetime, and gave the plaintiff a decree for partition, with a declaration that the widow was entitled to a fifth share in the estate, including the Rs. 1,000, and the taluk No. 1520, and that the plaintiff was entitled to a one-fourth share of what was left.

The plaintiff preferred a special appeal to the High Court on, amongst others, the grounds indicated above.

Mr. *Amir Ali* and Baboo *Nilmadhub Bose*, for the appellant.

[167] Baboo *Gurudas Banerjee*, and Baboo *Jogesh Chunder Dey*, for the respondents.

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(1) 12 B. L. R. 385.

1885 AUG. 12. — APPELLATE CIVIL. — 12 C. 165.

The nature of the arguments sufficiently appear from the judgment of the High Court (NORRIS and GHOSE, JJ.) which was as follows:—

JUDGMENT.

This was a suit for an account, discovery and partition.

The plaintiff is one of the sons of one Ramdhon Ghose, who died leaving him surviving, besides the plaintiff, three other sons and a widow, and the suit is against those three sons, and the widow, for the relief mentioned above, in respect to the estate left by the said Ramdhon Ghose.

As regards the first two of these reliefs both the Courts below have concurrently found that the plaintiff is not entitled to them, and we are of opinion that there are no sufficient grounds in this appeal for interfering with their decision in those respects.

As regards the claim for partition, both the lower Courts have held that the property should be divided into five equal parts or shares, of which the widow and the four sons were each to get one, the widow getting hers in lieu of maintenance.

The learned Counsel for the appellant has argued that, as it has been found by the Judge of the lower Court that Ramdhon Ghose had, before his death, made a gift of taluk No. 1520 in favour of his wife as *stridhan*, and had moreover, by his will, given her a legacy of Rs. 1,000, she was not entitled under the Hindu law to get any share upon a partition amongst the sons.

The learned Counsel further argued that Ramdhon Ghose in his will, by implication excluded the widow from any share on a partition; and that assuming that she was entitled to such a share, the decree of the lower Court was not correct because she gave no evidence showing what was the real value of the taluk No. 1520, which had been given to her as *stridhan*.

The first contention of the learned Counsel is not supported by any authority; and we are of opinion that under the Hindu law, upon a partition taking place amongst the sons of a deceased person, his widow is entitled to get a share equal to that of each of the sons; and that if she had received any property by gift or legacy from the father, she is entitled to so much only, as with what she has already obtained, would make up her proper share [168] [see Shama Churn's Vyavasta Darpana, pp. 516 and 517, and the authorities referred to therein; *Jodoonath Dey Sircar* v. *Brojonath Dey Sircar* (1)].

But it is said that in his will, Ramdhon Ghose, by implication, excluded his widow from getting such a share. We have carefully examined the will, but we are unable to put such a coustruction upon it as is contended for by the appellant. There was no bequest to the sons: the will simply laid down certain directions as to how the estate was to be dealt with and managed after the testator's death; and in the 6th paragraph the testator provided that after his death, and after his youngest son had attained majority, the executors should divide the estate amongst the sons in accordance with the *shastras*.

This provision, we are of opinion, had not the object, nor can we give it the effect, of excluding the widow from that share which she would be entitled to under the Hindu law. The right of the widow to demand a share does not accrue uutil the sons divide the father's property; and as it is settled law, that when such a division takes place the widow

(1) 12 B.L.R. 385.

is entitled to a share, we are of opinion that in the present case the Courts below were right in allowing her a share.

The next question that arises is, whether in view of what the plaintiff's mother has already received, the decree which has been made in this case by the lower Courts is right.

It appears to us that the decree, though somewhat loosely worded, is substantially correct, and fully meets the requirements of the case. The portion that relates to this subject is in these words : "After giving the mother a fifth share, including the sum of Rs. 1,000 and the taluk No. 1520, a fourth share of the residue of the moveables and immoveables as per schedule referred to under the 4th issue."

What the Subordinate Judge really meant to decree was, that the widow was to get a one-fifth share of the estate upon partition, and that the value of the taluk No. 1520, and the legacy of Rs. 1,000 should be taken into account in making up this one-fifth share. We have no doubt that this was his intention, and that accords with the directions of the Hindu law in the matter **[169]** and what was laid down by Mr. Justice Macpherson, after a careful consideration of the texts bearing upon the question, in *Jodoonath Dey Sircar* v. *Brojonath Dey Sircar* (1). Of course, if it turns out at the time of partition that the mother has already obtained her proper share, she will be entitled to nothing more.

We are, therefore, of opinion that the decree of the Court below is right, and that the appeal should be dismissed with costs.

Appeal dismissed.

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12 C. 169.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

ISWAR PERSHAD GURGO AND OTHERS (*Plaintiffs*) *v.* JAI NARAIN GIRI (*Defendant*).* [28th August, 1885.]

Possession, suit for—Auction-purchaser, suit by, for possession—Execution Proceedings—Possession, Application for by auction purchaser—Sale certificate—Limitation Act (XV of 1877), *sch. II, art.* 138—*Civil Procedure Code (Act XIV of* 1882), *s.* 318.

A suit by an auction-purchaser to obtain possession of land, the subject-matter of his purchase, will lie when it is shown that an attempt has been made to obtain possession in execution proceedings, and that such attempt has been unsuccessful.

In the case of *Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty* (2), it was not intended to hold that under no circumstances would such a suit lie, but that so long as the means provided by s. 318 of the Civil Procedure Code are open to a purchaser, he is bound to have recourse to that section rather than to bring a fresh suit.

[Cons., 14 C. 644 (648).]

THIS was a suit to obtain possession of property sold in execution of a decree on the 22nd April 1876. The decree was obtained by the father of the plaintiffs against the defendant, and the purchaser was one Nobin

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*Appeal from Appellate Decree, No. 2274 of 1884, against the decree of H. Gillon, Esq., Judge of Midnapore, dated 8th of September 1884, reversing the decree of Baboo Kedar Nath Mozoomdar, Second Subordinate Judge of that district, dated the 28th of August 1883.

(1) 12 B. L. R. 385. (2) 10 C. L. R. 258.

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Chunder Mitter who was an am-mookhtar of the plaintiffs' father, and who purchased *benami* for him. Nobin Chunder Mitter obtained the sale certificate on the 11th May 1876. The plaintiffs alleged that, after obtaining the sale certificate, Nobin Chunder Mitter, on the 5th October 1876, applied for possession, but was met by an objection made by [170] one Kadumbini Dossee, the wife of the debtor. That objection was overruled on the 2nd March 1877 and possession was ordered to be given to Nobin Chunder Mitter. Subsequent to this Kadumbini instituted a suit against Nobin Chunder to compel him to execute a *kobala* in her favour, and on the institution of that suit Nobin Chunder Mitter did not proceed to take possession. That suit was ultimately dismissed by the High Court on special appeal. In June 1879 Nobin Chunder Mitter died, and on the 31st May 1880 his son and heir, Shorut Chunder Mitter, executed a *ladavipotro* in favour of the plaintiffs, by which he disclaimed all right to the property, and admitted that his father's purchase was *benami* for their father. After the death of their father the plaintiffs applied for the issue of a sale certificate to them, and obtained it on the 4th March 1881, and possession was ordered to be given to them. Upon this the defendant again objected that the application was made more than three years after the date of the sale, and that objection was upheld, and the order for delivery of possession was set aside. The plaintiffs accordingly instituted this suit on the 11th of January 1883 through the Manager of the Court of Wards, setting out the above facts and stating that at the time of the application on behalf of the plaintiffs for the sale certificate they were unaware of the grant of a sale certificate having been previously made to Nobin Chunder Mitter.

The defendant contended in his written statement, that, as the plaintiffs' application for possession to be given them in the execution proceedings had been held to be barred by limitation, the suit would not lie, and that their right to obtain possession was gone. Upon the merits he pleaded that, upon the property being put up for sale, it had been arranged between Nobin Chunder Mitter and the *am-mookhtar* of Kadumbini Dossee that the former was to be allowed to purchase the property at a low figure, and that he was afterwards to convey it to Kadumbini, receiving a premium for his share in the transaction ; that in accordance with that arrangement, the property, which was worth Rs. 16,000 or Rs. 17,000, had been sold for Rs. 35 only, and that under the circumstances the plaintiffs were not entitled to the benefit of the sale.

[171] The first Court held that the suit was maintainable, and was not barred by limitation, and found that the agreement alleged by the defendant was not proved, and accordingly gave the plaintiffs a decree. The lower appellate Court, without going into the merits of the case, reversed that decision upon the ground that the suit would not lie as the plaintiffs were bound by s. 318 of the Code of Civil Procedure, to obtain possession in the execution proceedings, and that the application must be made within three years from the issue of the certificate of sale in accordance with art. 178 of sch. II of the Limitation Act.

Against that decision the plaintiffs now specially appealed to the High Court.

Mr. *Pugh*, Baboo *Bhobani Churn Dutt*, Baboo *Taruk Nath Palit* and Baboo *Jogesh Chunder Dey*, for the appellants.

Baboo *Rash Behari Ghose* and Baboo *Jugut Chunder Banerji*, for the respondent.

The following cases were referred to during the arguments :— 1885 AUG. 28.

By Mr. *Pugh—Seru Mohun Bania* v. *Bhagoban Din Pandey* (1); *Govind Ragunath* v. *Govinda Jagoji* (2); *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (3); *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (4); *Jagan Nath* v. *Baldeo* (5); *Kristo Govind Kur* v. *Gunga Pershad Surmah* (6); and *Mozuffer Wahid* v. *Abdus Samad* (7). APPELLATE CIVIL.

By Baboo *Rash Behari Ghose—Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty* (8). 12 C. 169.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

This was a suit brought by the assignees of the heir of the certificated auction-purchaser of certain immoveable property sold in execution of a decree against the defendant on the 22nd of April 1876. The plaintiffs' father was the holder of that decree, and the certified purchaser was Nobin Chunder Mitter.

[172] The plaintiffs allege that their father was the real purchaser, and that Nobin Chunder Mitter was only benamidar for him, and this allegation has been confirmed by a *ladavipotro*, executed by the heir of Nobin Chunder after the latter's death.

The plaintiffs claim therefore both as heirs of their father who, they say, was the real purchaser, and as assignees of the heir of the ostensible purchaser.

The lower appellate Court, reversing the decree of the Munsif, has dismissed the suit on the ground that it is not maintainable. That Court was of opinion that the only manner in which an auction-purchaser or his assignee could obtain possession of the property sold to him, otherwise than by the voluntary act of the judgment-debtor, was by an application to the Court under s. 318 of the Procedure Code; and that the plaintiffs or Nobin Chunder Mitter having failed to obtain possession in this manner within three years from the date of the sale certificate, the right to possession was barred by art. 178 of sch. II to the Limitation Act.

The lower appellate Court, in holding that a regular suit for possession was not maintainable, relied upon a ruling of this Court in *Kristo Gobind Kur* v. *Gunga Pershad Surmah* (6), which was followed in the case of *Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty* (8). The case of *Kristo Gobind Kur* v. *Gunga Pershad Surmah* (6) does undoubtedly lay down the law in the manner understood by the lower appellate Court. But the learned Chief Justice, in following that decision in the case of *Lolit Coomar Bose* v. *Ishan Chunder Chuckerbutty*, (8) expressed some doubt as to its entire correctness.

On the other hand, this Court held in the case of *Seru Mohun Bania* v. *Bhagoban Din Pandey* (1) that such a suit is maintainable; and in *Krishna Lall Dutt* v. *Radha Krishna Surkhel* (3) it was held that the suit was maintainable if possession given under s. 318 had been infructuous. And a Full Bench of the High Court of Allahabad in *Jagan Nath* v. *Baldeo* (5) dealt with such a suit as being maintainable.

Quite recently another Division Bench of this Court composed of Wilson and Beverley, JJ., in a case not yet reported—Appeal [173] No. 207

(1) 9 C. 602. (2) 1 B. 500. (3) 10 C. 402. (4) 11 C. 93.
(5) 5 A. 305. (6) 25 W. R. 372. (7) 6 C.L.R. 539. (8) 10 C.L.R. 258.

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of 1884, decided on the 20th July last, followed the decision in *Seru Mohun Bania* v. *Bhagoban Din Pandey* (1).

Our own opinion is in accordance with that decision; but with regard to the opposite rulings already cited, we felt a doubt whether we ought not to refer the question to a Full Bench. We have, however, had an opportunity of consulting the learned Chief Justice in the matter, and have his authority for saying that he had no intention of laying down that no such suit could be under any circumstances maintainable: but that so long as the means provided by s. 318 are open to a purchaser, he is bound to have recourse to that section rather than bring a fresh suit.

In the present case it appears that the purchaser did endeavour to obtain possession in the shorter and more simple manner, but that he was opposed by a third party who actually brought a suit to restrain him.

There seems, therefore, to be no reason in law why the present suit should not be maintained. The lower appellate Court is mistaken in supposing that, because the summary remedy is no longer available, therefore the purchaser's title is extinguished.

We, therefore, set aside the decree of the lower appellate Court and remand the appeal to be heard and decided on the merits. Costs of this appeal to abide the result.

Appeal allowed and case remanded.

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12 C. 173.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BHUGWAN DASS MARWARI AND ANOTHER (*Defendants*) *v.* NUND LALL SEIN AND ANOTHER (*Plaintiffs*).* [10th August, 1885.]

Arbitration—Reference to Arbitration by Court of Appeal—Order by Appellate Court remitting case to Original Court to pass decree upon award—Appeal—Award made out of time—Arbitration award, Legality of—Civil Procedure Code (Act XIV of 1882), ss. 2, 506, 514, 582.

An appeal was preferred against a decree of an original Court dismissing [174] a suit, and the Appellate Court sent the case back for the purpose of certain evidence being taken and certified to it. Pending that being done the parties applied to the Appellate Court to refer the case to arbitartion, and that Court referred that application to the Original Court for disposal although the case was still pending in its own file for disposal. Subsequently another application was made to the Original Court to refer the case to arbitration, and on the 10th May the record was sent to the arbitrator with directions to submit his award within seven days. On the 12th September, as the award had not been sent in, the Original Court passed an order recalling the record, and subsequently the award of the arbitrator, dated the 12th September, was filed. The Original Court thereupon forwarded the record to the Appellate Court for its decision. Objections were taken to the award, but overruled, and the Appellate Court passed an order directing the case to be sent back to the Original Court, with orders to pass a formal decree in accordance with the award of the arbitrator.

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* Appeal from Appellate Order, No. 166 of 1885, against the order of L. R. Forbes, Esq., Deputy Commissioner of the Sonthal Pergunnahs, dated the 2nd of May 1885, reversing the order of W. M. Smith, Esq., Sub-Divisional Officer of Dumka, dated the 12th of September 1883, and directing him to pass a formal decree in accordance with the decree of the arbitrator, dated the 12th September 1884.

(1) 9 C. 602.

Held, that a second appeal lay against the last-mentioned order, inasmuch as it amounted to a decree under the provisions of s. 2 of the Civil Procedure Code.

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12 C. 173.

Held, also, that the award was bad in law, because the time within which it was directed to be made had never been enlarged, and the Court's order of the 12th September recalling the record could not be taken as an indication that the time was enlarged.

Semble, an appellate Court has the power to refer a case to arbitration at the instance of the parties under s. 582 of the Code of Civil Procedure, 1882.

In re Sangaralingam Pillai (1) cited; *Jugessur Dey* v. *Kritartho Moyee Dossee* (2) cited and distinguished.

[F., 18 C. 507 (509); R., 13 B. 119 (122).]

THE plaintiffs in this case sued to recover a sum of Rs. 960 and interest thereon, being half the compensation money which they alleged had been paid by Udit Narain Singh to the second defendant in consideration of a right to an *ijara* being given up and in which compensation the plaintiffs claimed to be entitled to a half share.

The facts of the case and the nature of the proceedings which give rise to the appeal are sufficiently stated in the judgment of the High Court.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Rajender Nath Bose* and Baboo *Dwarka Nath Chuckerbutty*, for the appellants.

Baboo *Sreenath Dass* and Baboo *Kuruna Sindhu Mookerjee*, for the respondents.

[175] During the hearing of the appeal the case of *Jugessur Dey* v. *Kritartho Moyee Dossee* (2) was cited, and relied on as an authority for the proposition that an appellate Court has no power to refer a case to arbitration.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

The different procedure followed in the Courts of the Sonthal Pergunnahs from that laid down in the Code of Civil Procedure has very much complicated the present case. The suit was one to recover money from the defendants. The first Court dismissed it. Upon appeal the lower appellate Court considered that the evidence upon the record was insufficient to enable it to come to a determination and that the evidence of one Baboo Udit Narain Singh was necessary. It therefore sent the case back to the first Court in order that the evidence of this witness might be recorded and certified to by the lower appellate Court. So far the Court seems to have followed the ordinary procedure recognised in the Code. After the case had gone down a petition appears to have been presented to the lower appellate Court requesting that the case might be referred to the arbitration of two persons named therein. The lower appellate Court thought fit to refer this petition to the Court of Original Jurisdiction to which the case had been remitted only for the purpose of having the evidence of a particular witness recorded, the case still pending in appeal in the file of the lower appellate Court. The petition having gone down, the application seems to have fallen to the ground. Another application was made to the Court of first instance, requesting it to refer the case to the arbitration of the same Udit Narain, for whose evidence the lower appellate Court

(1) 3 M. 78. (2) 12 B.L.R. 266.

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had sent the case down. The petition stated that the parties agreed to be bound by the decision of Udit Narain Singh. The Court on the 10th May sent the record to Udit Narain, with directions to submit his award as arbitrator within seven days. Nothing, however, seems to have been done till the 12th September following. On that day the Court directed an order to be sent to the arbitrator to resubmit the record, inasmuch as up to that time his award had not been sent in; and [176] the case was sent down for trial on the 18th September. The arbitrator's award, dated the 12th September, was then sent in, and the first Court forwarded it with the record to the lower appellate Court for the decision of the appeal. Objections were taken by the defendants to the award on various grounds. The lower appellate Court notices only one ground from among the objections filed by the defendants, namely that the judgment of the arbitrator was delivered in their absence. That objection the lower appellate Court thought was of no consequence. It considered that the parties were bound by the decision of the arbitrator. Thereupon, instead of formally deciding the appeal in accordance with his view, the Deputy Commissioner sent the case back to the first Court, with orders to pass a formal decree in accordance with the award of the arbitrator.

The defendants have preferred a second appeal to this Court. The ultimate procedure adopted by the lower appellate Court gave the respondents an opportunity, which their pleader has availed himself of, of objecting to the hearing of this appeal. He says that there can be no appeal against an arbitration award, and there is no decree of the lower appellate Court against which a second appeal can be preferred. It seems to us, however, clear that the order of the lower appellate Court such as it is, amounts in law to a decree within the meaning of s. 2 of the Civil Procedure Code, because the matter was before the lower appellate Court on the merits. The parties were entitled to a decision of that Court as upon the merits; and we have no doubt that the order made by the Deputy Commissioner directing the first Court to draw up a formal decree in accordance with the terms of the award was intended by him finally to dispose of the matter before him. We, therefore, held that the appeal is one that we ought to hear; and the greater part of the day has been spent in hearing it.

The objections taken to the decision are based upon the alleged illegality of these proceedings connected with the arbitration. It has been contended that a case cannot be referred to arbitration when it is before an appellate Court, and that arbitration can only be had recourse to before the decree of the first Court has been made. It has been next objected that, supposing an appellate [177] Court has authority to refer a case to arbitration, there is no authority in the first Court to do so, when the case is really pending in appeal in the Court above it. It has been further objected that the application in this case to refer the matter to arbitration was not made in accordance with s. 506 of the Code. That section says that the parties desiring the reference must apply in person, or by their respective pleaders specially authorized in writing in their behalf. It is contended that the application for the reference to arbitration in this case was not made by the appellant Bhugwan Dass nor by any pleader duly authorized on his behalf; and that, therefore, the reference was one with respect to which the Court below had no jurisdiction to act. And it is further contended that the award was not valid, because it was not made within the time allowed by the Court. The time allowed was seven days from the

10th of May, and the award was not made until the 12th September following. 1885 AUG. 10.

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As to whether a case can be referred to arbitration after it has been in an appellate Court, a Full Bench decision of this Court was cited, wherein it is said that an appellate Court has no authority to refer a case to arbitration. That case, however, was decided when Act VIII of 1859 and Act XXIII of 1861 were in force. It was held that s. 37 of Act XXIII of 1861 did not extend to an appellate Court, the powers of an original Court, with reference to arbitration. The terms of s. 582 of the present Code seem to us rather wider than the old sections; and there has been a ruling of the Madras High Court in the case of *Sangaralingam Pillai* (1), to the effect that an appellate Court has power in such matters. Though we are inclined to follow the Madras High Court Ruling, it is not absolutely necessary for us in the present case to decide this point. It is not necessary, because we think that on two other grounds taken by the appellant, the arbitration proceedings were bad. Section 506 is distinct as to the persons by whom the application to refer a case to arbitration must be made. There were two defendants. One of them appears to have made the application in person. The second is said to have made it, not in person, and not through any pleader specially authorized in writing, but through [178] a person named Ram Rek. If Ram Rek had been a recognised agent of the defendant Bhugwan Dass, within the meaning of s. 36, we might have said that he would have been competent to make the application under s. 506, but Ram Rek was not his recognised agent within the meaning of s. 36. He was simply a person authorized by a muktearnamah to look after the present suit on behalf of the defendant Bhugwan Dass. The Court below, therefore, in our opinion, had no jurisdiction to make this reference to arbitration.

As to the other ground, that the award was not made within the time allowed by the Court, we think that this is a matter which is governed by the last clause of s. 514. The time fixed was seven days. That time was never enlarged, and the award was not made till four months afterwards. For the respondents it has been contended that the time allowed by the Court must be held to mean all the time between the reference and the formal recall of the case, unless the Court has by some specific order cancelled the reference in the meantime. It was argued that the Court's order of the 12th September, calling back the record, must be taken as an indication that the Court considered that it had enlarged the time sufficiently. To our minds it simply indicates that the lower Court was ignorant of the procedure to be adopted. It is evident that that Court is not familiar with several portions of the Code.

We think that the arbitrator's award being clearly bad in law in two different respects, all the proceedings connected with that award must fall to the ground, and that the lower appellate Court was wrong in sending the case back to the first Court. We, therefore, set aside the decree of the lower appellate Court and send the case back to the Deputy Commissioner to be decided according to law. If the lower appellate Court still thinks that further evidence is required, it will be at liberty to have it taken.

The costs of this appeal will abide the result.

Appeal allowed and case remanded.

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(1) 3 M. 78.

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[179] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BUNWARI LALL (*one of the Defendants*) *v.* CHOWDHRY DRUP NATH SINGH AND OTHERS (*Plaintiffs*).* [5th August, 1885.]

Appeal—Costs—Order in discretion of Court—Special Appeal.

When a question of costs is purely in the discretion of the lower Court no appeal will lie, but when a matter of principle is involved an appeal will lie.

Where *A* was sued upon the allegation that he had instigated his co-defendant *B* to refuse to deliver up a document, for the recovery of which the suit was brought, and where no relief was prayed as against *A*, but the lower Courts awarded a decree in favour of the plaintiff directing *A* to pay half the costs of suit:

Held, that the question was one of principle, and that a second appeal lay to the High Court against the decree directing *A* to pay such costs.

[R., 16 B. 241 (242); 6 O. C. 52 (55); 5 C.L.J. 642 (644) = 34 C. 878.]

IN this case there were two defendants, Khedu Naik, the minor son of one Urjun Naik, deceased, and Bunwari Lall, a pleader's mohurrir, who alone appealed against the decisions of the lower Courts.

The suit was brought for the recovery of a deed under the following circumstances:—

Urjun Naik, who was the proprietor of a certain mouzah during his life time, being in difficulties, had created encumbrances over the mouzah on several occasions, some of such encumbrances consisting of *zuripeshgi* leases granted to the plaintiff in respect of various portions of the mouzah. Ultimately, falling into arrears with his rent of the mouzah, a decree was obtained against him, and the mouzah was about to be sold, when an arrangement was come to by which the plaintiffs agreed to take a mokurari lease of twelve annas of the mouzah in consideration of the sum of Rs. 3,300, leaving the remaining four annas to Urjun Naik free of encumbrances, and it was agreed that the Rs. 3,300 was to be applied to paying off the *zuripeshgi* leases and other encumbrances, and also to liquidating the amount of the decree.

[180] In accordance with this arrangement the mokurari lease was executed, the encumbrances paid off, and a balance of Rs. 65 out of the consideration money, according to the plaintiffs, remained payable to Urjun Naik.

The plaint went on to allege that Urjun Naik was under the control of Bunwari Lall, and that after the execution and registration of the mokurari lease he refused to make over either the lease or the registration receipt to the plaintiffs; that Bunwari Lall asked for a bribe of Rs. 200 on the lease being demanded, and on the plaintiff's refusing to pay him anything he instigated Urjun Naik not to give up the lease; that criminal proceedings were instituted against Urjun Naik and Bunwari Lall, which resulted in the former being imprisoned and the latter fined Rs. 200, and that Urjun Naik died in jail; that notwithstanding the criminal proceedings the lease was not given up by Khedu Naik, although it was demanded of him. The plaintiffs, therefore, prayed that Khedu Naik

* Appeal from Appellate Decree, No. 320 of 1885, against the decree of G. E. Porter, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 20th November 1884, affirming the decree of A. W. Mackie, Esq., Assistant Commissioner, with powers of a Subordinate Judge, of Ranchee, dated the 1st of May 1884.

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might be ordered to give up the lease and for the costs of the suit, together with such other relief as they might be found entitled to, and deposited the Rs. 65 in Court.

Both defendants contested the suit. The defence raised on the part of Khedu Naik is immaterial for the purpose of this report, but Bunwari Lall pleaded that there was no cause of action against him, and that he had no interest in the suit and he denied the allegation that Urjun Naik was acting under his control.

The first Court gave the plaintiffs a decree disbelieving the defence set up by Khedu Naik, and finding as a fact that it was through Bunwari Lall that Urjun Naik refused to deliver up the lease, gave costs against both defendants in equal shares. Bunwari Lall appealed, and the lower appellate Court considered that it was clear that he had instigated Urjun Naik to refuse to give up the lease and that he had taken an active part in the matter by keeping the registration receipt and obtaining the lease from the registration office, and afterwards filing it in Court in Urjun Naik's name, in a suit then pending in Court. That Court, therefore, held that the first Court was right in directing Bunwari Lall to pay half the costs and dismissed the appeal.

[181] Bunwari Lall now preferred a special appeal to the High Court, upon the ground that he was not liable to pay any costs, and that no decree should have been passed against him.

Baboo *Umakali Mookerjee*, for the appellant.

Baboo *Kishori Lal Gossami*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

This appeal relates only to an order for costs.

The appellant is described in the plaint as defendant No. 2 ; and the Courts below, in giving the plaintiff a decree, have ordered that the costs be paid by both the defendants in equal shares.

For the respondent it is contended that no second appeal lies on a question of costs ; and in support of this contention the vakeel refers to the cases of *Futeek Parooce* v. *Mohender Nath Mozoomdar* (1) and *Gridhari Lal Roy* v. *Sundar Bibi* (2). Those cases, however, go to support the proposition that, when a question of costs is purely in the discretion of the lower Court, no appeal will lie. A very recent case [*The Secretary of State for India in Council* v. *Marjum Hosein Khan* (3)] shows that on a question of principle an appeal will lie against an order for costs ; and the same view was in fact laid down in the Supplemental Volume to the Bengal Law Reports, Full Bench Rulings. Here the question of principle involved amounts to this, that as against the defendant No. 2, the appellant before us, the plaintiff had no cause of action and sought no relief against him in the plaint, and therefore could not receive costs from him. The suit was to get possession of a document executed in favour of the plaintiff by the father of the defendant No. 1, but of which delivery had been denied him. In connection with this matter, it seems that a criminal prosecution was had against the father of the defendant No. 1, as also against the defendant No. 2, for abetting in the attempt to extort money from the plaintiff in connection with the delivery of the document. Both these individuals were punished. The father of **[182]** the defendant No. 1 has since died.

(1) 1 C. 385. (2) B.L.R. Sup. Vol. 496. (3) 11 C. 359.

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It appears to us on the plaint that the plaintiff's suit to recover the document was only against the defendant No. 1. The document was found to be under his control; and, though it is said that the withholding of the document by his deceased father was chiefly owing to the instigation of the defendant No. 2, we think there was no cause of action against the latter.

The appeal is allowed, and the order for costs as against the appellant must be set aside with costs in this Court and the lower Court.

Appeal allowed.

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12 C. 182.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

NARENDRA NARAIN RAI (*Plaintiff*) *v.* BISHUN CHANDRA DAS AND OTHERS (*Defendants*).* [29th July, 1885.]

Onus probandi—*Resumption, Suit for*—Lakheraj—*Mal—Rent-free lands—Landlord and Tenant.*

In a suit for resumption of lands where the defendants allege that the lands are *lakheraj*, the *onus* is on the plaintiff, in the first instance, to show that the lands are *mal*, and if he fails to make out a *prima facie* case, this suit should be dismissed.

Bacharam Mondul v. *Peary Mohun Banerjee* (1) followed.

Newaj Bandopadya v. *Kali Prosono Ghose* (2); and *Akbur Ali* v. *Bhyea Lal Jha* (3) cited and distinguished.

[Rel. on., 14 Ind. Cas. 90.]

IN this case the plaintiff sued to obtain possession of some 24 bighas of land situate in a mehal called Lukhipur. He alleged that the whole mehal was put up to sale for arrears of Government revenue on the 6th April 1871, and purchased by him, and that by reason of such purchase he was entitled to obtain possession of all *mal* lands within the zemindari. The plaint went on to state that the defendants held a jote of some 15 bighas under the plaintiff, paying rent for the same, and that in addition to such 15 bighas the plaintiff had ascertained that the [183] defendants were in wrongful possession of 24 bighas of *mal* land and refused to give up possession to the plaintiff; that the lands in suit were lying waste at the time of the permanent settlement, and a tank, which formed a portion of the lands in suit, was in the zemindar's khas possession, and that the ancestor of the defendants gradually took possession of the same without right or title; that the only rent-free lands in the zemindari were those to be found recorded in a chitta, after a measurement which had taken place in the year 1193 (1786), and as no other *lakheraj* lands had been registered in the Collectorate, the plaintiff claimed that the lands in suit were *mal*, and that he was entitled to obtain possession with mesne profits for a period of three years.

The defendants, in addition to pleading that the suit was barred by limitation and *res judicata*, alleged that the land was *lakheraj* and had been so since the 1st December 1790.

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*Appeal from Appellate Decree, No. 1839 of 1884, against the decree of B.L. Gupta, Esq., Officiating District Judge of Birbhoom, dated the 30th of June 1884, reversing the decree of Babu Menu Lal Chatterji, Subordinate Judge of that district, dated the 14th of December 1883.

(1) 9 C. 813. (2) 6 C. 543. (3) 6 C. 666.

The first Court, while holding that it lay on the plaintiff to make out a *prima facie* case that the lands were *mal* before the onus shifted on to the defendants, came to the conclusion that the plaintiff had proved that branch of his case, and that the defendants' witnesses were unworthy of credit. Deciding the other issues raised in favour of the plaintiff, that Court decreed the suit with costs.

The lower appellate Court reversed that decree. Upon the question as to whether the lands were *mal* or *lakheraj*, the judgment of the Court was as follows : "Having heard the whole of the evidence read and discussed, I feel bound to say that, although the defendants have failed to make out a satisfactory *lakheraj* title, the evidence adduced by the plaintiff is at least equally poor. It rests almost exclusively on the oral testimony of the plaintiff's servants and defendants, and there is not a scrap of document to prove that any of these lands ever paid rent. Thus the defendants, being in long and undisturbed possession of the lands as *lakheraj* lands, and plaintiff on whom lies the *onus probandi* having failed to adduce satisfactory evidence, the lower Court should have dismissed the suit. The decision is accordingly reversed and the appeal decreed with costs."

The plaintiff now preferred a special appeal to the High Court.

[184] Baboo *Mohini Mohun Rai* and Baboo *Saroda Prosunna Rai*, for the appellant.

Baboo *Trailokya Nath Mitter*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

In this case it appears that the plaintiff on the 6th April, 1871 purchased the whole of a certain zemindari at a sale for arrears of revenue. The present suit is for possession of 24 bighas of *mal* land appertaining to certain jotes in the zemindari. The defendants contend that the land is *lakheraj*. The lower appellate Court held that the onus was on the plaintiff to show that the lands were *mal*, that he had failed to discharge it, and dismissed the suit. The case of *Bacharam Mundul* v. *Peary Mohun Banerjee* (1), in which the decision was based upon a ruling of the Privy Council in *Harihar Mukhopadhya* v. *Madhab Chundra Babu* (2), is a distinct authority for holding that in a suit for resumption of lands, when the defendant alleges that the lands are *lakheraj*, the onus is on the plaintiff, in the first instance, to show that the lands are *mal*, and that if he fails to make out a *prima facie* case, the suit should be dismissed. The cases of *Newaj Bundopadya* v. *Kali Prosono Ghose* (3) and *Akbur Ali* v. *Bhyea Lal Jha* (4), upon which the other side relied, assumed the lands in dispute to be within the ambit of, or intermingled with, lands admittedly held as *mal*. In the present case upon the pleadings no such assumption can be made. We think, therefore, that the District Judge was right in dismissing the suit upon this ground. That being so, it becomes unnecessary to consider the other questions as to *res judicata* and limitation, which were argued at the hearing. The appeal is dismissed with costs.

Appeal dismissed.

(1) 9 C. 813.
(2) 8 B. L. R. 566=14 M. I. A. 153.
(3) 6 C. 666.
(4) 6 C. 543.

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APPEL-
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CIVIL.

12 C. 185.

12 C. 185.

[185] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

LALA BHARUB CHANDRA KARPUR (*one of the Defendants*) *v.* LALIT MOHUN SINGH (*Plaintiff*).* [14th August, 1885.]

Regulation VIII of 1819, *s.* 13—"*Profits*"—*Adjustment of accounts between defaulting tenure-holder and person who has held possession as mortgagee under Regulation VIII of* 1819, *s.* 13.

The word "profits" in the 4th clause of s. 13 of Regulation VIII of 1819 means that which is left to the tenure-holder after payment of the rent of the tenure.

A person who enters into possession of a tenure as mortgagee under the provisions of that section is bound in the first place to pay the rent due to the landlord out of the collections before applying the same to the liquidation of his own debt, and the defaulter is not to be liable for the rent of the tenure during the period of the possession by the person so holding it as mortgagee.

THE defendant No. 1 was the putnidar of a certain taluk named Lot Sarangpur, a mehal belonging to the Raja of Burdwan and the plaintiff, and Baboos Chukun Lall Roy and Soshi Bhusan Roy were the durputnidars. The putni taluk having been advertised for sale for arrears of rent due to the zemindar, the plaintiff, in order to stay the sale, deposited the sum of Rs. 988-14-5 with the Collector on the 1st Joisto 1279 (13th May 1872), and thereupon the sale was stopped, and the plaintiff obtained possession of the putni tenure on the 21st Bhadro 1279 (5th September 1872), under the provisions of s. 13 of Regulation VIII of 1819.

Afterwards the defendant No. 2, having purchased the tenure from defendant No. 1, deposited the sum of Rs. 1,028-7 with the Collector on the 13th Bysack 1288 (24th April 1881), being Rs. 988-14-5, the amount advanced by the plaintiff, with interest thereon from the 1st Joisto 1279 to the 21st Bhadro following, and under the orders of the Collector obtained possession of the tenure on the 26th April 1881. The plaintiff preferred a claim in the proceeding before the Collector, but that claim was disallowed, and he, therefore, instituted the present suit to recover the [186] sum of Rs. 3,206-6, which he alleged to be still due to him, and to have the putni mehal, and the defendant made liable for that amount.

The first defendant contested the suit, upon the ground that the plaintiff was not entitled to the amount sued for by reason of the same including compound interest and collection charges and being calculated on an erroneous principle. He also pleaded tender of Rs. 881-15-6, but the evidence upon that plea was disbelieved.

The first Court considered that the rule to be observed in adjusting the accounts was that ordinarily the profits of the tenure should go first to the satisfaction of the interest on the deposit; second of the deposit money itself; and that in cases where the plaintiff had to pay rents due to the zemindar from his private funds, he would be entitled to interest from the date of payment to the date of realization from the durputnidar, and that this money should also be satisfied from the profits. That

* Appeal from Appellate Decree, No. 2214 of 1884, against the decree of S. H. C. Tayler, Esq., Judge of Burdwan, dated the 20th of August 1884, reversing the decree of Baboo Jogesh Chundra Mitter, Second Subordinate Judge of that district, dated the 15th of May 1883.

Court held further that the "profits" consisted of the difference between the rent realized from the durputnidar and the rent paid to the zemindar, and that was the only money which the plaintiff could apply in the above manner.

That Court disallowed the collection charges upon the ground that under the circumstances of the case the plaintiff had incurred no expense on that account, and directed a decree to be drawn up in favour of the plaintiff for the amount to be found due upon the account being adjusted in the manner above indicated.

Against that decree the plaintiff appealed, and the lower appellate Court reversed the decree of the lower Court, and gave the plaintiff a decree for the full amount claimed with costs.

The latter Court held that the word "profits" was not restricted to the balance of receipts left after deducting all costs and liabilities, which would be equivalent to saying it meant "not profits," but must be construed to include all the money realized from the particular holding, and that therefore a creditor, when holding a tenure as security for his claim under the provisions of s. 13 of Regulation VIII of 1819, was entitled to recoup [187] himself from any sums he might receive from such holding. The Court also held that the plaintiff standing in the position of putnidar, though possibly bound to pay the rent due from the putnidar, was not bound to apply the rents received from the durputnidar to that purpose, but might apply them to the payment of his own claim and pay the rent due to the zemindar out of his own pocket. The decision of the Court below was also reversed upon the question of the plaintiff's right to recover the collection charges claimed, and the method of adjusting the account adopted by the plaintiff was held to be the correct one.

Against that decree the first defendant preferred a special appeal to the High Court.

Baboo *Srinath Dass* and Baboo *Jogendro Chunder Ghose*, for the appellant.

The Advocate-General (The Hon. *G. C. Paul*) and Baboo *Rash Behary Ghose*, for the respondent.

The nature of the arguments appear sufficiently from the judgment of the High Court (TOTTENHAM and AGNEW, JJ.) which was as follows:—

JUDGMENT.

The defendant-appellant was the putnidar of Lot Sarangpur, a mehal belonging to the Maharaja of Burdwan. The plaintiff-respondent in this Court is a durputnidar. To protect the putni from sale for arrears of rent under Regulation VIII of 1819 the plaintiff in the month of Joisto 1279 paid in the amount due for putni rent, and in Bhadro following he obtained possession of the putni under the provisions of s. 13 of the Regulation, which gave him a lien on the tenure in the same manner as if the amount had been advanced upon mortgage, in order to recover that amount from any profits belonging thereto. He retained possession until the commencement of 1288, when the Collector ordered the putni to be released in favour of defendant No. 2, who having purchased the rights of defendant No. 1, paid into the Collectorate the sum originally advanced by plaintiff with interest to the date on which the latter obtained possession of the putni. The plaintiff brought this suit to recover Rs. 3,206-6 as being still due to him, and the lower appellate Court has [188] decreed that amount which the first Court had cut down upon considerations urged by the defendants.

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The second defendant, purchaser of the putni from defendant No. 1, is not a party to this appeal.

The question upon which the case mainly turns is as to the proper construction of the word "profits" in the 4th clause of s. 13 of Regulation VIII of 1819. The plaintiff claimed to be entitled to appropriate the whole of the collections of the putni during his possession, in the first place to the satisfaction of his claim for the interest and principal of the sum by advancing which he had entitled himself to possession, and to treat all subsequent payments of the putni rent as disbursements from his own pocket on behalf of the defendant and as ever adding to the sum of the latter's debt to him bearing interest.

On the other hand, the defendant appellant contends that the word "profits" means that which remains to the putnidar after the payment of the rent of the putni. He submits, therefore, that the plaintiff being in possession as mortgagee under s. 13 was bound to pay the putni rent first from the gross collections, and was not entitled to charge the defendant with any portion of such rent accruing aud paid during the period of his possession. It seems to us that this construction urged by the defendant is the true one, and that it is the only one consistent with the context. The District Judge drew a distinction between "profits" and "net profits," but we consider that in this section the meaning is what that the Judge terms "net profits;" for the section gives the plaintiff the right of possession only for the purpose of recovering the amount advanced by him as described in the earlier part of the clause; and it goes on to provide that the defaulter may recover the tenure by repayment of the entire sum advanced with interest at the rate of 12 per cent. per annum *up to the date* of possession having been given as above, or by proving in a regular suit that the full amount so advanced with interest has been realised from the usufruct of the tenure. It thus seems clear to us that the law does not contemplate that the defaulter is also to be held liable for the rent of the tenure during the period of the possession of him who holds it as under a mortgage.

[189] And there is authority for holding that when the subject of a mortgage is leasehold property, and the mortgage is put in possession under circumstances which amount to an assignment of the leasehold interest, the mortgage becomes liable as a rule to pay the rent. See *Kannye Loll Sett* v. *Nistoriny Dossee* (1).

We think, therefore, that the lower appellate Court committed an error in law in permitting the plaintiff to calculate the amount due to him upon the principle adopted in his account.

The appellant has taken two other objections, *viz.*, that the plaintiff has charged him compound interest, and that he has made him liable for collection charges in respect of the period during which plaintiff held possession of the putni. As to compound interest we are satisfied that the appellant was under a misapprehension : for it has been shown to us that each instalment of interest claimed by plaintiff was credited to defendant in the account, and there is no claim for interest upon interest.

As to collection charges we think that in any account rendered by the plaintiff to defendant of the profits of the tenure during the period of his possession, plaintiff is entitled to take credit for moderate collection charges, but that would only be if the defendant were claiming a refund of the surplus profits over and above the debt for which the plaintiff had

(1) 10 C. 443.

possession of the putni. And it hardly seems to be a question in the present suit what amount of collection charges should be allowed. For in the view we have taken of the case the plaintiff was not entitled to claim anything from the defendant in respect of the putni rent paid, while he was himself in possesssion under s. 13 of the Regulation.

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We must, accordingly, set aside the decree of the lower appellate Court, and inasmuch as appellant seems to have acquiesced in the decree passed against him by the first Court, and admitted in that Court that the plaintiff was entitled to recover from him on a different principle from that of the claim, we shall restore that decree.

The appellant will get his costs of both the Appellate Courts.

Appeal allowed.

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12 C. 190.

[190] CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

QUEEN-EMPRESS *v.* TAFAULLAH.* [12th September, 1885.]

Escape from lawful custody—Arrest under Civil Process, Escape from—Criminal liability of officer suffering escape—Penal Code (Act XLV of 1860), s. 223.

Section 223 of the Penal Code applies only to cases where the person who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested under civil process.

TAFAULLAH, a peon of the Munsif's Court, was entrusted with a warrant for the arrest of a judgment-debtor, named Alimulla Sircar, in execution of a decree. He arrested Alimulla, but while bringing him to the Munsif's Court, Alimulla escaped. The Munsif thereupon held a proceeding and recorded his opinion that there were grounds for a magisterial enquiry "under s. 651 of the Civil Procedure Code," and forwarded copies of his proceedings to the Sub-divisional Magistrate, with the request that he would deal with the matter according to law, and an intimation that the peon Tafaullah would be sent when notice of the date fixed was received.

The Deputy Magistrate, however, summoned the accused under s. 651 of the Civil Procedure Code, and without framing a charge convicted him under s. 223 of the Indian Penal Code and sentenced him to a fine of Rs. 50, or in default to three months' simple imprisonment.

The matter was brought to the notice of the Sessions Judge, who, under the provisions of s. 438 of the Code of Criminal Procedure, referred the case to the High Court, stating his reasons for so doing as follows:—

"Assuming that s. 223 applies, I do not think that the omission to frame a charge caused any failure of justice, for the peon, as is evident from his statement to the Deputy Magistrate, perfectly understood what he was being tried for. It is not, therefore, upon this ground that I refer the case.

[191] "But after the best consideration I have been able to give the matter, I cannot assure myself that s. 223 (as amended by Act XXVII of 1870) applies to the facts. The question turns upon the meaning of the

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* Criminal Reference No. 161 of 1885, made under s. 438, by J. Whitmore, Esq., Officiating Sessions Judge of Rungpore, dated the 4th of September 1885.

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words 'lawfully committed to custody.' I have not been able to find any High Court Ruling in point, but I do not think that 'arrested under a warrant' and 'committed to custody' are interchangeable terms. I do not wish to distinguish between 'arrest' and 'custody,' but between 'arrest' and 'committal.' The latter expression seems to be confined to the direct action of a Court itself when the person to be committed is before it. I would base this view on the last para. of s. 336 of the Civil Procedure Code, and upon the language used in the ruling *In the matter of Hastie* (1), where the words 'one stage only, when a man *has been arrested* (as here) and is brought up for committal, *but has not yet been committed*' seem to clearly recognise a distinction between '*arrest*' and '*committal*.'

"I need hardly observe that the question whether a Civil Court peon who negligently suffers his prisoner to escape *en route* is or is not criminally liable under s. 223 of the Indian Penal Code is of considerable practical importance, and as the above considerations seem to me to show that he is not, I would beg to recommend that the Magistrate's order be set aside."

No one appeared on the reference.

The opinion of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

OPINION.

We think that the Sessions Judge is right in considering the conviction to be illegal. Section 223 of the Penal Code applies only to cases where the person, who is allowed to escape, is in custody for an offence, or has been committed to custody, and not to cases where such person has simply been arrested under civil process. We, therefore, set aside the conviction and order the fine, if paid, to be refunded.

Conviction quashed.

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12 C. 192.

[192] CRIMINAL REVISION.

Before Mr. Justice Wilson and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF E. G. BUSKIN.
IN THE MATTER OF THE PETITION OF C. F. THOMAS.
E. W. HART *v.* E. G. BUSKIN.*
E. W. HART *v.* C. F. THOMAS. [2nd September, 1885.]

Railway Act (IV of 1879), ss. 17, 31—Passenger not producing season ticket when called upon—Travelling without a ticket—Order for recovery of fare.

A passenger who has obtained a monthly ticket is liable to be called upon to produce it at any time on the journey which it covers, and if he does not so produce it, he is liable under ss. 17 and 31 of the Railway Act to pay the fare for the journey between the stations for which his ticket was issued. The order under s. 31, in case of his refusal to pay it, should be one merely for recovery of the amount due as the fare, and not an order to pay such sum or any other sum as if it were a fine.

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* Criminal Revision Nos. 324 and 325 of 1885, against the order of Baboo Roy Ram Sunkur Sen Bahadoor, Deputy Magistrate of Sealdah, dated the 25th July 1885.

(1) 11 C. 451 (460).

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A passenger who has such a ticket which is still in force and in his possession cannot be said to be travelling without a ticket within the meaning of s. 31, merely because he does not happen to have the ticket with him, and therefore cannot produce it when called upon to do so.

[R., Rat. Unrep. Cr. Cases 435.]

IN these two cases the petitioners were prosecuted under the Railway Act (IV of 1879), s. 31. Mr. Buskin, the petitioner in the first case, was a monthly ticket-holder on the Eastern Bengal State Railway, his ticket entitling him to travel between Barrackpore and Sealdah stations. He was, on 29th June last when travelling to Sealdah, called upon to produce his ticket, but having inadvertently left it behind at his house, he was unable to produce it.

The Deputy Magistrate found that he was technically guilty of omitting to show his ticket when called on, and made an order that he should be "fined annas 14, realizable by distress and sale if not paid."

Major C. F. Thomas, the petitioner in the second case, was also a monthly ticket-holder, on the same line, between the same stations, and on the 3rd July was found travelling without a ticket. He had his ticket when coming to Sealdah in the morning, but had left it at his office, and when asked to produce it on the [193] return journey could not do so. In this case the Deputy Magistrate inflicted a "nominal fine of one anna."

The defendants in both cases petitioned the High Court to have the order of the Deputy Magistrate set aside.

Mr. *Hill*, for the petitioners.

Section 31 of Act IV of 1879 deals with cases of passengers who without desiring to defraud, are found travelling without tickets. Now the wording of the Magistrate's order shows that he treated the matter as a criminal one, inasmuch as the petitioners have been *fined* in one case fourteen annas, and in the other one anna. I submit that the petitioners could not be prosecuted criminally; the matter before the Court was a matter of civil liability with the provision that the debts due from the petitioners might be recovered by distress or warrant. This is clear from s. 32 which differs from s. 31. The case of *Tokee Bibee* v. *Abdool Khan* (1) points out that a proceeding of the nature of this case is not a criminal one. Under s. 31 there is an implied pre-existing liability that the passenger will pay the fare, but till conviction there is no pre-existing liability to pay a fine. The punishment of fine throughout the Act is kept entirely distinct from the payment of fares.

As to whether a matter is to be considered a criminal or civil proceeding, see *Queen* v. *Fletcher* (2) and *Mellor* v. *Denham* (3). I submit the proceedings under s. 31 are civil proceedings.

[WILSON, J.—We need not trouble you further on that point].

As regards the demand made to Buskin to pay his fare, that I submit was not enough; a specific amount should have been demanded. Suppose, for instance, Buskin had been unable to prove that he had started from Barrackpore, then if the matter was a civil one, the Railway Company, knowing where the train had started from, would have to make a demand of a specific sum. As to this point see *Brown* v. *Great Eastern*

(1) 5 C. 536. (2) L.R. 2 Q.B.D. 43 (3) L.R. 5 Q.B.D. 467.

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Railway Company (1). With regard to the reasonableness of a bye-law which requires a passenger to show his ticket when required, see *Saunders* v. *South Eastern Railway Company* (2). With [194] regard to the case of Major Thomas, the Magistrate had no power to fine him one anna ; he might have declared him liable to a payment of fourteen annas, but he has not done so. I submit that the cases have been treated criminally, and for that reason, if for no other, the orders must be quashed. Could the petitioners, however, be charged with offences under s. 31 ? Section 31 refers to s. 17, and that latter section refers to the question of the creation of the contract. I submit the liability of the petitioners is one arising out of the contract created by s. 17.

[WILSON, J.—"Travelling without a ticket" in s. 31 must mean travelling without having taken a ticket.]

Yes; tickets are taken from the passengers to Calcutta at Barrackpore, and if s. 31 were not read so, those passengers could be proceeded against as having travelled without tickets. There is no such liability arising out of the second part of s. 31 which refers to passengers "having such a ticket and not showing it," those words have the meaning of a contumacious refusal to show a ticket. As to this, see *Dearden* v. *Townsend* (3).

Mr. *Bonnerjee, contra,* contended that in substance the order of the Magistrate, was correct; and that, although he had under a mistake made use of the word "fine," yet it was clear that the matter was intended to be treated civilly.

The following judgment was delivered by the Court (WILSON and GHOSE, JJ.) :—

JUDGMENT.

WILSON, J.—The facts of this case are these: The petitioner Mr. Buskin was the holder of a monthly ticket entitling him to travel on the Eastern Bengal State Railway between Barrackpore and Sealdah. On the morning of the 29th June last he travelled by a train from Barrackpore to Sealdah. Being asked while in the train by a ticket-collector in service of the Railway administration to show his ticket, he was unable to do so, having accidentally left it at his house in Barrackpore. The ticket-collector asked him to pay his fare and he refused. The fare from Barrackpore to Sealdah was fourteen annas. The ticket-collector knew that Mr. Buskin held a monthly ticket.

Application was made to the Police Magistrate of Sealdah by the station master of Sealdah for a summons against [195] Mr. Buskin, in respect of a charge of having travelled without a ticket, and when asked to pay his fare refusing to do so, ss. 17 and 31 of the Indian Railway Act (IV of 1879) being referred to. After some intermediate proceedings, on the 3rd July a summons was issued against Mr. Buskin, requiring him to attend on the 15th July, and answer a complaint charging him with having travelled without a ticket and refusing to pay his fare when asked to do so, and further with not showing his ticket and giving it up when demanded. Mr. Buskin appeared, and after some adjournments the matter was finally disposed of on the 25th July. The Magistrate having found that Mr. Buskin was unable to show his ticket on the occasion in question, said: "The defendant is, therefore, technically guilty of the omission as laid down in the Act and is fined annas 14 realizable by distress and sale if not paid."

We are asked to set aside this order.

(1) L.R. 2 Q.B.D. 406. (2) L.R. 5 Q.B.D. 456 (461). (3) L.R.Q.B. 10.

Upon the main question, we think the Magistrate is right, that is to say, we think Mr. Buskin was bound to pay the fare from Barrackpore to Sealdah amounting to fourteen annas.

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12 C. 192.

By s. 17 of the Railway Act (IV of 1879): "Every person desirous of travelling on a Railway shall, upon payment of his fare, be furnished with a ticket specifying in English and the principal vernacular language of the district in which the ticket is issued, the class of carriage for which, and the place from and place to which the fare has been paid, and the amount of such fare; and every passenger shall, when required, show his ticket to any Railway servant duly authorized to examine the same, and shall deliver up the same to any Railway servant duly authorized to collect tickets." By s. 31: "Any passenger travelling on a Railway without a proper ticket, or having such a ticket and not showing or delivering up the same when so required, under s. 17 shall be liable to pay the fare of the class in which he is found travelling from the place whence the train originally started, unless he can prove that he has travelled a less distance only, in which case he shall be liable to pay the fare of the class aforesaid only from the place whence he has travelled. Every such fare shall on application by a Railway servant to a Magistrate, and on proof of the passenger's liability, be recoverable from such [196] person as if it were a fine, and shall, when recovered, be paid to the Railway administration."

Under these sections the Railway administration is to furnish every passenger with a proper ticket; no passenger is to travel without such a ticket; every passenger is to show or deliver up his ticket when called upon; and any passenger who fails in either of these points is liable to pay the ordinary fare for his journey, or if he cannot show where he got into the train, the ordinary fare from the starting point of the train.

We do not think Mr. Buskin's case falls within the provision as to travelling without a ticket. We do not think that a passenger who has been duly furnished with a proper ticket, which is still in force and still in his possession, can be said to be travelling without a ticket, while making a journey covered by that ticket. But Mr. Buskin does seem to us to have failed to show his ticket within the meaning of the Act. There is no distinction drawn between one kind of ticket and another. Every passenger, whether a season ticket-holder or not, may be called upon to show his ticket, and if he is so called upon, and has not got his ticket with him to show, he may be required to pay the ordinary fare. We are of opinion that, having regard to the language and extent of s. 17 of the Act, s. 31 should be read thus: Any passenger travelling on a Railway without being furnished with a proper ticket, or having been furnished with such a ticket and not showing or delivering up the same when so required under s. 17, shall be liable, &c., &c. The Magistrate was therefore right in holding that Mr. Buskin was liable to pay fourteen annas, the fare from Barrackpore to Sealdah.

But the form of the order as described in the judgment by which Mr. Buskin is to be "fined fourteen annas" is wholly wrong. Many sections of the Railway Act deal with frauds by passengers and other acts of wilful wrong, and these sections say that the offender is to be punished with a fine. But s. 31 dealing with innocent persons who may, like Mr. Buskin, find themselves in the wrong by mere accident, has nothing to do with punishment or penalty or fine. It simply makes a fare recoverable and recoverable in a summary way. If any final order is drawn up in this case, it must order payment of fourteen annas [197] as the fare

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from Barrackpore to Sealdah. In substance, however, the order of the Magistrate is correct.

The case of *Hart* v. *Thomas* is similar to Mr. Buskin's in every respect except one; but that one is very material. The Magistrate has not awarded the amount of the fare, which alone he could do under the section; but has imposed an arbitrary fine of one anna. The order is therefore wrong in substance and must be set aside.

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12 C. 197.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

RAM PROSAD JANNA AND ANOTHER (*Defendants*) *v.* LAKHI NARAIN PRADHAN (*Plaintiff*).* [29th July, 1885.]

Limitation Act (Act XV of 1877, sch. II, arts. 136 and 144)—Suit to obtain possession of land from vendor who has been dispossessed and subsequently recovered possession—Possession—Suit for.

A vendor who was at the time out of possession of certain immoveable property sold a share in it to a purchaser by a *kobala*. After the date of the sale the vendor recovered possession, and the purchaser, within 12 years of the vendors having so recovered possession but more than 12 years after he had been originally dispossessed, instituted a suit to obtain possession of the share covered by the *kobala*.

Held, that the suit was governed by art. 144 and not art. 136 of sch. II of the Limitation Act (XV of 1877) and was not barred by limitation.

Art. 136 does not apply to a suit brought against a vendor himself when he recovers possession.

[R., 13 B. 424 (428); 15 B. 261 (264).]

IN this case the plaintiff sought to obtain possession of a one anna five gundas share in a certain mehal. He alleged that a two annas ten gundas share belong to the defendants, and that in the year 1278 (1871-72) they, being out of possession and anxious to recover it, sold a one anna five gundas share to the plaintiff for the sum of Rs. 140, in order to meet the expenses necessary to recover their share. The sale took place under a *kobala* on the 25th Joisto 1278 (7th June 1871). The plaintiff further alleged that it had been agreed between him and the defendants, [198] that they should jointly take proceedings to recover the property, but that the defendants had neglected to do so, and that it had lately come to his knowledge that since the 25th Joisto 1278 (7th June 1871), the defendants had succeeded in amicably recovering possession of the whole two annas and ten gundas share, and had their names registered in the Collectorate on the 6th March 1879 in respect thereof. The present suit was instituted on the 4th May 1883.

The defendants pleaded that the suit was barred by limitation, that the *kobala* was without consideration, that no sale could take place when the vendors were not in possession, that the *kobala* was *benami* transaction, and that they had not even at the date of suit obtained possession of the property.

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* Appeal from Appellate Decree, No. 461 of 1885, against the decree of Baboo Girish Chandra Chowdhuri, First Subordinate Judge of Midnapore, dated the 20th of December 1884, reversing the decree of Baboo Atul Chandra Ghose, Munsif of Datun, dated the 10th of December 1883.

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The first Court found that the vendors had been out of possession about eight or nine years at the date of the sale, and that, therefore, the suit having been brought about 21 years after the date of the vendors' dispossession, it was barred under art. 136 of sch. II of the Limitation Act, and that Court also decided the issues raised upon the merits against the plaintiffs.

Upon appeal the decision of the first Court was reversed. The lower appellate Court considered that art. 144 and not 136 applied to the case, and that the plaintiff's cause of action arose from the time when the defendants having recovered possession refused to deliver possession to the plaintiff, and that as it was clear that they so recovered possession after the date of the *kobala*, though when precisely was not distinctly proved, the suit was within time. Upon the questions of fact that Court also disagreed with the findings of the lower Court, and accordingly reversed its decision and gave the plaintiff a decree with costs.

The defendants now preferred a special appeal to the High Court.

Baboo *Jagat Chunder Banerji*, for the appellant.

No one for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

The points raised in this appeal are that the lower appellate Court was wrong in holding that the suit was not barred under [199] the provisions of art. 136 of the Limitation Act, and also that the Appellate Court was wrong in reversing the first Court's finding as to the passing of the consideration and the *benami* nature of the transaction between the plaintiff and the defendants.

As regards the last two points, we think that the findings of the Appellate Court are unassailable in second appeal. The onus lay upon the defendants to prove that consideration had passed, and that the transaction was *benami* ; and on the evidence the lower Courts found against the defendants.

As regards the point of limitation we think that the appellant's vakil is wrong in contending that the case falls under art. 136 of the Limitation Act. It is true that the defendant's vendors were not in possession at the time of the sale, but we think that the article is not intended to apply to a suit brought against the vendors themselves upon their recovering possession. It appears to us that the lower appellate Court was right in applying art. 144 of the Act. That being so, we see no reason to interfere with the decision of the Court below. The appeal will be dismissed but without costs, as no one has appeared for the respondent.

Appeal dismissed.

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12 C. 199.

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APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BISVANATH MAITI (*Plaintiff*) *v.* BAIDYANATH MANDUL AND ANOTHER (*Defendants*).* [11th August, 1885.]

Judgment, Contents of—Appeal from Appellate Decree—Second appeal, Grounds for—Omission to state reasons in judgment—Civil Procedure Code (*Act XIV of* 1882), *ss.* 574, 584.

The fact that the judgment of an Appellate Court is not drawn up in the manner prescribed by s. 574 of the Civil Procedure Code is no ground for a second appeal under s. 584 unless it can be shown that the judgment has failed to determine any material issue of law.

[R., 8 O.C. 290 (291); D., 13 C.W.N. 143=2 Ind. Cas. 404.]

THE plaintiff in this suit, as sub-lessee under the defendant No. 3, sued to recover possession of a *chuck* named Nallar, with [200] mesne profits. His case was that his lessor Mritunjoy Das, defendant No. 3, held possession of the *chuck* as *mourasi pattidar* under the zemindar; that he cleared the jungle, erected embankments, and brought some portion of it under cultivation; that while thus in possession he let the *chuck* to him, the plaintiff, by a *mourasi mokurari* lease, dated the 2nd Falgun 1287 (12th February 1881); that he, the plaintiff, remained in possession up to Asar 1289 (June 1882) when he was dispossessed by the defendants Nos. 1 and 2.

The defendants Nos. 1 and 2 denied that the plaintiff or his lessor were ever in possession of the *chuck*, and pleaded that the suit was barred by limitation. They alleged that one Lukhikant Bidyabhuson was in possession of the *chuck* under an *amalnama* granted to him by the zemindar in the year 1273 (1866-67); that in the year 1275 (1868-69), the tenure was purchased from Lukhikant by Narain Mandul, father of the first defendant; that after that purchase Narain Mandul, and after him the defendants cleared the jungle and cultivated the lands partly in *nij jote* and partly by tenants, and they claimed to have been in possession for upwards of twelve years. They further alleged that in the year 1281 (1874-75) Mritunjoy granted an *amalnama* to Narain Mandul and received rent from him, and they contended that the suit could not be maintained; inasmuch as no notice of ejectment had been served on them.

The following issues were framed :—

(1) Is the suit barred by limitation?

(2) Was the plaintiff bound to serve the defendants with notice of ejectment?

(3) Is the *patta* propounded by the plaintiff genuine?

(4) Has the plaintiff's lessor, Mritunjoy Das any right to the disputed *chuck*?

(5) Have the defendants a right of occupancy in the disputed *chuck*?

(6) If the plaintiff be held entitled to get *khas* possession, are the defendants entitled to any and what sum as compensation for clearing the jungle?

(7) Is the plaintiff entitled to recover any and what amount of mesne profits from the defendants?

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* Appeal from Appellate Decree, No. 315 of 1885, against the decree of H. Gillon, Esq., Judge of Midnapore, dated the 17th of November 1884, affirming the decree of Baboo Gonesh Chandra Chowdhuri, Subordinate Judge of that district, dated the 27th of February 1884.

[201] The first Court decided the 1st, 3rd, 4th and 5th issues in favour of the plaintiff, but held that the defendants had been in possession of the disputed *chuck* for upwards of twelve years as tenants, though they had not acquired a right of occupancy, and being thus in possession as tenants and not as trespassers they were entitled to notice to quit, which had not been given them and, therefore, that Court dismissed the suit.

Upon appeal the lower appellate Court delivered the following judgment :—

"The facts of the case are given in the lower Court's judgment.

Even supposing that the lower court misapprehended certain portions of the evidence, I concur in the finding that the defendants were tenants of some kind and not mere trespassers. Furthermore granting, for the sake of argument, that the defendants are merely tenants-at-will, I cannot accept the appellant's contention that notice to quit was unnecessary, and that the institution of this suit was sufficient notice on the point. The cases of *Hem Chunder Ghose* v. *Radha Pershad Paleet* (1), *Rajendronath Mookhopadhya* v. *Bassider Ruhman Khondkhar* (2), and *Ram Rotton Mundul* v. *Netro Kally Dassee* (3) have been referred to and considered. I do not consider that it has been established that the defendant's tenure is of such a nature that formal notice to quit was unnecessary. I find nothing in the reported cases or in the Land Transfer Act to support the appellant's contention that the institution of this suit was sufficient notice to quit in the case of this particular tenancy.

I accordingly dismiss the appeal with costs."

Against that decree the plaintiff now preferred a special appeal to the High Court.

Mr. *W. Garth*, and Baboo *Kasikanta Sen*, for the appellant.

Baboo *Rashbehari Ghose*, and Baboo *Jogesh Chunder Dey*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

We have been pressed to set aside the decree of the lower [202] appellate Court in this case upon the ground that the judgment is not in accordance with s. 574 of the Civil Procedure Code, that is, that the Judge has not categorically set down the points for determination, the decision thereupon, and the reasons for the decision. It is said that in the judgment as it stands there is nothing on which the appellant can satisfy himself whether or not he has good grounds for a second appeal. The lower appellate Court delivered a very short judgment in which it confirmed the decision of the first Court. We find upon examination that the only point really before the lower appellate Court was this, whether or not the defendants were tenants or trespassers in respect of the land from which the plaintiff sought to eject them. The learned Counsel for the appellant has invited us to observe that the case was a very complicated one as set out in the pleadings and issues, and that the one point decided by the District Judge would by no means dispose of all the points raised. But we find that of the seven issues set down for trial, the 1st, 3rd, 4th, and 5th were decided in favour of the plaintiff, and the plaintiff, who was the appellant in the Court below, had no reason to bring those issues up again. Four then out of the seven issues were

(1) 23 W. R. 440. (2) 2 C. 146. (3) 4 C. 339.

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decided in favour of the plaintiff. Two were decided in favour of the defendant, namely, the 2nd and 7th, or rather the decision on the 2nd issue made the decision of the 6th and 7th issues unnecessary. The 2nd issue was, "was it obligatory on the plaintiff to serve the defendant with notice of ejectment." It is now admitted that, unless the defendants were trespassers, it was obligatory on the plaintiff to serve them with notice of ejectment. If they were tenants at all, however low their station, they could not be ejected without notice; so that really the only point on which the lower appellate Court's decision was required was, whether the defendants were tenants or trespassers. The Court below has decided that they were not trespassers, but tenants of some kind or other. It is objected that the District Judge has not stated the particular evidence upon which he came to this conclusion, and that it was apparent from his judgment that he did not concur with the first Court in the construction put by that Court upon certain portions of the evidence.

We think that it would have been better no doubt if the lower appellate Court had stated somewhat more fully upon [203] what its conclusion was based. But we have no doubt upon perusal of its judgment that the Court below had read the evidence and meant to find upon that evidence as a whole that the defendants were not trespassers. The fact that the judgment was not drawn up in the manner prescribed by s. 574 is not, we think, a ground for a second appeal under s. 584, unless it can be shown that the judgment had failed to determine any material issue of law. It is evident, as I have already observed, that there was no material issue of law before the Court, excepting the issue whether tenants-at-will are liable to be ejected without notice, and on that question it is now admitted there can be no dispute. The only issue before the lower appellate Court was simply one of fact. The manner in which the judgment has been drawn up could not be a substantial error in procedure which may possibly have produced any error or defect in the decision of the case upon the merits, for no doubt the Judge had in his own mind already decided the case before he wrote his judgment.

That this fact is not matter for a second appeal was laid down by the late Chief Justice Sir Richard Couch in *Doolee Chund* v. *Oomda Begum* (1). The proper course to be followed in such a case is said to be to require the Judge, if still holding office, to supplement his judgment by giving the reasons on which it is based. Where the Judge is no longer holding that office, that course cannot be adopted. For that reason it cannot be adopted in this case. The Judge is no longer in the district from which this case came. It is clear, therefore, to us that the principal objection taken is not a ground in this case upon which a second appeal can be based. Another objection is taken in the written petition of appeal, that the lower appellate Court was wrong in setting up for the defendants a case which they themselves did not set up, namely, that they are tenants-at-will. We find, however, that the lower appellate Court did not hold that they were tenants-at-will, but simply said that they were tenants, and, even if so low as tenants-at-will, they are still entitled to notice before being ejected.

[204] We, therefore, find no reason for disturbing the judgment or decree of the lower appellate Court. The appeal is dismissed with costs.

Appeal dismissed.

(1) 18 W. R. 473.

12 C. 204.

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APPELLATE CIVIL.

12 C. 204.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

KANIZAK SUKINA (*one of the Defendants*) *v.* MONOHUR DAS (*Plaintiff*).* [18th August, 1885.]

Civil Procedure Code—(Act XIV of 1882), s. 317—Benami system—Fraud—Suit against purchaser buying benami—Sale certificate granted in name of benamidar.

Certain property belonging to a judgment-debtor was brought to sale and purchased by a person in the benami name of her daughter, then an infant, and the sale certificate was made out in the name of the latter. Subsequently the mother mortgaged the property, and the mortgagee brought a suit, obtained a decree; and had the property sold and purchased it himself. Upon his being resisted by the daughter in attempts to get his name registered as proprietor, he instituted a suit against both mother and daughter to establish his rights to the property. The daughter thereupon objected that such suit would not lie by reason of the provisions of s. 317 of the Civil Procedure Code.

Held, that the provisions of that section, which were intended to prevent fraud, were inapplicable to the facts of the case, and that the suit was maintainable.

[Diss., 16 M. 290 (292) ; F., 21 C. 519 (521) ; R., 21 A. 29.]

THE plaintiff in this case sued to establish his right to, and to obtain possession of, a ten-gunda and odd share in a certain village, alleging that he was a creditor of defendant Takdir-un-nissa, and had purchased the land in suit at a sale in execution of a decree which he had obtained against her. The other defendant was Mussumat Sukina, daughter of the first defendant. The facts of the case were as follows :—One Hyder Ali, father of the defendant Takdir-un-nissa, was the owner of a one-third share in the whole village, and after his death a creditor named Daibi Misser obtained a decree against his widow, three sons and three daughters, whom he left surviving, and caused the whole of the one-third share in the village to be sold. The purchaser at that sale was one Mahomad Saleh, a pleader, who immediately [205] put in a petition dated the 2nd October 1866, stating that he had purchased the property for certain members of Hyder Ali's family in various shares, and amongst others that he had purchased the share, the subject-matter of this suit, for Sukina. The sale certificate was drawn up accordingly. In 1867 the first defendant borrowed money through her husband from the plaintiff's father, and to secure the repayment thereof mortgaged the share of the village now in suit. In 1873 plaintiff obtained a decree upon his mortgage, caused the property in suit to be sold, and purchased it himself.

He alleged in his plaint in this suit that upon applying to have his name registered the first defendant put in an objection on behalf of her daughter the second defendant, and his application was in consequence disallowed. He, therefore, brought the suit to set aside the Collector's order, to have his right declared, and to obtain possession alleging that the second defendant's name had been used in the transaction as benamidar for her mother and that she had no right to the property in suit. The second defendant alone contested the suit and claimed to be

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* Appeal from Appellate Decree, No. 385 of 1885, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 23rd of October 1884, confirming the decree of Baboo Koilas Chandra Mukherjee, Second Subordinate Judge of that district, dated the 29th of November 1880.

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entitled to the property by virtue of the sale certificate being in her name; she denied that she was a mere benamidar, although she admitted that she was a minor at the date the purchase was made on her behalf.

The first Court found that the purchase was made benami by the first defendant in the name of her daughter Sukina, and holding that the suit was not barred under s. 317 of the Code of Civil Procedure, gave the plaintiff a decree.

Sukina thereupon appealed, but her appeal was dismissed upon the ground that no one appeared on the day fixed for its hearing; she therefore preferred a special appeal to the High Court, and succeeded in getting the case remanded for retrial by the lower appellate Court upon the merits.

Upon such retrial the lower appellate Court confirmed the decision of the lower Court that Sukina was a mere benamidar for her mother, and upon the question as to whether the suit could be maintained having regard to the provisions of s. 317, delivered the following judgment: "Then can the case lie in view of the terms of s 317? I think it can. In the **[206]** first place the section was intended to check the benami system by denying to a person who has employed an agent a remedy against that agent, if the latter turns traitor. Here there can be no question of that sort. In the second place I think the transaction is clearly a fraudulent one intended to defraud subsequent transferees. (See s. 53, Transfer of Property Act.) The second paragraph of s. 317 expressly lays down that when the cause of action is that the name of the purchaser has been fraudulently inserted the suit will lie.

That Court therefore dismissed the appeal.

Sukina now preferred a special appeal to the High Court.

Mr. *R. E. Twidale*, for the appellant.

No one appeared for the respondent.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows:—

JUDGMENT.

We are of opinion that the lower Courts are right in overruling the objection that the present suit does not lie under the provisions of s. 317 of the Code of Civil Procedure. It is found by the Courts below that the property in dispute was purchased by the appellant's mother in her name while the appellant was a minor, in the year 1866; that the mother and not the appellant was in possession; that the mother hypothecated it in a bond executed by her in favour of the plaintiff; that the plaintiff obtained a decree against the mother on that bond, and in execution of that decree purchased this property and obtained possession.

These being the facts of this case, we do not think that s. 317 applies. There connot be any doubt that if a creditor of the real owner of a property brings a suit for declaration that it belongs to his debtor and not to the certified benami purchaser, it would not be precluded by the provisions of s. 317. That section was intended to prevent fraud, and if it were to apply to a case like that stated, instead of preventing fraud it would promote fraud.

We are, therefore, of opinion that upon the facts found by the lower Court, there is no force in the objection that has been taken.

We dismiss the appeal without costs, as no one appears for the respondent.

Appeal dismissed.

12 C. 207.

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APPEL-LATE CIVIL.

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[207] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

MAHENDRA LAL KHAN (*Plaintiff*) v. ROSOMOYI DASI AND OTHERS (*Defendants*).* [24th August, 1885.]

Evidence—Admissibility in evidence of judgments not "inter partes."

In a suit for *khas* possession of land upon the allegation that the defendant refused to give up possession or to pay rent for it, a decree declaring that the land in suit was liable for rent was tendered in evidence. The decree had been obtained by an auction-purchaser against the defendants, but the plaintiff did not claim title through the auction-purchaser who had in fact been treated as a trespasser and ejected.

Held, that the ruling in the case of *Gujju Lal* v. *Fatteh Lall* (1) governed the case, and that the decree was inadmissible in evidence.

Although the case of *Hira Lal Pal* v. *Hills* (2) decides that in certain cases judgments not *inter partes* may be received in evidence, it does not lay down that such judgments can be treated as conclusive evidence of the facts with which they deal.

[R., 12 A. 1 (18) (F. B.) ; 24 B. 591 (597) = 2 Bom. L. R. 386.]

IN this case the plaintiff sued to obtain khas possession of certain land in the occupation of the defendants after having served them with notices either to quit or to pay a fair rent and grant him kabuliats. His case was that in 1843 or 1844 his predecessors in title mortgaged his zemindari, which included the lands in suit ; in 1847 the mortgagees fraudulently obtained a decree for foreclosure, which, however, was subsequently set aside in the year 1852, and his predecessors were declared entitled to redeem the property ; pending these proceedings the mortgagees had alienated the property which was sold for arrears of Government revenue, and eventually came into the hands of one Sidhi Nazar Ali Khan as purchaser; in 1860 the plaintiff's predecessor brought a suit to redeem the property and to set aside the various sales, and obtained a decree in their favour in 1866, that decree being ultimately confirmed on appeal in the year 1870; in 1861 , while Sidhi Nazar Ali Khan was in possession, he had brought a suit against the present defendants in [208] respect of the lands now insuit, alleging then to be rent-paying tenants, and in that suit he obtained a decree in 1862 declaring the lands held by the defendants to be liable to the payment of rent to the zemindar. The plaintiff now sued for khas possession and mesne profits.

The defendants contended that the decree obtained against them in 1862 by Sidhi Nazar Ali Khan was not binding upon them, as the plaintiff was not a party to that suit, and did not claim through Sidhi Nazar Ali Khan ; they also pleaded limitation by over 12 years, adverse possession, and in the alternative set up a mourasi mokurari lease purporting to have been executed in their favour by the plaintiff's predecessor, Rani Shiromoni, on the 15th Magh 1174 (26th January 1768).

The first Court held that the potta of the 15th March 1174 was a genuine document, and that the plaintiff was bound by it, and that he was not entitled to khas possession and dismissed the suit upon the ground.

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* Appeal from Appellate Decree No. 637 of 1885, against the decree of H. Gillon, Esq., Judge of Midnapore, dated the 30th of December 1884, affirming the decree of Baboo Upendra Chandra Ghose, Munsif of that district, dated the 31st of July 1883.

(1) 6 C. 171. (2) 11 C.L.R. 528.

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Amongst the issues raised was one as to whether or not the plaintiff was entitled to rely on the decree obtained by Sidhi Nazar Ali Khan in 1862, and upon that issue the Court held upon the authority of *Gujju Lal* v. *Fatteh Lall* (1) that the decree was inadmissible in evidence, not being a judgment *inter partes*.

Upon appeal the decree of the first Court was confirmed, upon the ground that the suit was wrongly framed, as being one based upon a resumption decree, and the proper course was to sue for assessment of rent and a kabuliat and not for ejectment and khas possession. As regards the decree of 1862 that Court came to the same conclusion as the lower Court, and held that the decree was not admissible in evidence, inasmuch as the plaintiff did not claim through Sidhi Nazar Ali Khan, but treated him as a trespasser : that being so he could not be bound by any acts or admission of Sidhi Nazar Ali Khan, hostile to his interests, and could not therefore be entitled to the benefit of his acts. That Court also considered that the decision in the case of *Gujju Lal* v. *Fatteh Lall* (1) applied to the case, and that the circumstances of the case did not justify a departure from the rule laid down by the Full Bench in the case of *Hira Lal Pal* v. *Hills* (2).

[209] On the hearing of the first appeal it was admitted that if the decree of 1862 were excluded from the record the plaintiff had no case.

Against that decree the plaintiff now preferred a special appeal to the High Court.

Mr. *J. G. Apcar*, and Baboo *Bhobani Charan Dutt*, for the appellant.

Baboo *Unnoda Pershad Bannerjee*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

This case is not distinguishable from those to which the lower appellate Court refers as having governed his decision that the decree formerly obtained by Sidhi Nazar Ali Khan when in possession as an auction-purchaser is not available as evidence in favour of the plaintiff-appellant, who does not, in any way, claim through that individual ; and that decision is in accordance with the ruling of the Full Bench in *Gujju Lal* v. *Fatteh Lal* (1) which we think should in this case be followed.

The case of *Hira Lal Pal* v. *Hills* (2), cited for the appellant, shows that in certain cases judgments not *inter partes* may be taken into consideration, but it does not pretend to lay down that such judgments can be treated as conclusive evidence which is what was sought in this case in respect of the judgment and decree in question.

The appeal must be dismissed with costs.

Appeal dismissed.

(1) 6 C. 171. (2) 11 C.L.R. 528.

12 C. 209.

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12 C. 209.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

BEPIN BEHARI MODUCK AND OTHERS (*Defendants*) *v.* LAL MOHUN CHATTOPADHYA (*Plaintiff*) AND ANOTHER (*Defendant*).*
[31st August, 1885.]

Hindu law—Partition—Purchaser from Hindu widow, Right of, to partition--Alienation by Hindu widow of share in family dwelling house—Decree for partition—Order directing commission of partition to issue, Appeal from--Appealable order—Civil Procedure Code (*Act XIV of* 1882), ss. 2, 396.

[210] An assignee of a Hindu widow, though a stranger to the family, is in the same position as the Hindu widow, and is entitled to sue for partition of the joint family dwelling house, and all that the Court has to see to is that the partition should be carried out in such a way as not to affect the rights of the reversioners.

Where an Appeal Court made a decree or order directing a commission to issue directed to an Amin to make a partition of certain property into certain specified shares and to allot the shares to the parties to the suit: *Held*, that such order amounted to a decree within the meaning of s. 2 of the Code of Civil Procedure, and that, though called a decree, it was in fact an order in the terms of s. 396 of the Code and was a proper order to make.

[R. 31 C. 214 = 8 C.W.N. 11 (15); 9 C.L.J. 421 = 13 C.W.N. 611 (618) = 2 Ind. Cas. 641].

IN this case the plaintiffs sued to obtain partition of a family dwelling-house and to have a one-third share, which he alleged he had purchased allotted to him.

He stated that the first three defendants were entitled to the remaining two-third share, and that the fourth defendant, Karunamoyi, a widow, had been entitled to the remaining one-third share on partition, and that he had purchased that share from her, she having been forced to sell it for necessity and he having paid the proper value of it to her. He further alleged that after the purchase which took place on the 13th Bhadro 1290 B. S. (28th August 1883), he served a notice on the first three defendants, asking them to come to an amicable partition, but that they had neglected to do so and therefore he brought the present suit.

The first three defendants contested the suit upon various grounds. They admitted that Karunamoyi was entitled to a one-third share, but they impeached the sale to the plaintiff, and alleged that it was a benami transaction, and that no consideration had passed. They further contended that the suit was barred under ss. 13 and 43 of the Civil Procedure Code, inasmuch as Karunamoyi had previously instituted a suit for partition and failed; they also denied the receipt of the notice, and contended that the plaintiff, being a stranger to the family, was not entitled to partition.

The Munsif held that the suit was not barred, as Karunamoyi's previous suit was dismissed for non-joinder, and express leave was given her to institute another suit for partition. He found [211] that the notice had been served, though it was unnecessary, and that the sale was a *bona fide* transaction and for legal necessity; but he refused to decree

* Appeal from Appellate Decree No. 1008 of 1885, against the decree of Baboo Mahendra Nath Mitter, Subordinate Judge of Burdwan, dated the 10th of March 1885, reversing the decree of Baboo Gopal Chundra Basu, Munsif of Kutwa, dated the 13th of March 1884.

1885 AUG. 31. — APPELLATE CIVIL. — 12 C. 209.

partition on the ground that, as the plaintiff was a stranger, he ought not to be allowed to intrude upon the privacy of the defendant's house and put them to inconvenience, and he gave the plaintiff a decree for Rs. 200, the purchase money paid by him to Karunamoyi with interest.

Against this decree the plaintiff appealed, and the defendants preferred a cross appeal against the finding that the sale had been for valuable consideration. The lower appellate Court agreed with the findings of fact of the first Court and dismissed the cross appeal, but it disagreed with the decision of the Munsif as to the plaintiff's right to a partition, and gave the plaintiff a decree for partition, and directed a commission to be issued to the Civil Court Amin to divide the property into two shares, *viz.*, two-thirds for the defendants and one-third for the plaintiff, and to allot such shares to the parties. It further gave the Amin power to award such sums as he might think fit to the parties for the purpose of equalizing the value of their respective shares.

Against that decree the defendants now brought a special appeal to the High Court, upon the ground that the plaintiff, being a stranger, had no right to partition, and that the lower Court had not followed the procedure prescribed by the Code, and that there was no decree which could be executed.

Baboo *Umbica Charan Banerji*, for the appellants.

Baboo *Guru Das Banerji*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

The plaintiff in this suit claimed the partition of a share in a Hindu family dwelling-house purchased by him from a widow.

The first Court. having regard to the inconvenience which it considered would be entailed on the other members of the family if the partition were allowed, made a decree in favour of the plaintiff only for the sum which he had paid for the share in question.

The lower appellate Court reversed that decree and decreed actual partition in favour of the plaintiff.

[212] The grounds taken in this second appeal are that the purchaser of the share of a Hindu widow in a family dwelling-house is not entitled to a partition of that share ; inasmuch as possibly the Hindu widow had no right to alienate her share ; and further that the lower appellate Court has not followed the procedure laid down in the Code ; that in fact there has been as yet no decree which can be executed. It is contended that in a suit for partition, if the Court thinks that the plaintiff is entitled to obtain it, it must, before making a final decree, have the partition carried out by commissioners as provided by s. 396. Therefore, the order of the lower Court against which this second appeal has been filed, as if it were a decree, is not a decree at all. At any rate there is no decree which can be executed.

In our opinion the appellant must fail on both contentions. That a Hindu widow has a right to partition has been established by the Full Bench decision in *Janoki Nath Mukopadhya* v. *Mothuranath Mukopadhya* (1), and the assignee of a Hindu widow is in the same position. All that has to be secured in favour of the reversioners is that the partition should be so carried out as not to affect their rights. The lower

(1) 9 C. 580.

appellate Court, therefore, was right in law in holding that the plaintiff is entitled to actual partition. 1885 AUG. 31.

As to the other point, we think it clear that the adjudication of the plaintiff's right to obtain a partition amounts to a decree within the meaning of s. 2 of the Code of Civil Procedure. Therefore an appeal will lie against that decree. APPELLATE CIVIL.

As to the decree not being capable of execution, we think that is an objection which need not stand in the way of either of the parties. The lower appellate Court has in its decree made an order in the terms of s. 396 that the Civil Court Amin shall carry out the partition in the manner prescribed. Whether the order to the Amin goes direct from the lower appellate Court or whether it goes from the Court of original jurisdiction, the Munsif, seems to us to be of no importance. We, therefore, see no reason for interference in the matter. 12 C. 209.

While this appeal was pending, it seems that an application [213] to execute the decree was made before the Munsif, and the Munsif took steps to execute it. Thereupon a rule was obtained in this Court to show cause why execution should not be stayed pending the hearing of this appeal. We have, therefore, now to dispose of that rule. As we see no reason for interfering with the decree passed by the lower appellate Court, it follows that there can be no reason for staying execution in the terms of the rule.

The appeal is dismissed with costs, and the rule discharged.

We make no order as to the costs in the rule.

Appeal dismissed.

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12 C. 213.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

SMITH (*Plaintiff*) v. DINONATH MOOKERJEE AND OTHERS (*Defendants*).*
[2nd September, 1885.]

Voluntary payment—Landlord and Tenant—Government revenue, Payment of, by putnidar—Defaulting proprietor, Liability of, to recoup putnidar who pays Government revenue for him, when a separate account has been opened—Revenue Sale Law (Act XI of 1859), *ss.* 9, 10, 11, 13, 14 *and* 54—*Contract Act (Act IX of* 1872), *ss.* 69, 70.

A putnidar who had made certain payments on account of Government revenue due by his superior landlords who had defaulted, although a separate account had been opened for the payment of such Government revenue, brought a suit to recover the amount so paid. In such suit it was contended that the payments were merely voluntary, and that the plaintiff could not recover them.

Held, that the plaintiff was "interested" in making the payments, and was therefore entitled to recover under s. 69 of the Contract Act.

Held further, that s. 70 of the Contract Act applied to the case, inasmuch as the word "does" in that section includes payments of money, and also that the plaintiff was entitled to recover under s. 9 of the Revenue Sale Law as he believed in good faith that his interest would be endangered by a sale taking place.

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* Appeal from Appellate Decree No. 1722 of 1884, against the decree of C. A. Kelly, Esq., Judge of Nuddea, dated the 7th of August 1884, affirming the decree of Baboo Amrita Lal Chatterji, Subordinate Judge of that district, dated the 28th of August 1882.

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The liability of a landlord under s. 9 of the Revenue Sale Law to recoup a person paying Government revenue for him does not depend upon the question of whether the money was originally deposited or not, but accrues upon its being credited in payment of the arrears.

[Appl., 22 C. 28 (32); 28 A. 563=A.W.N. (1904) 114=3 A.L.J. 372; 15 Ind. Cas. 55; Commented upon, 2 C.L.J. 311 (317); R. 7 C.W.N. 609 (612)=30 C. 794; 7 O.C. 146 (149); 11 Ind. Cas. 155; Disc., 14 C.W.N. 699=6 Ind. Cas. 341; Rel. on, 21 Ind. Cas. 207 (209).]

[214] IN this case the plaintiff sought to recover the sum of Rs. 1,035-4-3 on account of principal and interest, which he alleged to be due to him from the defendants for moneys paid by him on account of the Government revenue of Taruff Shyampur. The plaintiff was the putnidar of certain mouzahs in the said taruff, of which the defendants were the owners. He alleged in his plaint that the defendants had for several years omitted to pay the Government revenue due by them, and that in order to save his putni right he had paid it for them, and thus saved their property. In respect of some portion of the payments made by him he stated that he had set off the amount against the rent due from him to the defendants, and he claimed to be entitled to recover the balance of Rs. 851-15-1 together with interest, Rs. 183-5-2, thereon.

The defendants stated that there was a separate account for the payment of the Government revenue in respect of the taruff, and that the revenue was collected separately, and that in consequence thereof, even if a sale had taken place, the plaintiff's putni would not have been cancelled, and that the payment made by the plaintiff must, therefore, be considered purely voluntary, and that he was not entitled to recover the amount from them. They also pleaded that some of the payments made by the plaintiff were barred by limitation, and that he was not entitled to set them off in the manner he alleged he had done, and they took other objections in the written statement immaterial to the points at issue in the present appeal.

The first Court held that the plea raised by the defendants that the payments were voluntary was a good one; that the plaintiff was not interested in the payment of the revenue due from the defendants; and that if a sale of the share had taken place, the plaintiff's putni was not likely to have been affected. It further held that the case did not fall within s. 70 of the Contract Act, and that there was nothing to show that the defendants had been benefited by the payments. The Court therefore, without going into the other issues, dismissed the suit.

The lower appellate Court took the same view, and held that the payments could not be considered other than voluntary, and that the plaintiff could not be considered as "interested," [215] in making them within the meaning of s. 69 of the Contract Act. It also held that the plaintiff's interests were not jeopardised at the time the payments were made so as to enable him to claim under the provisions of s. 9, Act XI of 1859. It accordingly confirmed the decision of the lower Court and dismissed the appeal.

The plaintiff now preferred a special appeal to the High Court.

Mr. *Pugh*, and Baboo *Lall Mohun Dass*, for the appellant.

Baboo *Rash Behary Ghose*, and Baboo *Sharoda Prosunno Roy*, for the respondents.

The nature of the arguments upon the hearing of the appeal appears

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sufficiently from the judgment of the High Court (MITTER and MACPHERSON, JJ.) which was as follows :—

JUDGMENT.

The (plaintiff) appellant seeks to recover from the (defendants) respondents the sum of Rs. 1,035-4-3 under the following circumstances.

The appellant is the putnidar of certain mouzahs appertaining to a share of Taruff Shyampur, in respect of which the respondents, the owners thereof, have caused a separate account to be opened for the payment of the Government revenue either under s. 10 or s. 21 of Act XI of 1859. The whole of this revenue or a portion thereof not having been paid for several years past by the respondents, and the appellant having paid the same, the present suit was brought for the recovery of the amount so paid with interest.

The lower Courts have held that the appellants are not entitled to recover, taking the facts set forth above to be correct.

The Subordinate Judge who has decided this case in the original Court was of opinion that the appellant was not interested in the payments which he made, because, if the share of the respondents' zemindari had been sold in consequence of their default, his *putni* right would not have been affected under the provisions of s. 54 of the Sale Law. Neither was the appellant entitled to recover, because in the opinion of the Subordinate Judge the appellant "did nothing for the defendants" who are not shown to "have been benefited by these payments." He accordingly **[216]** dismissed the suit, being of opinion that the present case did not fall under either s. 69 or s. 70 of the Indian Contract Act.

On appeal the District Judge has taken the same view as the Subordinate Judge regarding the applicability of ss. 69 and 70 of the Indian Contract Act to the present case, and has further held that the claim did not fall within the purview of s. 9 of the Sale Law, upon which it seems the appellant also relied before him.

We are of opinion that the decision of the lower Courts is erroneous. It is clear that the respondents were bound to pay the revenue which the appellant has paid. It seems to us that he was *interested* in its payment. It is true that if the "separated" share had been sold under s. 13 of the Sale Law for the arrears of revenue due upon it, the appellant's putni rights would not have been affected by that sale. But if the entire estate had been put up to sale under s. 14, the appellant's putni would have been avoided by such sale. Therefore, although in consequence of the respondent's non-payment of the revenue, the risk to the appellant's putni was somewhat remote, still it cannot be denied that he had *some* interest in paying it. It has been said that if payments made under the circumstances of the present case are recoverable under s 69, mischievous consequences would follow ; because, as soon as a tenant committed a default in the payment of his rent, any under-tenant of his would be competent to drag him into Court by making the payment himself. But s. 69 only applies to payments made *bona fide* for the protection of one's own interest. A person may be interested in the payment, but in making the payment if he is not actuated by the motive of protecting his own interest, he cannot recover under s. 69 [See *Desai Himatsingi Joravarsingi* v. *Bhavabhai Kayabhai* (1).]

If this construction of s. 69 be correct, the mischievous result apprehended would not arise. Men do not readily pay another's debts, and

(1) 4 B. 643 (652).

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if an under-tenant under the circumstances mentioned above, believing that it is his interest to liquidate the arrears of the rent of his superior tenant, does make the payment, we do not see any real hardship to the latter in being called upon by [217] the former to reimburse him. The present case, therefore, in our opinion falls under s. 69 of the Indian Contract Act.

We are also of opinion that the lower Courts are in error in coming to the conclusion that the provisions of s. 70 of the Indian Contract Act and s. 9 of the Sale Law are not applicable to the facts of the present case. It has been contended before us on behalf of the respondents that the word "does" in s. 70 of the Indian Contract Act does not include payment of money. This contention is negatived by the decision of the Bombay High Court already cited, and is contrary to the view expressed by the Allahabad High Court in *Nath Prasad* v. *Baij Nath* (1) and by a Division Bench of this Court in *Nobin Krishna Bose* v. *Mon Mohuu Bose* (2).

This contention is chiefly based upon the argument that if the word "does" in s. 70 did include payment of money, s. 69 would be wholly unnecessary. But this would not be so, because there may be cases in which a person who is bound to pay a certain sum of money would not be necessarily benefited by its payment by another. Such a case would not fall under s. 70 but under s. 69. The Subordinate Judge says that it has not been shown that the respondents have been benefited by the payments made by the appellant. But a person who enjoys the profits of a property burdened with the payment of certain taxes is surely benefited by one who pays those taxes for him.

The present claim is equally sustainable under the provisions of s. 9 of the Sale Law. Under this section if the appellant "believed in good faith" that his interest would be endangered by the sale of this zemindari, he would be entitled to recover.

But it has been said that this case does not come under the section in question, because the money was not paid as a deposit, but in liquidation of the arrears of revenue, and was at once credited in payment thereof. But this circumstance, in our opinion, does not render the provisions of this section inapplicable. The liability of the landlord under this section does not depend upon this, *viz.*, whether the money was originally deposited or not, but accrues upon its being credited in payment of the arrear. This is quite clear, because the person making the deposit is not [218] entitled to recover until the money deposited has been credited in payment of the arrear. The provision relating to the deposit has been made for the convenience of the depositor in order to enable him to obtain refund of the money easily if before the "sunset" day the arrears are paid by the zemindar, and has no bearing upon the question of his liability to reimburse the person making the payment for his benefit. This liability arises, as already remarked, upon the money being credited in payment of the arrear. This was done in the present case, and we are therefore of opinion that the appellant's contention, based upon s. 9 of the Sale Law, is equally sound.

We set aside the decision of the lower Courts and remand the case to the Subordinate Judge to decide it upon the other issue arising in it. The costs to follow the result.

Appeal allowed and case remanded.

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(1) 3 A. 66. (2) 7 C. 573.

12 C. 219 (P. C.) = 12 I. A. 183 = 4 Sar. P.C.J. 676.

1885 JULY 2. PRIVY COUNCIL. 12 C. 219 (P.C.) = 12 I.A. 183 = 4 Sar. P.C.J. 676.

[219] PRIVY COUNCIL.

PRESENT :

Lord Watson, Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On appeal from the Court of the Judicial Commissioner, Central Provinces.*]

SANGRAM SINGH (*Plaintiff*) *v.* RAJAN BAHI AND ANOTHER (*Defendants*). [2nd July, 1885.]

Evidence Act, I of 1872, *s.* 32, *sub-s.* 5—*Statement as to the existence of relationship—Special means of knowledge.*

The judgment of an Appellate Court, reversing that of a Court of first instance, on a question as to the existence of relationship, rested mainly on a statement recorded in prior settlement proceedings as made by a person, since deceased, who was employed therein as *mukhtar*, by certain members of the family. This judgment was reversed on a second appeal by the Court above on the ground that the statement was inadmissible, not coming within the meaning of Act I of 1872, s. 32, sub-s. 5, as that of a person having special means of knowledge on the question.

Held, that the statement was inadmissible, as it appeared that his only means of knowledge were from his being instructed as such *mukhtar*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns.

Held, also, that the Court of second appeal had rightly declined to send the case back for evidence to be taken as to whether he had, or had not, other means of knowledge.

[Cited, 31 C. 871.]

APPEAL from a decree (19th September 1882) of the Judicial Commissioner, reversing a decree (30th March 1882) of the Additional Commissioner, Jabalpur, and restoring a decree (14th March 1882) of the Deputy Commissioner, Jabalpur district.

The question on this appeal was whether a statement made by a person, since deceased, relating to the existence of relationship, was admissible in evidence under Act I of 1872, s. 32, sub-s. 5, such statement having been recorded in settlement proceedings as that of a *mukhtar* of certain members of the family who were parties thereto.

The appellant claiming to succeed to the ancestral taluk Bargaon in the Jabalpur district, sued the respondents, mother and son, who were niece, *i. e.*, brother's daughter, and grand- [220] nephew, respectively, of Parmode Singh, the last male owner who died in 1852. Rajan Bahi had obtained *dakhil kharij* in her name, her son being recorded as her *karinda.*

Sangram Singh, the plaintiff, alleged title as sixth in descent from Sadu Rai, the common ancestor, Parmode Singh having been fifth ; and he relied on a *pushtnama*, or pedigree table, filed at settlement, as coming from certain members of the family, by Harbilas, their *mukhtar*, whose statement in regard to it was recorded by the settlement officer on 4th December 1862. Harbilas died before the present suit. The Deputy Commissioner, in the first instance, dismissed the suit which was, however, on appeal decreed by the Additional Commissioner, who accepted the statement of Harbilas, and found that there was sufficient proof of the plaintiff being the nearest male heir.

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On a second appeal the Judicial Commissioner (Mr. R. J. Crosthwaite) was of opinion that the statement of Harbilas, not having been accompanied by anything to show that he had means of knowledge other than his instructions as *mukhtar*, was inadmissible under the Indian Evidence Act, 1872, s. 32, sub-s. 5 ; also that the other evidence as to the relationship of Sangram Singh was worthless. He, therefore, reversed the decree of the Additional Commissioner, restoring that of the first Court.

Mr. *J. Graham, Q.C.*, and Mr. *Robert Hornell*, for the appellant, argued that his title had been established. This statement of Harbilas was admissible under s. 32, sub-s. 5. The Judicial Commissioner at all events should not have disposed of the case adversely to the appellant without giving him an opportunity to show that Harbilas, even supposing that his testimony had been accepted without having sufficient foundation laid for it, had, in fact, had special means of knowledge.

Reference was made to Act I of 1872, s. 32, sub-s. 5 ; Act XVII of 1872, s. 2, adding after the word "relationship" in the above Act, the words "by blood, marriage, or adoption." They also contended that the statement of Harbilas, as to the *pushtnama*, was an entry in a public record stating a fact, such entry having been made in the performance of a duty enjoined [221] upon settlement officers by Regulation VII of 1822, in the preparation of the Record of Rights, in this case relating to mouzah Bargaon. It followed that the entry was admissible by the 35th section of the Indian Evidence Act, 1872, in another way than had been suggested ; and that it could be taken for what weight it possessed. Reference was made to *Lekraj Kuar* v. *Mahpal Singh* (1).

Mr. *C. W. Arathoon*, for the respondent, was not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R.P. COLLIER.—In this case an action was brought by Sangram Singh to recover possession of a mouzah called Bargaon against a lady of the name of Rajan Bahi and her son, Rajan Bahi being a niece of Parmode Singh, who was its last possessor ; and the plaintiff sought to recover this mouzah by proving his descent through six generations from one Sadu Rai, from whom Parmode had been descended through some five generations.

Without determining whether or not if the plaintiff had proved his pedigree he would be entitled to succeed, their Lordships address themselves to the question whether he has proved it. He endeavoured to prove it in this way. Some oral evidence was called which may be dismissed with the observation that it went to the effect that he had performed the funeral rites of burning the body of Parmode, but would be very far from establishing such a title as he seeks to set up. His main evidence consisted of certain depositions of deceased persons which he contended were admissible in evidence. Those depositions had been taken in a proceeding which had been instituted in 1863 between the two widows of Parmode Singh on the one side, and one Deo Singh, a claimant, on the other, with reference to the settlement of this mouzah Bargaon, and they seem to have been taken with a view to the making up of what are called the *wajib-ul-arz* or village papers. The first of these is a deposition of one Harbilas, who was a *mukhtar* of these ladies.

(1) 5 C. 745 = 7 I.A. 63.

1885 JULY 2. PRIVY COUNCIL. 12 C. 219 (P.C.) = 12 I.A. 183 = 4 Sar. P.C.J. 676.

The first question which arises is whether the evidence of the *mukhtar* was admissible for the purpose for which it was put in. It is said to have been admissible under Act I of 1872, s. 32. "Statements, written or verbal, of relevant facts made by [222] a person who is dead or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases." And one of the cases put in sub-s. 5 is : "When the statement relates to the existence of any relationship between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised."

It has been objected that this *mukhtar* had no special means of knowledge, and therefore that he does not come within the description of persons mentioned in this section. It nowhere appears that he had any other knowledge than as *mukhtar* acting for these ladies. He is not shown to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns. Therefore in their Lordships' opinion he does not come within the description of a person having special means of knowledge. But further it appears from his deposition that he is making a statement of the case on the part of his clients rather than professing to speak his own knowledge of facts. He begins his deposition in this way : "They (his clients) mean to show that the taluka of mouzah Bargaon was acquired by their ancestor Sadu Rai, and has now devolved on Mussamut Ladli Thakurani and Sawai Thakurani by reason of descent according to the genealogical tree," and so on. It appears to their Lordships, therefore, on the two grounds, first, that he was not shown to have special knowledge, and secondly, that he did not pretend to speak from his knowledge at all, that this deposition was not admissible.

There remain the depositions of the ladies, which are very short, and which perhaps it may be convenient to read. First, there is that of Mussamut Sawai Thakurani, who was the younger widow of Parmode. She says : "Mussamut Ladli and Mussamut Lalto are the proper heirs to the property after my death. Delan Shah comes after them on their death." Mussamut Ladli was the eldest widow, and it would seem that at this time she [223] was not able to give evidence by reason of failure of her faculties. Mussamut Lalto with whom a settlement had been made by the Government (it does not clearly appear why), was the widow of a nephew of Parmode Singh, called Abhman Singh. Mussamut Sawai is asked, "who are Delan Shah and Beni Singh?" and she says : "The genealogical tree given by Mussamut Ladli will show their lineage. Delan Shah is the legitimate son, and Beni Singh the offspring of a concubine." It would also appear that Mussamut Ladli had at one time made some statement, which is not put in. Then the lady is asked : "Mussamut Ladli in her statement declares Deo Singh as the heir to the property, and the genealogical tree also shows that he bears a close relation to you ; how is it then that you do not like to declare him so?" She answers : "The reason of this is, that when my husband, Parmode Singh died, this Deo Singh put me to a great trouble. He tried to have the *dakhil kharij* made in his own name, but it was justly and rightly made in the name of Mussamut Ladli. Similarly at the time when an inquiry of proprietary rights was going on, he skilfully induced Mussamut Ladli to

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quarrel with me. Again, he does not like me, and so as a matter of course I do not like him. I am pleased with Delan Shah, because he is of my family and is always ready to obey me. (Question) Beni Singh also appears from the genealogical tree to be closely related to you ; what do you say about him ? (Answer) " I do not like even to hear his name." This lady appears to think that Deo Singh had a better title than the plaintiff, but she made no mention of Deo Singh, because she did not like him, and she mentioned the son of the plaintiff because she did like him.

The deposition of the next lady is as follows : She is asked :—" The proprietary rights of the Bargaon taluka, pergunnah Bilshei, have been conferred on you by the Government for life. Now it is asked of you who will succeed to your property after your death ? She answers : "Mussammut Sawai Thakurani, my mother-in-law, is the heir of the estate after my death. When she dies Delan Shah, whom she has declared to be her heir, may succeed her. I quite agree with her in the statement she has made. I have no objection to make against it."

[224] Their Lordships agree with the Judicial Commissioner that the evidence of these two ladies is worthless. Therefore, if the evidence of Harbilas is struck out, the plaintiff has made no case.

The case came in the first instance before the Deputy Commissioner, who dismissed the plaintiff's claim, thinking the evidence of Harbilas was inadmissible, and if admissible, not proving the plaintiff's case. It subsequently went before the Additional Commissioner, who found in favour of the plaintiff, he being of opinion that the evidence of Harbilas was admissible on the ground that he had special knowledge, and he undoubtedly seems to have acted mainly on that evidence. Indeed, there is no other evidence on which he could be presumed to act. The case came thirdly before the Judicial Commissioner, and the Acting Judicial Commissioner reversed the judgment of the Additional Commissioner mainly upon the ground that the Additional Commissioner was wrong in accepting the evidence of Harbilas, it not having been shown that Harbilas had any special means of knowledge. The Acting Judicial Commissioner, their Lordships think rightly, assumed the judgment of the Additional Commissioner to have been given mainly, if not entirely, upon the ground of his believing the evidence of Harbilas, and treating it as admissible. The Judicial Commissioner being of opinion that that evidence was not admissible, reversed the judgment, and accordingly the judgment of the original Court stands confirmed. It may be observed that a question was raised before the Judicial Commissioner as to whether directions should be given for the case to be sent back and evidence to be taken on the subject of the special knowledge of Harbilas, but the Judicial Commissioner, in their Lordships' opinion, rightly declined to give any such directions.

For these reasons their Lordships are of opinion that the judgment of the Judicial Commissioner was correct, and that this appeal should be dismissed. They will accordingly humbly advise Her Majesty to that effect. The appellant should pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant : *Messrs. Merriman, Pike and Merriman.*

Solicitor for the respondents : Mr. *T. L. Wilson.*

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12 C. 225 (P.C.) = 12 I.A. 215 = 4 Sar. P.C.J. 652 = 9 Ind. Jur. 437.

12 C. 225 (P.C.)=12 I.A. 215=4 Sar. P.C.J. 652=9 Ind. Jur. 437.

[225] PRIVY COUNCIL.

PRESENT:

Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.
[*On appeal from the High Court at Calcutta.*]

KAMINI SUNDARI CHAODHRANI (*Defendant*) v. KALI PROSSUNNO GHOSE AND ANOTHER (*Plaintiff.*)
[9th, 10th, 11th and 27th June, 1885.]

Remand—Powers of Appellate Court—Property in different districts—Decrees of District Courts, Powers of Appellate Court to amend—Act VIII of 1859, *s.* 12*—Procedure—Unconscionable Bargain—Interest.*

Neither under s. of 12 Act VIII of 1859, nor in any other way, has the High Court in its appellate capacity power to give jurisdiction to a District Court to inquire into facts, as upon a remand, in a suit decided in the Court of another district, and relating to lands in the latter.

Of two mortgages, between the same parties, the first comprised four villages, of which three were in district A, and a fourth property was in district B. The second mortgage comprised, in addition to the above, three other villages in district B. Suits brought in both districts by the assignee of the mortgagee against the mortgagor were thus framed, *viz.*, in the suit in district A for possession upon foreclosure of both mortgages, and for a declaration of the plaintiff's right as purchaser of one of the properties; and in the suit in district B for payment of the debt on the second mortgage. Both suits were dismissed.

The High Court, hearing appeals in both suits together, affirmed the dismissal of the suit in district B, and remanded the other to the Court of first instance in district A, to have the proportionate value of the properties determined, with a view to the apportionment of the liability of the parties by way of contribution.

As the defendant who succeeded in both suits in the District Courts raised no question of jurisdiction, each of them might be taken to have had the consent of parties to its hearing the whole suit before it. But no such consent could be deemed to have been given to the order of the High Court made as above stated on contested appeals. This order was, accordingly, unauthorized. Although wide powers of amendment, of framing new issues, and of modifying decrees are conferred upon the High Court by provisions in the Code, of which the plain meaning is not to be narrowed by judicial construction, these powers were exceeded in the change of the suits by the order in question, into a suit of a description differing totally from that of either of them, as originally decreed; and this without the consent of the parties.

Fraud apart, a loan to a *purdanashan* woman from her own *mukhtear* at an exorbitant rate of interest, the security being ample, may be a hard and unconscionable bargain on which the contract for such rate of interest will not be enfored. *Beynon* v. *Cook* (1) referred to and followed.

[F., 17 C. 699 (F.B.); Appl., 26 C. 316; 25 A. 284 (286)=23 A.W.N. 44; 1 N.L.R. 76 (79); R., 23 B. 22 (31); 9 A. 228; 11 A. 57 (67); 29 C. 823 (827); 8 O.C. 193 (195); 9 Bom. L.R. 1296 (1298)=32 B. 208; 4 A.L.J. 222=29 A. 303=A.W.N. (1907) 55; D., 27 C. 421 (427); 31 C. 233 (240); 8 O.C. 210 (215).]

[226] TWO consolidated appeals from two decrees (20th July 1878 and 27th June 1881), of the High Court, by the first of which a decree (1st March 1877) of the Subordinate Judge of the Nuddea district was affirmed. By the other decree of the High Court, a decree (29th February 1876) of the First Subordinate Judge of the district of the 24-Pergunnahs was reversed.

The questions raised on these appeals related to the mode in which the High Court had disposed of suits brought by the assignee of the rights

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(1) L.R. 10 Ch. Ap. 389.

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of a mortgagee under two mortgages, by *kut-kobala*, of interest in land in the possession of a Hindu widow.

After the mortgages, but before the assignment, the assignee had become the purchaser of the interest in part of the property mortgaged, a zemindari in the Nuddea district named Alumpur, at a sale for arrears of Government revenue. How this affected the form of the assignment is explained below.

In 1875, the first of these suits was brought by the assignee in the Court of the First Subordinate Judge of the 24-Pergunnahs for possession of three villages in that district comprised in the first mortgage, upon foreclosure in conformity with Regulation XVII of 1806, and for a declaration of his right to that part of the property which he had purchased at auction sale, *viz.*, the zemindari of Alumpur in Nuddea. As to this part of the case, among other defences, it was alleged that if the sale and assignment of Alumpur had freed it from liability, then no right to the three other villages in the 24-Pergunnahs as against the mortgagor, could be enforced; but the proper claim would be a suit for contribution.

In 1876, the second suit was brought in the Court of the Subordinate Judge of Nuddea for Rs. 63,394, due under the second mortgage, which comprised all the property mortgaged in the first, with the addition of three other villages in the Nuddea district. Both suits having been dismissed, appeals were heard on both of them together by a Divisional Bench of the High Court (GARTH, C.J., and MCDONELL, J.) The decree of the Nuddea Court was affirmed, but the other decree was dealt with as explained in the following judgment.

These appeals have been argued together, and we think it [227] right, under the circumstances, to dispose of them in one and the same judgment.

"On the 26th of March, 1872, the defendant, Srimati Kamini Sundari Dasi, borrowed Rs. 12,000 from Grish Chunder Banerji, and to secure that sum and interest, she mortgaged to him, by way of conditional sale, a half-share in five different properties—Kachiara, Atghara, Dariapur, Chapra, and Alumpur. The loan was repayable, with interest at 4 per cent. per mensem, within one month from the date of the mortgage.

"On the 9th of May, 1872, (the first mortgage being unpaid) the defendant, in consideration of a further loan of Rs. 24,000, gave Grish Chunder another mortgage, by way of conditional sale, of the same five properties as were mortgaged by the former deed, and also of three other properties—Hijli, Turruf Ranaghat, and Dihi Santa.

"This sum of Rs. 24,000 was to be repaid, with interest at Rs. 2-4 per mensem, on the 9th of May, 1873; and the deed provided that the mortgagee was to have his remedy, either by foreclosure or sale of the mortgaged properties, or by suit against the mortgagor, for the mortgage money and interest.

"On the 29th of July, 1873, no part of the above mortgage debts having been paid, Grish Chunder gave to the defendant the usual notice to foreclose the properties mortgaged by the first deed.

"On the 23rd of March, 1874, the defendant's half-share in Alumpur was sold for arrears of revenue, and the plaintiff, Kali Prosunno Ghose, became the purchaser, subject to the mortgages then existing upon the property.

"As Alumpur was by far the most valuable of all the mortgaged properties, and as, by the pending foreclosure proceedings, the plaintiff's interest in it was in jeopardy, (his purchase of it having been made subject

to the mortgages), he arranged with Grish Chunder Banerji to purchase from him his entire interest in the two mortgages, for the amount of principal and interest then due, and a bonus of Rs. 10,000 in addition.

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"Accordingly, on the 3rd of June, 1874, an assignment was made, by Grish Chunder, of the mortgaged properties to Bhugwan Chunder Mitter (the plaintiff No. 2), as trustee for [228] the plaintiff No. 1, Kali Prossunno Ghose; the assignment being expressly thus made to a trustee, to prevent a merger of the mortgagor's interest in that of the mortgagee, as regards the estate of Alumpur.

"Of the five properties which were mortgaged by the first deed, Chapra has been sold on account of a prior mortgage debt; and it is admitted that this property is not available under either mortgage.

"On the 28th of April, 1875, the plaintiff brought the first of these suits (making his trustee, Bhugwan Chunder Mitter, a co-plaintiff) for the purpose of obtaining possession of the three properties, Kachiara, Atghara, and Dariapur (mortgaged by the first deed, by force of the foreclosure proceedings; and also to obtain a declaration that he (the plaintiff) was entitled by virtue of his purchase, as well as of the foreclosure proceedings, to a proprietary right in Alumpur.

"In this suit, the Subordinate Judge held, that as the plaintiff had purchased the mortgagor's interest in Alumpur, and the mortgagee's interest in the whole of the mortgaged properties, he had become both the payer and receiver of the mortgage debts, and that consequently those debts, and the remedies for them, had become extinguished; and he considered that, looking to the real substance of the transaction, the fact of the plaintiff having taken the assignment of the mortgage in the name of a trustee, although he did so expressly to avoid the merger, made no difference in his legal position. He accordingly dismissed the plaintiff's suit.

"Meanwhile, on the 7th of February, 1876, another suit had been brought by the same plaintiff against the same defendant to recover the amount of the mortgage-debt and interest due under the second mortgage. The suit was tried by the same Subordinate Judge, and was dismissed upon two grounds,—first, that by purchasing Alumpur, the mortgage-debt had become extinguished; and, secondly, that notwithstanding the terms of the mortgage-deed, the plaintiff could have had no personal remedy against the defendant for the debt, until all his remedies against the property had been exhausted.

[229] "We consider that the view which the lower Court has taken of these cases is not altogether correct.

"In the first place, the Subordinate Judge was wrong in supposing that by taking an assignment of the mortgages *bona fide* in the name of a trustee, the plaintiff could not prevent the merger of the mortgagor's and mortgagee's interests, and, consequently, the extinguishment of the mortgage-debt. The assignment was taken in the trustee's name expressly for the purpose of preventing the merger, and keeping alive the two estates; and there is ample authority that this object may properly and legally be carried out by means of an assignment of this nature. [See *Watts* v. *Symes* (1); *Adams* v. *Angell* (2).]

The real objection to these suits, in an equitable point of view, appears to us to be this—that the plaintiff, who is the beneficial owner of Alumpur, subject to the mortgages, and as such liable, conjointly with the

(1) 1 DeG. M. and G. 240. (2) L. R. 5 Ch. D. 634.

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owners of the other mortgaged properties, to pay his proportion of the entire mortgage-debts, has attempted to foreclose Alumpur and the other properties comprised in the first mortgage for a part only of the mortgage-debts (that part which was due under the first mortgage), and as then sued the defendant personally for the remainder, to the payment of which he himself, as the owner of Alumpur, is bound to contribute. We have great doubt whether, under such circumstances, he had any right to foreclose at all under the first mortgage. Grish Chunder, the original mortgagee, had, by accepting the second conditional sale of the properties, consented to charge them with an additional mortgage-debt, and having done so, it appears to us that it would have been inequitable on his part to foreclose the property under the first mortgage, and so deprive the defendant of that which both parties had agreed to look to as the primary means of satisfying the sum due upon the second mortgage.

"But even assuming for the sake of argument that the plaintiff could thus have foreclosed under the first mortgage, it is clear that he had no right (being himself the beneficial owner of Alumpur, and, as such, liable to contribute proportionately to [230] the payment of both mortgages), to foreclose the first mortgage in order to satisfy the debt due under that, and then to sue the defendant personally for the debt due upon the second mortgage, as though that debt were not a charge upon the mortgaged property at all, and he himself were not liable for his proportion of it. Even assuming that he could have foreclosed the first mortgage, which we much doubt, we are clearly of opinion that he had no right to bring the second suit, and that the bringing of that suit had the effect (by analogy to the English Rule of Equity in such cases, &c.) of re-opening the foreclosure, or preventing the foreclosure proceedings being confirmed, or sanctioned by this Court, and of enabling us to make a decree which will at once secure to the plaintiff his just rights and at the same time oblige him to do equity as regards the defendant."

The High Court then drew up the terms, as stated in their Lordships' judgment, of the interlocutory decree (20th July 1878) sending the suit by way of remand, for the determination of the values of the properties mortgaged, to the first Subordinate Judge of the 24-Pergunnahs. From this decree the first of the present appeals was preferred in 1879. Meantime the return from the 24-Pergunnahs was made to the High Court, setting forth the principle and results of the valuation which was based on the net annual profits of each estate, and the number of years purchase which the evidence showed that each would probably fetch. The final judgment of the High Court (27th June, 1881), approved the findings of the lower Court as to the relative values of the mortgaged estates. The amount of interest to be allowed was also considered, and this question was held to be "governed by the rate stipulated for in the mortgages up to the time of redemption by the mortgagors for realization of the mortgage-money. This appeared to the Court to be in accordance with the ordinary rule." The final order was that the plaintiff was entitled to the proportionate amount of principal and interest in respect of the mortgage-debts, the interest being calculated as above stated, and also to certain scheduled sums, with costs in all the Courts. Liberty to redeem within six months from the date of the decree ; otherwise, realization by attachment and sale of the mortgaged premises.

[231] The appellant's second appeal was admitted against this decree. 1885 JUNE 27. — PRIVY COUNCIL. — 12 C. 225 (P.C.) = 12 I.A. 215 = 4 Sar. P.C.J. 652 = 9 Ind. Jur. 437.

Mr. *J. T. Woodroffe*, for the appellant, argued that the High Court had exceeded the powers of an appellate Court in dealing with the decree of the First Subordinate Judge of the 24-Pergunnahs, with a view to the apportionment of liability between the parties the High Court had altered the frame of the suits, and changed the description of remedy sought. In fact, it had affirmed the dismissal of one of the suits, and to alter the scope of the other in the manner attempted was beyond its powers. Nor had the result been successful in regard to the merits, for the maintenance of the respondent's right in Alumpur did not correspond with the continuing liability of the other mortgaged properties, and led to an inconsistency between the nature of the case made, and the relief given. Also, the claim in the Court of the 24-Pergunnahs had been made the basis for the decree of the High Court, which in effect involved a decree for payment, notwithstanding that a claim for a mortgagee's remedy, in conformity with Regulation XVII of 1806, could not be made the basis for a money-decree. In a suit for possession on foreclosure a decree for money cannot be given.—Macpherson on Mortgages, Chap. IX. Again, as that decree could be supported as originally made, *viz.*, dismissing the suit, on grounds legally tenable, the High Court had no course but to affirm the dismissal by dismissing the appeal.

He referred to *Mohanand Chatterjee* v. *Govindnath Roy* (1); *Zalem Roy* v. *Deb Shahee* (2); *Roghoobar Dyal Singh* v. *Bhekaree Singh* (3); *Gokul Doss* v. *Kriparam* (4); *Nugender Chunder Ghose* v. *Kamini Dossee* (5); *Nawab Azimut Ali Khan* v. *Jowahir Singh* (6); *Bhuggobutty Dossee* v. *Shama Charn Bose* (7); *Gokal Das Gopal Das* v. *Poran Mal Premsukh Das* (8). Next, the rate of interest should be referred to. The plaintiff knew well the value of the property, and how ample was the security. The interest was excessive. He referred to *Earl* [232] *of Aylesford* v. *Morris* (9); *Nevill* v. *Snelling* (10); *Kanai Lal Jowhari* v. *Kamini Debi* (11), citing this last case on the subject of the protection of secluded women.

For the respondent Kali Prossunno Ghose, Mr. *T. H. Cowie, Q. C.* and Mr. *R. V. Doyne*, contended that it had been correctly decided by the High Court that the appellant was equitably bound to contribute, proportionally, to the relative value of the mortgaged properties which she claimed to retain, (notwithstanding their foreclosure or liability to foreclosure) to the payment of the mortgage debt charged by the *kut-kobalas* on all the properties. The latter remained liable after the purchase of Alumpur. In regard to the alleged alteration of the frame of the suit, it was originally one for possession supplemental to the relief under the Regulation. The appellant had made no objection to the suits being dealt with as they had been; and he had in no way been surprised or prejudiced. Nor had the alteration exceeded the powers which the Court possessed to amend and modify.

The High Court had rightly allowed interest at the rate agreed upon between the parties, the rate not being necessarily excessive, and the parties having dealt under circumstances that did not indicate any undue influence.

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(1) 7 Sel. Rep. 92 = 8 I.D.O.S. 82. (2) Marsh. 167. (3) 22 W.R. 472.
(4) 13 B.L.R. 205. (5) 11 M.I.A. 241. (6) 13 M.I.A. 404.
(7) 1 C. 337. (8) 10 C. 1035. (9) L.R. 8 Ch. Ap. 484.
(10) L.R. 15 Ch.D. 679. (11) 1 B. L. R. O.C. 31 note.

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Mr. *J. T. Woodroffe*, in reply, argued that besides the right on the part of the appellant to insist that the dismissal of the suits should have been upheld, the remand order was irregular, and beyond the Court's powers on account of the situation of the property, partly in Nuddea. The High Court in its appellate jurisdiction could not authorize the Court of the 24-Pergunnahs to deal with a suit in which the property concerned was, in a great part, in another district.

Regarding the rate of interest it was submitted that the case fell within the law relating to unconscionable bargains. Reference was made to *Benyon* v. *Cook* (1); *Gooroo Doss Dutt* v. *Oomachurn Roy* (2); *Lal Beharee Awustee* v. *Bholanath Roy* [233] *Chakladar* (3); *Deen Dyal Lall* v. *Choa Singh* (4); *Munshi Buzloor Raheem* v. *Shamsoonissa Begum* (5); *Greesh Chunder Lahori* v. *Bhaggobatti Debia* (6); *Ashgar Ali* v. *Delroos Banoo Begum* (7); *Takoordeen Tewaree* v. *Nawab Syed Ali Hossein Khan* (8).

On a subsequent day, June 27th, their Lordships' judgment was delivered by:—

JUDGMENT.

SIR R. COLLIER.—These appeals are brought from two judgments of the High Court of Calcutta; the first interlocutory, dated 20th July 1878, the second final, dated 27th June 1881, in a suit in which the respondents were the plaintiffs, and the appellant the defendant.

The circumstances which gave rise to the suit, as far as they are material, are as follows: Srimati Kamini (by this short name it may be convenient to designate her), a *purda-nashin* lady, executed a *kut-kobala* of the moiety of five mouzahs, the largest and most valuable of which was named Alumpur, to which she was entitled as widow of Ram Chunder Pal Chowdhry, to secure the repayment, within one month, of Rs. 12,000, with interest at the rate of 4 per cent. per mensem until repayment, in favour of Grish Chunder Bandopadhya, who was the *benamidar* of Hari Churn Bose, her *mukhtar*.

One of these mouzahs, being subject to a prior mortgage, has been put out of the question; thus the mouzahs mortgaged may be treated as four.

On the 9th of May 1872, the same lady executed another *kut-kobala* in favour of the same person, whereby the said four mouzahs, together with three others, were hypothecated to secure the repayment, in April 1873, of Rs. 24,000, with compound interest at Rs. 2-4 per mensem (Rs. 27 per annum), calculated at quarterly rests.

On the 29th of June 1873, a notice of foreclosure was served under the first mortgage.

On the 23rd March 1874, Kali Prossunno Ghose (the first respondent) purchased on sale for arrears of revenue the interest [234] of Mussumat Kamini in mouzah Alumpur. It may be here observed that, on the adequacy of the price given by him (Rs. 70,000,) being questioned by the revenue authorities, he represented by petition that the mouzah was subject to encumbrances to the amount of Rs. 1,05,000, which he would be liable to discharge.

On the 3rd of June 1874, Grish Chunder assigned for Rs. 83,910-10-9 all his interest under the two *kut-kobalas* to the second respondent upon trust to prevent the merger of his rights under them, and to keep them

(1) L.R 10 Ch. Ap. 389. (2) 22 W.R. 525. (3) 23 W.R. 48.
(4) 25 W.R. 189. (5) 11 M.I.A. 551. (6) 13 M.I.A. 419.
(7) 3 C. 324. (8) 1 I. A. 192 = 13 B.L.R. 427.

alive for the benefit of the first respondent, and empowered him to continue and prosecute the pending foreclosure proceedings, and the name of the first respondent was substituted for that of Grish Chunder in the foreclosure proceedings.

On the 24th April 1875, being more than twelve months after the notice of foreclosure had been given by Grish Chunder, the respondents filed their plaint in the present suit in the Court of the Subordinate Judge of the 24-Pergunnahs. That plaint, which relates only to the first mortgage, after stating the facts above recited, prays for an order giving to plaintiff No. 1 (Kali Prossunno Ghose) a proprietary right based upon foreclosure in the three mouzahs other than Alumpur, and with respect to Alumpur for a declaratory decree confirming his possession of it, on a right derived from foreclosure of mortgage.

The defendant, by her written statement, alleged (among other things) that the mortgage had been obtained from her by fraud, denied the right of the plaintiffs to foreclose the mortgage, and asserted that if he had any claim it was to bring a contribution suit.

While this suit was pending, on the 7th February 1876, the plaintiffs brought another suit in the Court of the Subordinate Judge of Nuddea, in which the three additional mouzahs mortgaged by the second *kut-kobala* are situated, against the defendant to recover the principal and interest under that *kut-kobala*. We have not the plaint in this suit in the record, but it must be taken that the claim was against the defendant personally.

The Subordinate Judge of the 24-Pergunnahs, finding against the allegation of fraud, dismissed the first suit on the ground that **[235]** by the plaintiffs' purchase of Alumpur, coupled with the assignment which he took of the rights of the mortgagee, the whole mortgage debt became extinguished, a ground of decision manifestly wrong, and properly reversed by the High Court.

The second action was dismissed by the Subordinate Judge of Nuddea, mainly on the ground that the second *kut-kobala* did not give a personal remedy against the defendant. This judgment was affirmed by the High Court. The former judgment was varied in a manner which will be hereafter described.

It is convenient here to consider what were the rights of the parties, and what were the judgments which the lower Courts ought to have pronounced.

The object of the plaintiffs in bringing the separate suits in different jurisdictions seems to have been to foreclose the four mouzahs, including Alumpur, under the first mortgage only, whereby Kali Prossunno Ghose would obtain the mouzahs in respect of a comparatively small debt, and freed from any liability to contribute to the payment of the second mortgagee, and he would obtain an absolute estate in Alumpur, subject to an encumbrance amounting, not to Rs. 1,05,000 as he had represented to the Board of Revenue, but probably to something less than Rs. 20,000. He relied on the second mortgage for procuring the whole sum thereby secured by a personal remedy against defendant, *i.e.*, against the mortgaged property and any other she might have.

In their Lordships' opinion the plaintiffs had no right to claim Alumpur, or the three other mouzahs, by foreclosure. The defendant could not have redeemed the three other mouzahs without their liability under the second mortgage being taken into account, nor could the plaintiffs foreclose them under the first mortgage only, thus depriving the second mortgage of their contribution. With respect to Alumpur, he, having

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purchased the equity of redemption, was bound to contribute to the payment of both the mortgages in the proportion of the value of Alumpur to the other properties, and he could not free himself from this obligation by foreclosing Alumpur, under the first mortgage only. Their Lordships are therefore of opinion that his suit was rightly dismissed, though not for the reason given by the Subordinate Judge.

[236] The judgment dismissing the second suit having been affirmed, and no cross appeal having been presented, it cannot now be questioned.

The appellant, therefore, had a right to judgment in both suits.

This being so, we now come to the manner in which the High Court dealt with the case, in the single desire, their Lordships doubt not, to do what they deemed complete justice between the parties.

Having affirmed the decree of dismissal in the second suit whereby it was ended, they in some sense revive it, and turn both suits into a contribution suit, which they send by way of remand to the Court of the 24-Pergunnahs. They observe :—

"We think, therefore, that, under the circumstances, the proper decree in both suits will be: 1*st*—That the first suit be dismissed, except as regards Alumpur; and that the plaintiff's right to Alumpur be decreed, the plaintiff No. 1 and the defendant being subjected to the following conditions: 2*nd*—That as between the plaintiff No. 1 and the defendant, the properties mortgaged by both deeds (except Chapra) be valued by the lower Court. 3*rd*—That the debt secured by the first mortgage be borne by the plaintiff No. 1 and the defendant, in the proportion of the aggregate values of the properties Kachiara, Atghara, and Dariapur to the value of Alumpur. 4*th*—That the debt secured by the second mortgage be borne by the plaintiff No. 1 and the defendant in the proportion of the aggregate values of all the properties mortgaged by that deed (except Chapra) to the value of Alumpur. 5*th*—That the defendant be at liberty to redeem all the properties except Alumpur, upon repaying the proportion of the mortgage debts and interest due from her, corresponding with the proportionate value of the other mortgaged properties to Alumpur, until fresh proceedings for foreclosure or for sale of the mortgaged properties (except Alumpur) shall have been taken in due course by the plaintiff. 6*th*—That until the mortgage debts and interests shall be fully satisfied, the said mortgaged properties in the hands of the defendant shall be considered as charged with the proportion of the mortgage debts, which she is hereby declared liable to pay. 7*th*—That each of the parties do **[237]** bear and pay his and her own costs of the first of these suits, and that the costs of the second suit in both Courts be paid by the plaintiff No. 1."

To this judgment it is objected,—

1*st*.—That the High Court, in their appellate capacity, had no power to confer on the Court of the 24-Pergunnahs jurisdiction to deal with a suit in the Nuddea district relating to property situated in Nuddea.

2*nd*.—That to change the two suits into one contribution suit was beyond their power.

The case of property the subject of suit being situated in two jurisdictions is thus provided for in Act VIII of 1859, the Act governing the procedure in this action. S. 12 is in these terms :—If the property be situate within the limits of different districts, the suit may be brought in any Court otherwise competent to try it within the jurisdiction of which the land or other immoveable property in suit is situate, but in such case

the Court in which the suit is brought shall apply to the Sudder Court for authority to proceed in the same." 1885 JUNE 27.

This section, in their Lordships' judgment, is not applicable to the circumstances of this case. Neither suit comprised the whole property, nor did either District Court apply to the High Court (now substituted for the Sudder) for leave to deal with the whole of it. The plaintiffs intentionally divided their claim, and preferred its parts in different jurisdictions.

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Their Lordships are aware of no power of the High Court in its appellate capacity to give jurisdiction to the Court of the 24-Pergunnahs to deal with a suit commenced and prosecuted in Nuddea relating to lands in Nuddea. It may be observed that the Court of the 24-Pergunnahs dealt with Alumpur, which is in Nuddea, and that the Court of Nuddea dealt with the three mouzhas twice mortgaged which were in the 24-Pergunnahs. The defendant, who succeeded in both suits, raised no question upon this, and each of the District Courts must be taken to have tried the whole suit before it by consent. But the order of the High Court now appealed against can in no sense be deemed to have been made by consent.

With respect to the second objection, their Lordships, while **[238]** fully recognizing the advantages to the administration of justice of the wide powers of amendment and modification of decrees, and of framing new issues, conferred upon the High Court by ss. 350, 351, 352, 353, 354, and being by no means disposed to narrow their plain meaning by judicial construction, are nevertheless of opinion that to change (as has been done in this case) two suits, one of which had been dismissed on appeal, into one suit of a totally different description from either of them, and this without consent, exceeds the powers conferred by the Act.

It follows that the judgment of the 20th July 1878 must be reversed. If so, all that followed on that judgment, the remand, and subsequent judgment of 1881, will fall to the ground, and the judgment of the District Courts respectively dismissing both suits will be affirmed. The defendant should have her costs in the High Court as well as in the lower Courts, and the costs of this appeal. Their Lordships will humbly advise Her Majesty to this effect.

This view of the case makes it unnecessary to determine a question which has been argued at the bar, *viz.*, whether the defendant can be relieved from the exorbitant rates of interest stipulated for in the mortgages; but as unfortunately further litigation with respect to the mortgages seems not improbable, their Lordships think it may be useful to intimate the view that they are disposed to take of this question.

The finding of the lower Court against fraud and undue influence must now be accepted ; a contrary finding would have avoided the whole transaction.

But assuming the validity of the mortgage, a question arises whether, under the circumstances, the rate of interest exacted did not amount to a hard or unconscionable bargain such as a Court of Equity will give relief against.

The doctrine of equity on this subject was laid down by the Master of the Rolls in *Beynon* v. *Cook* (1), and this judgment was affirmed by the Court of Appeal. Rhys Beynon was a reversioner or remainderman ; Cook was a money-lender who took from him a

(1) 10 L. R. Ch. Ap. 391.

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promissory note for 100*l.*, for which he was charged 15*l.* [239] discount, for six months and a mortgage of his reversionary interest, with interest at the rate of 5 per cent. per month. The Master of the Rolls made a decree for redemption on payment of the amount advanced, at simple interest at 5 per cent. per annum. He observed : " The point to be considered is, was that a hard bargain ? The doctrine has nothing to do with fraud. It has been laid down in case aftercase that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the rule of reasonableness which has been laid down by so many Judges."

This equitable doctrine appears to have a stong application to the facts of this case, where we have the borrower, a *purdanashin* lady ; the lender, her own *mukhtar*, under the cloak of a *benamidar*; the security an ample one, as abundantly appears ; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable ; and a purchaser, with full notice of these circumstances.

C. B. *Appeal allowed.*

Solicitors for the appellant : Messrs. *Lambert, Petch & Shakespear.*

Solicitors for the respondent Kali Prossunno Ghose : Messrs. *Barrow & Rogers.*

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PRIVY COUNCIL.

PRESENT :

Sir B. Peacock, Sir R. P. Collier, Sir R. Couch and Sir A. Hobhouse.

[*On appeal from the High Court at Calcutta.*]

THE OFFICIAL TRUSTEE OF BENGAL (*Plaintiff*) *v.* KRISHNA CHUNDRA MOZUMDAR AND OTHERS (*Defendants*).

[11th, 12th and 27th June, 1885.]

Appellate Court, Powers of—Power to vary decree as made in the lower Court—Decree confined to rights in issue between parties—S. 565 of the Code of Civil Procedure, 1877.

After the trial of issues raising the question whether the plaintiff was, or the defendants were, entitled to zemindari rights in certain mehals, a decree was made affirming the title of the plaintiff, the evidence in support of the defendants' case being discredited, and the latter were declared by the decree to be the " plaintiff's under-tenure holders of the said mehals."

[240] This was modified on appeal by the declaration that " the defendants are putnidars of the same mouzahs."

Held, that it was unnecessary on this appeal to consider whether the appellate Court was right in its conclusion that the defendants were putnidars, because, upon the case which had been set up for the defendants, and upon the issues framed and tried in the lower Court, the appellate Court could not properly make such a declaration; the defendants could not be in a better position than they would have been in had they claimed to be putnidars, in which case an issue as to that title would have been framed and tried.

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Section 565 of Act X of 1887 (1) does not enable an appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court.

[D., 9 A. 434 (437).]

APPEAL from a decree (17th May 1883) of the High Court, varying in certain particulars a decree (30th July 1881) of the Subordinate Judge of the Pubna district.

The questions raised on this appeal were whether the High Court was right on the following points, *viz.*, (*a*) in making the declaration on its decree, which in other respects affirmed that of the lower Court, that the defendants in the suit were putnidars of certain mouzahs of which the plaintiff had been by the concurrent decisions of both Courts found to be zemindar and entitled to have his name registered as proprietor under Beng. Act VII of 1876, the defendants having failed to prove their alleged title to be zemindars of the same mehals ; and, (*b*), in making the direction that the plaintiff (who now preferred his appeal) should bear his own costs in both Courts. The appellant, who was the Official Trustee of Bengal, represented the interests of the creditors of N. P. Pogose, who had by purchase become entitled to the zemindari interest in fifteen mouzahs, forming a separate revenue-paying mehal named Bhanguria, in the Pubna district.

Mehal Bhanguria formerly belonged to Azimuddin Chaodhri, by whom it was conveyed to his wife, Nyjam-ul-Nissa Khatun, now deceased. N. P. Pogose purchased from her, and as assignee in trust for his creditors, the present appellant obtained an order for possession of the mehal in execution of a decree. Afterwards the present respondents who were not parties to the above order [241] applied to the Deputy Collector, under Beng. Act VII of 1876, to have their names registered as proprietors of villages included in Mehal Bhanguria. To this application objections were filed by the present appellant, who alleged that the applicants were dependent talukdars, and not zemindars, and that they held only a subordinate interest in the mouzahs.

Both the Deputy Collector and the Collector, however, the former on the 31st December 1878 and the latter on appeal on the 27th March 1879, made orders disallowing these objections on the part of the Official Trustee, and granting the application.

The Official Trustee thereupon sued the defendants in the Court of the Subordinate Judge of Pubna. Setting forth his title to the zemindari right, through Pogose, in virtue of a *bil ewaz hibba*, obtained by the latter from the previous owner, he alleged that he had obtained possession with the aid of the Civil Court. The orders made by the Deputy Collector and Collector in 1878 and 1879 had been obtained upon the production of false evidence, *viz.*, two fabricated *kobalas* purporting to have been executed on the 8th and 15th of Cheyt, 1207, respectively. The only rights in the mehal which the defendants in fact had were to remain in possession of certain mouzahs therein on payment of rent to the zemindar; this being in virtue of their having acquired therein, from the plaintiff's predecessor in estate, Azimuddin Chaodhri, " ordinary subordinate jimmadari rights." The plaintiff asked that the *kobalas* might be set aside as false and fabricated ; that the orders above mentioned might not receive effect, but that his right as zemindar to have registration of his name under Beng. Act VII of 1876 might be declared, and that he might

(1) This section is identical with s. 565 of Act XIV of 1882.

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receive his costs with interest. The defendants having denied the plaintiff's title, and asserted their own, the Subordinate Judge, Baboo J. K. Chatterjee, fixed issues, among others, as to the genuineness of the *kobalas* as to the plaintiff's zemindari right, and as to whether the defendants were "jimmadari under-tenure-holders," or zemindars of the disputed mehals.

He summed up his conclusions as follows :—

"Under these circumstances, I hold that both the *kobalas* are not genuine documents, and they were never acted upon, and they seem to me to have been forged by the defendants for the [242] purpose of establishing their zemindari right over the disputed mehals which they hold as under-tenure-holders under the plaintiff and his predecessors. I, on a careful consideration of the evidence, find that the plaintiff has satisfactorily proved that the defendants held these disputed mehals as under-tenure-holders under the plaintiff's predecessor, Azimuddin Chaodhri, and paid their putni rents to the said Chaodhri up to the year 1279 B. S., (1872-73), and I also find that the plaintiff has proved that he is the zemindar of disputed mehals by virtue of his purchase and decree, and he has been in possession of them by paying Government revenue to the Collector to the disputed mehals. On the other hand, the defendants have totally failed to establish that they purchased the zemindari right of the disputed mehals from the plaintiff's predecessors and their co-sharers, or that they ever paid Government revenue to the Collector. I, therefore, hold that the defendants are not the proprietors of the disputed mehals, but under-tenure-holders or putnidars under the plaintiff, and therefore their names should be removed from the Collector's register, because the Collector was wrong in registering the defendants' names as proprietors of disputed mehals. After considering all the circumstances and evidence in this case, I come to the clear conclusion that the plaintiff is entitled to get a declaratory decree by establishing his zemindari right in the disputed mehals, and the present suit is not barred by general limitation, because the plaintiff has proved his possession within twelve years before the institution of this suit; and I also hold that both the *kobalas* and the Collector's *namjari* order are liable to be set aside."

The decree followed this judgment with costs.

On appeal, the High Court (MCDONELL and TOTTENHAM, JJ.) altered the decree upon the points above mentioned, declaring the defendants to be putnidars, and directing that each party should pay their own costs.

Mr. *E. Macnaghten*, Q. C., and Mr. *J. T. Woodroffe*, for the appellant, argued that the decree in respect of the declaration that the defendants were putnidars, was wrong on two grounds : First, as no issue as to this right on the part of the defendants had been framed, and as it had not been set up in the first Court, the High [243] Court had no power to import it into its decree. Secondly, the declaration that the defendants were putnidars was incorrect ; their being putnidars was inconsistent with their having attempted to establish (an attempt which they had made by producing false evidence), their rights as zemindars. Also the High Court's discretion as to costs had not been rightly exercised.

Mr. *J Graham*, Q. C., and Mr. *R. V. Doyne*, for the respondents, argued that the variation made by the High Court in the decree of the Court below was warranted by the facts that appeared on the record, and was permissible as a matter of procedure. Practically, the High Court was acting so as to prevent future litigation by giving the Court's final

determination on the relative position of the parties. The evidence, and the language of the judgment of the first Court, were in no way inconsistent with the case that the defendants were putnidars.

Reference was made to s. 565 of Act X of 1877.

Counsel for the appellant were not called upon to reply.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The appellant brought a suit in the Court of the Subordinate Judge of Pubna against the defendants, alleging that the whole of 15 mouzahs named in the schedule to the plaint was the zemindari right of the late N. P. Pogose, and having obtained possession with the aid of the High Court, the appellant, as the Official Trustee, appointed under the orders of the High Court, was entitled to and possessed of the same. And he prayed the Court to set aside an order of the Deputy Collector of Pubna, dated the 31st December 1878, and a subsequent order of the Collector, dated the 27th of March 1879, for registration of the defendants' names with reference to the mouzahs, and to pass a decree for registration of his name, after cancelling the registration of the defendants' names, in zemindari right. He also asked the Court to set aside, as fabricated and fraudulent, two false *kobalas*, which purported to have been executed on the 8th and 15th Cheyt 1207.

The suit was occasioned by the proceedings of the defendants under Act VII of 1876, who applied for the registration of their names as proprietors of certain specific portions of the estate composed of these mouzahs, and produced in support of [244] the application the *kobalas* referred to. The appellant objected, and asserted that they were dependent talukdars, and consequently were not entitled to have their names registered, but the Deputy Collector overruled the objections, and ordered the names to be registered as applied for. This order was on an appeal affirmed by the Officiating Collector of Pubna. The defendants in their written statements, relied upon the *kobalas*, and claimed to be co-sharers in the zemindari. Issues were framed, of which it is now necessary to notice only three. They were :—" *8th.* Whether the defendants' *kobala* deeds are genuine or collusive ; if so, whether they are liable to be set aside. *9th.* Whether the plaintiff is in possession of the disputed mehals as zemindar or not. *10th.* Whether the defendants are jimmadar under-tenure-holders or zamindars of the disputed mehals." The last issue seems to have been put in this form in consequence of a statement in the plaint that the defendants had acquired from the plaintiff's predecessor ordinary subordinate jimmadari rights, but the question raised by it was whether the defendants were zemindars. The Subordinate Judge decided that both the *kobalas* were forged, and said that they seemed to him to have been forged by the defendants for the purpose of establishing their zemindari rights over the disputed mehals, which they held as under-tenure-holders under the plaintiff and his predecessors. He made a decree in these terms : That this suit be decreed, with costs, after establishment of the plaintiff's zemindari right to the disputed mehals ; that the defendants be declared to be the plaintiff's under-tenure-holders of the said mehals ; that the false *kobalas* and the Collector's order for registration of name be set aside ; that the plaintiff is entitled to register his name

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to the disputed mehals in place of the names of the defendants in the Collectorate register."

The defendants appealed to the High Court, and, among other grounds of appeal, said the Court below ought to have held on the evidence that the defendants were part owners of the zemindari, and not mere under-tenure-holders, and that, at any rate, it ought not to have made a decree in favour of the plaintiff, leaving the status and rights of the defendants wholly undefined. The High Court agreed with the Subordinate Court, that the [245] *kobalas* were not genuine, and that the plaintiff was entitled to be registered zemindar ; but they went on to say : "The learned Advocate-General wishes us simply to declare that the plaintiff is entitled to be registered as zemindar of the property in question to the exclusion of the defendants, and invites us to say nothing as to the status of the latter. But we are certainly not disposed in any view of the plaintiff's case, to leave the defendants at his mercy, or to leave him the power of treating them in any future suit as the holders of ordinary subordinate jimmadari rights in these mouzahs, as he has described them in his plaint, or as undefined under-tenure-holders, as the lower Court has pronounced them to be. On the contrary, we are of opinion that, even should we feel bound to hold that the defendants' rights in these mouzahs fall short of absolute proprietorship, as to which technical proof seems alone to be wanting, their status is shown, even by the evidence adduced by the plaintiff, to be at the very least as high as that of putnidars and one which cannot now be disturbed." The decree was: "It is ordered and decreed that the decree of the lower Court be set aside, and in lieu thereof it is ordered and decreed that the plaintiff is entitled to have his name registered as zemindar in lieu of the names of the defendants, under Beng. Act VII of 1876, in the Collectorate of the district of Pubna, in respect of the mouzahs mentioned below, and that the defendants are putnidars of the same mouzahs." And each party was ordered to pay his own costs in that Court and in the Court below.

The plaintiff has appealed to Her Majesty in Council against the declaration that the defendants are putnidars. The High Court founded this declaration upon certain statements in the documentary evidence which had been put in by the plaintiff. Their Lordships do not think it necessary to consider whether they were right in their conclusion that the defendants were putnidars because they are of opinion that upon the case which had been set up in the defence, and the issues which had been framed and tried by the lower Court, the High Court could not properly make such a declaration. The defendants had not claimed to be putnidars, but had set up a false claim to be zemindars, and had attempted to prove it by forged deeds, and they ought certainly not to be in a better position than they would have been in if [246] they had brought a suit to have a declaration of their title as putnidars, in which case an issue as to that title would have been framed and tried by the lower Court. The proceedings in this suit were regulated by Act X of 1877, and their Lordships do not find any provision there which would authorize the appellate Court to do what has been done in this case. Section 565, which enables the appellate Court in some cases to determine a question of fact upon the evidence then on the record, cannot apply where the case has not been set up in the lower Court. Their Lordships are, therefore, of opinion that the decree of the High Court should be varied by striking out the declaration that the defendants are putnidars of the mouzahs and the order as to costs, and ordering that

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the defendants do bear the costs of the suit in the High Court and the lower Court. They will humbly advise Her Majesty accordingly, and the respondents will pay the costs of this appeal.

C. B. *Decree varied.*

Solicitors for the appellant: Messrs. *Lawford, Waterhouse & Lawford.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

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12 C. 246.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice Grant.

DROBOMOYEE CHOWDHRAIN (*Defendant*) v. SHAMA CHURN CHOWDHRY (*Plaintiff*) AND OTHERS (*Defendants*).*

[13th May, 1885.]

Hindu Law—Adoption—Vested estate divested by adoption—Power to adopt.

A, a Hindu, having succeeded to his father's estate, died unmarried, leaving him surviving his father's mother *S*, and his step-mother *N*. After *A's* death, *N*, under a power from her husband, adopted *B* as a son to *A's* father.

Semble, that the adoption did not divest the estate of *S*, in whom *A's* estate had vested on his death.

[R., 22 C. 565 (571); D., 18 C. 69 (73); 18 C. 385 (397).]

[247] THIS was a suit for the recovery of land. The plaint described the plaintiff as "Shama Churn Chowdhry, minor son of Uma Churn Chowdhry, deceased, by his next friend and mother Surjomoni Chowdhrain, caste Shaw, occupation zemindar, &c., inhabitant of Jamalpore, pargana Apel, station Panch Bibi, plaintiff." It then stated that the land in dispute formed portion of two mouzahs which belonged to the minor as his ancestral property, and which had been owned, and held in possession for a long time, before 12 years next preceding the institution of the suit, "by the predecessors of the minor plaintiff, and after them by Surjomoni Chowdhrain on behalf of the plaintiff." The plaint went on to state that, while Surjomoni was in possession of the disputed land on behalf of the minor Shama Churn, the defendants wrongfully dispossessed her therefrom, in Cheyt 1284; that the defendant had no right to the land, but that "the minor has right to it, and that the plaintiff is entitled to obtain possession of the same on behalf of the minor." The fifth paragraph of the plaint was as follows:—

"5. The plaintiff, therefore, prays (*a*) that a decree may be passed awarding to her, on behalf of the minor Shama Churn Chowdhry, possession of 18 bighas 12 cottas of land, as per boundaries given below, on determination that the same is comprised within *chuck* No. 28, appertaining to mouzahs Mirzapore and Ajampore, the zamindari of the minor Shama Churn Chowdhry, and on declaration of the right of the minor Shama Churn thereto; (*b*) that costs of Court may be allowed to her; (*c*) that a decree may be passed awarding to her any other relief in any shape whatever which she might be deemed entitled to receive."

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* Appeal from Appellate Decree, No. 2719 of 1883, against the decree of Babu Jiban Kristo Chaterji, Rai Bahadur, Subordinate Judge of Pubna and Bogra, dated the 15th of August 1883, affirming the decree of Baboo Aghore Chundra Hazra, Extra Munsif of Nawabgunge, dated the 10th of April 1882.

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The seventh paragraph of the plaint was as follows :—

"7. That the plaintiff has, according to the purport of the will left by the late Uma Churn Chowdhry, the father of the minor Shama Churn Chowdhry, duly obtained from the Judge's Court, Dinapore, probate and certificate relating to the said will, for the purpose of administration of the estate left by the said deceased."

The plaint was signed and verified by Surjomoni Chowdhrain, "guardian on behalf of Shama Churn Chowdhry, minor."

[248] The first paragraph of the defendant's written statement was as follows :—

"1. That the plaintiff's alleged minor Shama Churn is not either the legitimate or adopted son of the deceased Uma Churn Chowdhry, and neither is the said minor his legal heir ; consequently the plaintiff has no right to bring a suit on behalf of the said minor who is a party without right."

The third issue fixed by the Court of first instance was "whether the minor plaintiff Shama Churn Chowdhry has any right to proceed with the suit ?" On this point the judgment of the Court of first instance was as follows :—

"This is indeed a very general issue, and the defendants' pleader has very wisely restricted it to the simple point for consideration, *viz.*, whether the minor plaintiff is entitled to *chuck* No. 28, Mirzapore. Now it is admitted on all sides that Uma Churn Chowdhry was the real owner of the said *chuck* Mirzapore. The plaintiff has proved the will and *anumatipatro* under which he was adopted by the widow of the said Uma Churn Chowdhry. I am not going to enquire into the validity or otherwise of Uma Churn's will, or to consider whether the plaintiff's adoption was legally good or not for to try these incidental facts would be to exceed the proper limits of this suit, and I am glad to remark that the learned pleader, who has ably argued this case on behalf of the defendants, did not press those points. But it is argued that inasmuch as the said Uma Churn had a son living at the time of his death, and as that son died some four or five months before the plaintiff's adoption, the properties belonging to the said son of Uma Churn were vested by right of inheritance in Uma Churn's mother Surjomoni, who is the constituted guardian of the minor plaintiff ; and that as there is on proof of actual gift by Surjomoni in favour of the plaintiff, the plaintiff could not be entitled to *chuck* No. 28, Mirzapore, and as such has no right to sue for the disputed land. Let us consider how far these contentions are sound. Now the will of Uma Churn leaves no doubt that the testator intended that succession to his estate should be conferred on his son living at the time of his death, and on the demise of his said son on the sons to be adopted by his widows. If, therefore, Surjomoni became possessed of Uma Churn's properties on the death of his son Hur Cumar, she became so entitled, not as of absolute right, but as a trustee or manager on behalf of the minor plaintiff. That matters were thus understood by the parties appears from the several acts of the said Surjomoni. The name of the minor plaintiff was registered by the provisions of Bengal Act VII of 1876, and Surjomoni was appointed as a guardian of the plaintiff under Act XL of 1858. Besides, Surjomoni distinctly states in her deposition that the plaintiff is the owner of all the properties left by Uma Churn [249] or Hur Cumar, and that she has no claim whatever to any of those properties. Under all these circumstances, it does not lie in the mouth of the defendants to question the plaintiff's right to *chuck* No. 28, Mirzapore. If, according to the defendants, Uma Churn had a right to sue for

the said *chuck* No. 28, then the minor plaintiff, as adopted son of the said Uma Churn, has undoubtedly that right.

"Then I see no force in the argument that the plaintiff's suit as framed could not lie. The evidence adduced on behalf of the plaintiff discloses the same title as alleged in the plaint. This issue is, therefore, decided in favour of the plaintiff."

On appeal this decision was upheld. The Subordinate Judge's judgment, so far as is material, is as follows:—

"It is admitted on all hands that the deceased Uma Churn Chowdhry was the owner and possessor of *chuck* No. 28, which appertains to his zemindari Mirazapore and Ajampore. It is proved by the evidence of the witnesses, examined by the plaintiff that Uma Churn Chowdhry gave permission or *anumatipotro* to his widow to adopt, and that the said widow adopted the minor plaintiff as her and her deceased husband's son with the permission of her husband by performing the necessary *jag*, &c., according to the Hindu law, and it is also proved that the minor plaintiff has been in possession of all the property left by his deceased father and brother according to the terms of the will executed by the said Uma Churn Chowdhry, and he has been treated by agnates and cognates as adopted son of the deceased Uma Churn Chowdhry, and he has obtained registration of his name under Act VII of 1876 (see will and *anumatipotro* filed by the plaintiff). These documents have been proved and attested by the plaintiff's witnesses, and they were acted upon. I, therefore, hold that these documents are genuine. On the contrary, the defendants have failed to prove that the minor plaintiff is not an adopted son of the deceased Uma Churn Chowdhry, or that he has no right to the disputed property, or that his adoption was invalid. According to the Hindu law, I, therefore, hold that the minor plaintiff is the legal adopted son of the deceased Uma Churn Chowdhry, and his adoption is valid according to the Hindu law, and that he is competent to bring this suit through his legal guardian against the defendants, because his possession and rights in the disputed lands have been satisfactorily proved."

The defendant appealed to the High Court.

Baboo *Srinath Das*, and Baboo *Gurudas Bannerji*, for the appellant.

Baboo *Rash Behary Ghose*, for the respondents.

JUDGMENT.

The judgment of the Court (FIELD and GRANT, JJ.) was delivered by **[250]** FIELD, J. The plaintiff in this case is an adopted son and is still a minor. He sues to recover possession of certain lands which he alleges to be a portion of an estate which belonged to Uma Churn, his adoptive father. The only point with which we have to deal upon this appeal is whether the minor has a good title as adopted son. All the questions of fact have been found in his favour by the Courts below; and there is now no question as to these facts before us.

Uma Churn had three wives; with one of these ladies we have no concern. The two wives with whom we are concerned are Nobo Sundari and Gaya Sundari. Gaya Sundari was the mother of Hur Cumar, and Hur Cumar upon Uma Churn's death succeeded to his property. Hur Cumar died unmarried and during minority; and his mother Gaya Sundari died before him. Upon Hur Cumar's death, Gaya Sundari's co-wife, Nobo Sundari, in the exercise of an *anumatipotro*, or power of adoption granted to her by Uma Churn, adopted the present plaintiff.

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It has been contended before us on the part of the appellant that inasmuch as upon Hur Cumar's death, his grandmother Surjomoni, mother of Uma Churn, was his heiress, the property vested in her as such ; that the subsequent adoption of Shama Churn by Nobo Sundari could not have the effect of divesting the inheritance which had once vested ; and that therefore Shama Churn has no title to the property by virtue of which he can maintain this suit. This argument is based upon the decision of the Privy Council in the case of *Bhoobun Moye Debi* v. *Ram Kishore Acharji* (1) and the subsequent case decided by this Court—*Kally Prosonno Ghose* v. *Gocool Chundra Mitter* (2). See also the case of *Nil Komul Lahuri* v. *Jotendra Mohan Lahuri* (3). In none of these cases did the exact point which has been raised before us occur. But this very point did occur in another case which was not quoted in the course of the argument, the case of *Annammah* v. *Mabbu Bali Reddy* (4). We entertain no doubt that upon the authorities the decision of the bare question of Hindu law would be fatal to the success of the plaintiff's case if it had to be decided upon this bare question alone. The [251] adoption by Nobo Sundari having taken place after the estate had vested in Surjomoni upon the death of Hur Cumar, the subsequent adoption could not have the effect of divesting the estate once so vested. But it is said that there is something more than the *anumatipotro*, that the case is to be decided not upon the *anumatipotro* alone, but upon the *anumatipotro* taken with a will made by Uma Churn, probate of which will has since been granted. In the case of *Bhoobun Moyi Debi* v. *Ram Kishore Acharji* (1) their Lordships of the Privy Council observed that they were dealing with an *anumatipotro* only and without reference to any testamentary disposition, or the possible effect of such a disposition. They said : "Whether under his testamentary power of disposition, Gour Kishore could have restricted the interest of Bhowanee Kishore in his estate to a life interest, or could have limited it over (if his son left no issue male, or such issue male failed) to an adopted son of his own, it is not necessary to consider ; it is sufficient to say that he has neither done nor attempted to do this:" and then further on : "No case has been produced, no decision has been cited from the Text Books, and no principle has been stated to show that by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in possession, can be defeated and divested." But it is contended that upon the true construction of this will, the testator did not intend to make any provision for the event which had actually taken place. The clause of the will runs to this effect: "If my existing son *i.e.*, Hur Cumar, should die, and if no son of my loins should be born, then my wives, in the exercise of the power of adoption given to each of them for adopting three sons each, shall adopt sons, and such sons shall take the estate " It is argued that the testator was speaking with reference only to the state of things at the time of his death ; and that what was in his mind was the event of the (*vartamana putra*) existing son, dying during his lifetime, not being in existence at the time of his death : and that he did not contemplate the event which has actually happened, *i.e.*, the case of this son dying after his death. We have to observe that it is sought to raise this question, not between rival claimants to the inheritance, but [252] between a stranger and a person who is in possession of that inheritance, having succeeded thereto with the consent and acquiescence of Surjomoni, the only person who would be entitled to maintain a construction

2 (1) 10 M. I. A. 279. (2) 2 C. 295. (3) 7 C. 178. (4) 8 M. H. C. 108.

of the will adverse to the present plaintiff's title. We think that a stranger has no right in this way to seek out a flaw in the plaintiff's title and impugn the validity of that title. 1885 MAY 18.

There is evidence in the case to show that Surjomoni has acquiesced in the plaintiff's title; she acted as his guardian in bringing the present suit; and at her instance the minor's name was registered under the Land Registration Act. According to a possible and probable construction, the will has given the inheritance to the plaintiff, and we think that a stranger is not entitled to come in and say that under another construction, not set up by the person who would benefit thereby, that person and the plaintiff is the rightful owner. APPELLATE CIVIL. 12 C. 246.

We are, therefore, of opinion that this appeal must be dismissed with costs.

P.O.K. *Appeal dismissed.*

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12 C. 252.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Ghose.

JOGENDRO NATH SIRCAR (*Judgment-debtor*) *v.* GOBIND CHUNDER ADDI AND ANOTHER (*Decree-holders*).*

[11th July, 1885.]

Civil Procedure Code, 1882, *ss.* 284, 295, 315—*Execution of decree—Payment out of proceeds before confirmation of sale—Interest on decree from date of sale to date of confirmation.*

Although there is no express provision in the Code laying down that a decree-holder may take out of Court the proceeds of an execution sale before the date on which the sale is confirmed, yet s. 315 of the Code implies that this may be done.

The Court, however, under special circumstances, may refuse to pay over to the decree-holder the purchase-money until the sale is confirmed, but in such case, it should provide for due payment of interest on the money detained.

Held, that under the special circumstances of this case, the decree-holder was not entitled to receive interest from his judgment-debtor from the date of the sale to the date on which the sale was confirmed.

[D. and Commented upon, 18 C. 242 (246); R., 21 Ind. Cas. 210 (211).]

[253] THIS was an appeal from an order, dated 26th January 1885, passed by the Additional Judge of the 24-pergunnahs, allowing a decree-holder to receive from his judgment-debtor interest on his judgment-debt from the date of the sale in execution to the date of the confirmation of the sale.

It appeared that on the 12th August 1881 one Gobind Chunder Addi obtained a decree against Jogendro Nath Sircar for Rs. 33,473, with interest thereon at 6 per cent. till the date of payment. On the 9th January 1882 three properties belonging to the judgment-debtor were sold, one of these properties (lot No. 1) being bought by the decree-holder himself for Rs. 2,650, and the other two (lots Nos. 2 and 3) by one Monoranjun Dass for Rs. 30,650. On the 10th January a further property belonging to the judgment-debtor was advertised for sale, but the judgment-debtor paid

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* Appeal from Order, No. 133 of 1885, against the order of C. B. Garrett, Esq., Additional Judge of 24-Pergunnahs, dated the 26th of January 1885.

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into Court the balance due under the decree, and the sale was stayed. On the 23rd January 1882 Monoranjun presented a petition to the Court complaining of certain irregularities in connection with the sale, and intimated that he was about to apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property ; in this petition (of the 23rd January) he prayed that he might be allowed to deposit the balance of his purchase-money in Government securities, and that the sale proceeds should not be paid out until the date on which the sale might be confirmed. The decree-holder assented to this arrangement, but it nowhere appeared that the judgment-debtor was present at or had notice of the application. On the 9th February 1882 the decree-holder applied for the confirmation of the sale of the property purchased by himself, and drew out the sum of Rs. 2,650, the proceeds of sale of the property purchased by himself. At that time no similar application was made for the confirmation of the sale of the other two properties (lots Nos. 2 and 3), nor was any application made to withdraw the sale proceeds thereof. On the 8th March 1882, Monoranjun applied to have the sale set aside, and obtained an order appointing a Receiver to take charge of the property till the final order of the Court. On the 4th August 1882 the sale of the other two properties (lots 2 and 3), was confirmed, and on the 8th August a rule was issued calling upon Monoranjun to show cause why the **[254]** Government Promissory Notes deposited by him should not be sold, and the proceeds paid over to the decree-holder. But on the 18th August, on the application of Monoranjun, the Court ordered that the money should not be paid over until after the expiry of two weeks from that date. On the 21st August Monoranjun applied to the High Court to have the order of the 4th August set aside, and on the 11th September 1882, the High Court made a further order staying payment. Subsequently the High Court set aside the order of the 4th August 1882, and sent the case back for retrial ; and on the 21st March 1883 the Court made an order confirming the sale, which order was confirmed on appeal to the High Court on the 14th December 1884, the Court further directing that the purchaser should pay to the decree-holder, interest upon the amount of the decree from the 21st March 1883, the date of the confirmation of sale, to the date of payment of the purchase-money.

The decree-holder thereupon again applied to execute his decree in order to realize from the judgment-debtor interest upon his decretal money from the 9th January 1882, the date when the sale was held, to the 21st March 1883, when the sale was confirmed ; and on the 26th January 1885 the Additional Judge on this application held that the decree-holder was entitled to the interest claimed, because under the terms of s. 316 of the Civil Procedure Code the title of the purchaser dated from the date when the sale was confirmed, the judgment-debtor being entitled to the proceeds of the property up to that date.

The judgment-debtor appealed against this order to the High Court, making both the decree-holder and the auction-purchaser respondents.

Baboo *Umbica Churn Bose* and Baboo *Jadub Chunder Seal*, for the appellant, contended that the decree-holder not having applied to take the sale proceeds out of Court, it would be inequitable to make the judgment-debtor liable for the interest, and the more so as it was by the acts and objections of the auction-purchaser that the purchase-money was detained in Court.

Baboo *Bhowani Churn Dutt*, for the respondents.

[255] The Court (MITTER and GHOSE, JJ.) after stating the facts set out above, delivered the following judgment :— 1885 JULY 11.

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12 C. 252.

JUDGMENT.

The ground upon which the Additional Judge has decided this case implies that, until the date of the confirmation of sale, the judgment-creditor was not entitled to take out the sale proceeds of the properties sold in execution. We are of opinion that this view of the law is not strictly correct. It does not necessarily follow that, because the title of the execution purchaser dates from the date of the confirmation of sale, and the judgment-debtor continues to receive the profits of the property sold up to that date, the judgment-creditor is not entitled to draw out from Court the money realized by the sale. This view of the Additional Judge is negatived by the provisions of s. 315 of the Code of Civil Procedure which says : "When a sale of immoveable property is set aside under s. 312 or 313, or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase money (with or without interest as the Court may direct) from any person to whom the purchase money has been paid." This provision clearly implies that the purchase-money may be paid to the decree-holder before the date of the confirmation of sale. Although there is no express provision in the Code of Civil Procedure upon this point, yet ss. 284 and 295 indicate that the view taken by the District Judge is not correct. The Bombay High Court in *Vishvanath Maheshvar* v. *Virchund Panachund* (1) has held that a decree-holder may take out the purchase-money before the date of the confirmation of sale. Although a decree-holder may take out the purchase-money before the date of confirmation of sale, still we do not mean to hold that the Court holding the sale has no discretion in refusing to pay to the decree-holder the purchase money of the property sold before the date of confirmation of sale. There may be cases in which it would be necessary for the protection of the interests of the purchaser to detain the purchase-money until the confirmation of sale, and the Court may, under special circumstances, refuse to pay over to the decree-holder the **[256]** purchase-money until the sale is confirmed, but in such cases the Court should provide for the due payment of the interest of the money so detained. We are, therefore, of opinion that the ground upon which the Additional Judge's decision is based in this case is not correct.

We have then to determine for ourselves whether, under the special circumstances of this case, the order of the Additional Judge is sustainable. We are of opinion that it is not, upon the following grounds :—

First, we think that after the first three lots were sold on the 9th January 1882, and when the officer conducting the sale was proceeding with the sale of lot No. 4 on the next day, that is, on the 10th January, the judgment-debtor, having paid the balance of the decree, the sale of lot No. 4 and the remaining three lots was stopped under s. 291 of the Code of Civil Procedure. This had the effect of virtually satisfying the entire decree.

Secondly, there having been no application under s. 311 to set aside the sale within thirty days from the date of sale, the Court was bound to confirm it under s. 312. Although the decree-holder applied

(1) 6 B. 16.

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to the Court on the 9th February 1882 to confirm the sale of lot No. 1 which he himself had purchased, he did not make any such application regarding the other two lots which were purchased by Monoranjun Dass. Neither did he make any application for obtaining the sale proceeds realized in execution of his decree.

Thirdly, that on the 23rd January 1882, the purchaser of lots Nos. 2 and 3, *viz.*, Monoranjun Das, having applied to the Court to be allowed to deposit the balance of the purchase-money in Government Promissory Notes upon the condition that the said Notes were to be detained in Court until the result of the application which he was going to make for the reversal of the sale under s. 313 was known, the order prayed for having been made on the consent of the pleader of the decree-holder, but without any notice to the judgment-debtors, the decree-holder under these circumstances is not entitled to claim any interest on the money so kept in deposit from the judgment-debtors.

Fourthly, as it was quite open to the decree-holder, on the expiration of thirty days from the date of sale, to apply to the [257] Court for the confirmation of the sale of lots Nos. 2 and 3, and to apply for the payment to him of the sale proceeds, and as he did not move the Court for that purpose, he is not in our opinion entitled to any interest from the date of sale until the date when by an order of Court the money was directed to be detained until the disposal of the auction-purchaser's application to set aside the sale. The decree-holder, therefore, is not entitled to claim any interest from the date of sale to the 4th of August 1882.

Then as regards the period subsequent to that date, it is true that the money was detained by an order of this Court, a rule having been issued to that effect, but that the rule was disposed of on the 14th December 1884, along with the appeal preferred by the auction-purchaser. It was under the circumstances incumbent upon the decree-holder on that occasion to move this Court regarding the liability of the judgment-debtor to pay interest on the money in deposit in Court during the period which elapsed between the 9th January 1882 and the date of the stop order made by this Court. The order of this Court disposing of the rule provides for interest from the 21st March 1883, the date on which Mr. Macpherson confirmed the sale of lots Nos. 2 and 3 to date of payment of the purchase-money, but no provision was made in that order for the period between the 9th January 1882 and the 21st March 1883. Either the decree-holder did not ask the Court to make any order respecting this period, or he did ask, but his prayer was not granted by this Court. In either case he would be precluded from making a fresh application for the realization of the interest for that period.

Upon these grounds, we are of opinion that the decision of the additional Judge is erroneous. We accordingly set it aside with costs.

T.A.P. *Appeal allowed.*

12 C. 258.

1885 JULY 2.

APPELLATE CIVIL.

12 C. 258.

[258] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

W. SHERIFF (*Defendant*) v. DINA NATH MOOKERJEE AND ANOTHER (*Plaintiffs*).* [2nd July, 1885.]

Beng. Act VIII of 1869, *s.* 29—*Limitation—Suit for arrears of rent.*

The defendant held a putni in respect of a share in a zemindari, which share was held and the putni granted by a Hindu widow who died in Pous 1281. The plaintiffs were the heirs who succeeded to the zemindari on the death of the widow. In Pous 1284 they brought a suit against the defendant for the purpose of setting aside the putni, and on the 16th Pous 1285 obtained a decree declaring the putni invalid, and giving them *khas* possession with mesne profits. This decree was, however, reversed on appeal on the 6th Srabun 1288, and their suit was dismissed. In a suit for arrears of rent from 1282 to 1288, *held*, that the plaintiff was not protected from the operation of the law of limitation during the pendency of his suit to set aside the putni, and that his suit was barred except as to the arrears accruing within three years preceding the suit. *Hurrow Pershad Roy* v. *Gopal Dass Dutt* (1) followed; *Rani Surnomoyee* v. *Shoshi Mukhi Burmonia* (2) distinguished.

[F. 17 C. 251 (255); Expl., 16 C.P.L.R. 33 (35).]

THIS suit was brought for the recovery of arrears of rent due from the defendant in respect of a share of a putni taluk for the period from Pous 1281 (December 1874) to Choitro 1288 (March 1882).

The facts were that the defendant was the holder of an entire putni in respect of a four-anna share of a certain zemindari, which share was held and the putni granted by Sashimoni Debia, a Hindu widow, who died on 6th Pous 1281 (21st December 1874). The plaintiffs were some of the heirs who succeeded to the zemindari after the death of the widow, their share amounting to about a six anna share of the four-anna share of the zemindari. In Pous 1284 (December 1877), the plaintiffs and their co-sharer, Copal Churn Mookerjee, sued the defendant for the purpose of setting aside the putni. That suit was decreed by the first Court on 16th Pous 1285 (30th December 1878), the decree declaring the putni to the extent of the plaintiff's share to be invalid, and ordering *khas* possession of that share with mesne profits. On appeal **[259]** the judgment of the first Court was reversed on 6th Srabun 1288, (20th July 1881), and the suit was dismissed. The plaintiffs thereupon brought the present suit on 30th Choitro 1288 (11th April 1882).

The defence, as far as it is material, was that the claim for rent for the years 1281, 1282, 1283 and 1284 was barred by limitation.

In the lower Court the plaintiffs relied on the following cases—*Rani Surnomoyee* v. *Shoshi Mukki Burmonia* (2); *Ishan Chunder Roy* v. *Khaja Assannulla* (3); *Din Doyal Paramanick* v. *Radha Kishore Debi* (4); *Mohesh Chunder Chakladar* v. *Gungamonee Dossee* (5). And the defendant on the cases of *Huro Nath Roy Chowdhry* v. *Goluck Nath Chowdhry* (6); *Baroda Kant Roy* v. *Chunder Coomar Roy* (7); *Watson* v. *Dhonendro Chunder Mookerjee* (8); and *Brojendro Coomar Roy* v. *Rakhal Chunder Roy* (9).

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*Appeal from Appellate Decree No. 714 of 1884, against the decree of C. A. Kelly, Esq., Judge of Nuddea, dated the 20th of March 1884, affirming the decree of Babu Amrita Lall Chatterjee, Subordinate Judge of Nuddea, dated the 31st of January 1883.

(1) 9 C. 255. (2) 2 B.L.R.P.C. 10. (3) 8 B.L.R. 537 note=16 W.R. 79.
(4) 8 B.L.R. 536=17 W.R. 415. (5) 18 W.R. 59.
(6) 19 W.R. 18. (7) 23 W.R. 280. (8) 3 C. 6. (9) 3 C. 791.

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The Subordinate Judge held that the suit was not barred for the years 1282—1284, and gave the plaintiffs a decree for the arrears of rent for the period for which they sued, except for 1281, the rent of which was barred, and the first quarter of 1288 as to which the suit was premature. This decree was upheld by the Judge on appeal.

The defendant appealed to the High Court.

Baboo *Mohini Mohun Roy*, and Baboo *Hurendra Nath Mookerjee*, for the appellant.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Boydla Nath Dutt*, for the respondents.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The question in this appeal is whether the claim in suit, with regard to certain arrears of rent, is barred by limitation or not.

The particular years, the rent of which is in question in this appeal, are the years 1282, 1283 and 1284. The rule of limitation [260] applicable to the matter is contained in s. 29 of the Act. It provides that,—"suits for the recovery or arrears of rent shall be instituted within three years, from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fusli or Willayuttee year, in which the arrear claimed shall have become due." * * * There is no doubt that the rent of these particular years accrued much more than three years before the suit. Therefore *prima facie* the suit is barred. But the lower Courts have held that the particular circumstances of the case take the rent of those years out of the rule of limitation. The lower appellate Court puts the matter thus: "No doubt the claim would be barred under the ordinary rule of limitation contained in s. 29 of the Rent Act; but under peculiar circumstances, this rule has been held not to apply, and it appears to me that in the present case the plaintiff's claim should not be held as barred. It does not appear that the plaintiff's suit to set aside the putni, although it was eventually unsuccessful, was otherwise than *bona fide*, and it seems that they could not have sued the defendant (appellant) for arrears of rent between the date of the first decree and the date of the judgment reversing it, *viz.*, between the 16th Pous 1285 and the 6th Srabun 1288."

The matter referred to in that judgment is, that in the year 1285, the plaintiff brought a suit against the defendant to have the putni tenure, which he held, declared invalid as against the plaintiffs on the ground that it was granted by a lady having a limited interest. In that suit they obtained a decree in the first Court, but the decree was reversed on appeal. The question is whether that circumstance protects the present claim from the operation of the law of limitation. It appears to us on the authorities in the matter that it does not. It is not necessary to refer to more than one authority on the subject, the case of *Hurro Pershad Roy* v. *Gopal Doss Dutt* (1) before the Privy Council. The facts in that case were that the plaintiff sued for rent which was *prima facie* barred. He relied to meet the plea of limitation upon the fact that he had brought some suit unsuccessfully to oust the defendants from their holdings, and that during the period occupied by that suit he was [261] precluded from suing for rent. And the Privy Council held thus: "The appellant contends that the Statute did not run against his claim for rent after the year 1874, when he commenced these suits; and for

(1) 9 C. 255.

1885 JULY 2. — APPELLATE CIVIL. — 12 C. 258.

that proposition he relies solely on the authority of the case of *Rani Surnomoyee* v. *Shoshi Mukhi Burmonia* (1). Both Courts in India have decided against the appellant upon the ground that the Statute applies, and that his case does not come within the exception to the operation of the Statute established in the *case of Rani Surnomoyee*—an exception rather apparent than real." Then that case which has been relied on in the Court below is thus explained :—

" The effect of that case may be very shortly stated. The zemindar brought a certain putni taluk to sale, and sold it to a purchaser who was put in possession of it, and out of the purchase-money the arrears of rent were paid. Subsequently the sale was set aside for irregularity ; the zemindar had to refund the purchase money received by her, and the putnidar who succeeded in setting it aside obtained also the mesne profits for the time during which he was ousted. Under these circumstances, this Committee, whose judgment was delivered by Sir James Colville, observe : 'It is clear that until the sale had been finally set aside she'—that is, the plaintiff—'was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect.' In other words, the effect of the judgment of this Board is, that under the peculiar circumstances, the putnidar having recovered possession, together with mesne profits it was equitable that he should pay the amount of rent which was in arrears ; but that amount of rent did not accrue until the sale of the putni had been set aside, and, therefore, until that time the Statute could not run."

It is explained, therefore, that the *case of Rani Surnomoyee* rested upon this, that under the circumstances of that case a new ground of claim for rent had arisen when the sale was set aside by the Court.

[262] There is nothing of that kind in this case. The plaintiff's cause of action accrued long before the time of the former case. There was no period during which the tenancy ceased to exist. We cannot extend the time of suit on the ground that he brought a suit improperly, on the allegation that the relationship of landlord and tenant between him and the tenant did not exist.

The result is that the decree of the Court below will be varied to this extent that the rent for 1282, 1283 and 1284 will be disallowed.

The appellant will have his costs in this Court, and he will also get his costs in the lower Courts in proportion to the amount disallowed to the plaintiff.

J. V. W. *Decree varied.*

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(1) 2 B.L.R. P.C. 10.

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JULY 23.

APPELLATE CIVIL.

12 C. 262 = 10 Ind. Jur. 374.

12 C. 262 = 10 Ind. Jur. 374.

APPELLATE CIVIL.

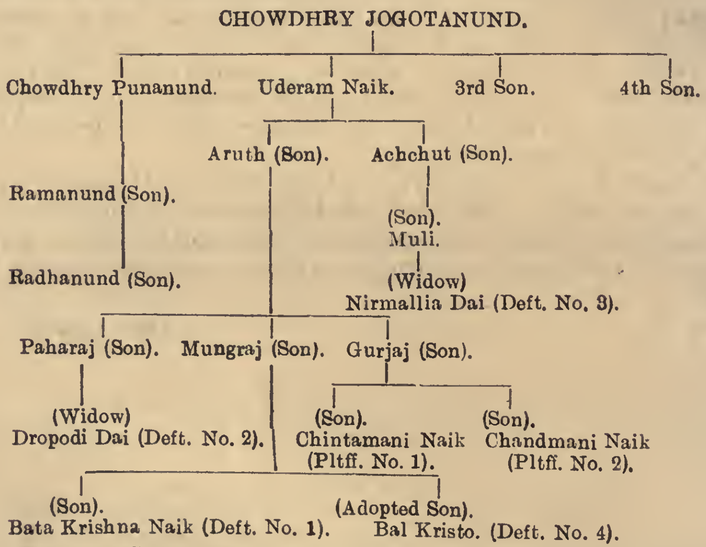
Before Mr. Justice Tottenham and Mr. Justice Agnew.

BATA KRISHNA NAIK AND OTHERS (*Defendants*) *v.* CHINTAMANI NAIK AND ANOTHER (*Plaintiffs*).* [23rd July, 1885.]

Hindu Law—Joint Family—Onus of proof—Presumption as to branch of family remaining joint when separation has taken place between it and other branches of joint family.

Each branch of a family whose original stock has been divided may continue to be a joint family within the meaning of the Hindu law, subject to all the presumptions arising from that state, and when such a state of facts exists the onus of proving a separation is on those who allege it, the presumption still being, in the absence of such proof, that the branch of the family remained joint amongst themselves.

THIS appeal arose out of a suit, instituted on the 27th August 1879, by the plaintiffs to recover their share of certain property upon the footing of its being joint family property, and upon the allegation that they had been dispossessed by the defendants upon the 15th Jeyt 1285 (28th May 1878). For the defendants it was contended that the separation had taken place at a much earlier date, and that consequently the plaintiffs' claim was barred by limitation; that of the properties claimed some did not exist and **[263]** others were the self-acquired properties of some of the defendants which never had belonged to the joint family; and that the suit was bad for non-joinder of parties. The last named defect was remedied by the parties being added before the first hearing. The following pedigree will explain the state of the family:



The first Court upon the evidence decided the case in favour of the plaintiffs and gave them a decree, being of opinion that it was not proved

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* Appeal from Appellate Decree, No. 126 of 1885, against the decree of J. B. Worgan, Esq., Officiating District Judge of Cuttack, dated the 13th of August 1884, affirming the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 27th of June 1881.

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APPEL-LATE CIVIL.

12 C. 262= 10 Ind. Jur. 374.

that a separation took place amongst the members of Uderam Naik's branch of the family before the date alleged in the plaint, and consequently that the family must be held to have been joint within 12 years of the date of suit.

The lower appellate Court reversed that decree and dismissed the suit upon the ground that it was barred by limitation.

It was found as a fact by that Court, and not disputed by the plaintiffs, that a separation had taken place about 40 years ago between Uderam Naik's branch of the family and the other descendants of Chowdhury Jogotanund, and the lower appellate Court for that reason declined to presume that Uderam Naik's descendants remained joint amongst themselves, and considered that the onus of proving that no separation had taken place lay on the plaintiffs, and that they had neither discharged that onus nor proved possession within 12 years.

The plaintiffs thereupon preferred a special appeal to the High Court against that decree, and the High Court remanded the case for reconsideration upon the ground that it by no means followed that the descendants of Uderam Naik ceased to be joint upon the [264] separation between them and the other descendants of Chowdhury Jogotanund taking place—*Upendra Narain Myti* v. *Gopee Nath Bera* (1). It was also of opinion that the lower appellate Court had erred in rejecting certain evidence consisting of a statement made by Mungraj as to the position of the family in the year 1871, and that the reasons relied on were not sufficient to support the finding that the suit was barred by limitation.

Upon the remand the lower appellate Court affirmed the decree of the Original Court in favour of the plaintiffs. It found that the defendants had failed to destroy the presumption that the family remained joint up to the time alleged in the plaint, though the onus was on them, and taking into consideration Mungraj's statement in 1871 that the family was then joint, it now held that the suit was not barred by limitation, as no separation was shown to have taken place till that alleged by the plaintiffs in 1285 (1878), and agreeing with the other findings of fact in the lower Court, gave the plaintiffs a decree for the share in the properties claimed.

Against this decree the defendants now preferred a special appeal to the High Court, upon the ground, amongst others, that the onus had wrongly been placed upon them.

Baboo *Mohesh Chundra Chowdhury*, Baboo *Anund Gopal Pulit* and Baboo *Gopi Nath Mookerjee*, for the appellants.

Baboo *Ambica Churan Bose* and Baboo *Karuna Sindhu Mookerjee*, for the respondents.

The judgment of the Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

This suit for the recovery of the plaintiffs' share in a joint family property was on one occasion dismissed by the Court below on the ground of limitation, the District Judge being of opinion that a separation had taken place so long before the institution of the suit that the plaintiffs could not succeed without proving their possession within twelve years. On second appeal to this Court, the case was remanded for a fresh decision, as we thought that the District Judge had wrongly dealt with the question

(1) 9 C. 817=12 C.L.R. 356.

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of [265] limitation. The lower appellate Court has now found for the plaintiffs, and has affirmed the decree made in their favour by the first Court. The defendants are the appellants in the present appeal.

The principal ground upon which the vakil for the appellants has addressed us is that the original stock of the family having been subjected to a separation many years ago, the presumption as to the joint family can no longer be maintained in regard to the various branches into which the family has been divided. With reference to this we think it sufficient to refer again to the case cited in our remand order, namely, *Upendra Narain Myti* v. *Gopee Nath Bera* (1). It appears to us that each branch of a family whose original stock has been divided may continue to be a joint family within the meaning of the Hindu law subject to all the presumptions arising from that state. We think, therefore, that the lower appellate Court did not err in the manner suggested by the vakil for the appellants. That being so, and the District Judge having further found that the separation occurred in the year 1285, we think that the present suit is not barred by limitation; and the separation having taken place at so late a date, we are of opinion that the Judge was right in acting upon the presumption of law that the property in question was joint family property.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

12 C. 265.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

THE ORIENTAL BANK CORPORATION *v.* T. F. BROWN & CO., LIMITED. [20th July, 1885.]

Discovery—Affidavit of documents—Sufficiency of affidavit—Further affidavit—Inspection of Documents—Privileged Communications—Practice.

Where in an affidavit of documents privilege is claimed for a correspondence on the ground that it contains instructions and confidential communications from the client (the plaintiff) to his solicitor, it must appear not merely that the correspondence generally contains instructions, &c., but that each letter contains instructions or confidential communications to the attorneys with reference to the conduct of the suit—*Bewicke* v. *Graham* (2) followed.

[R., 15 B. 7 (11).]

[266] JUDGE'S summons to consider the sufficiency of an affidavit as to possession of documents sworn by John Paterson, the plaintiff's constituted attorney, on the 30th day of June 1885. The material portions of the affidavit are as follows :—

1.—That the plaintiff-Corporation has in its possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto annexed.

2.—That on behalf of the plaintiff-Corporation I object to produce the said documents set forth in the second part of the first schedule hereto.

3.—That on behalf of the plaintiff-Corporation I object to produce the last-mentioned documents on the ground that they are cause papers

(1) 9 C. 817=12 C.L.R. 356.

(2) 7 Q.B.D. 400.

in this suit, and correspondence and other papers containing the instructions given on behalf of the plaintiff-Corporation and confidential communications made on behalf of the plaintiff-Corporation to the attorneys of the plaintiff-Corporation with reference to the conduct of this suit.

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The second part of the first schedule was as follows: "The cause papers in this suit, and correspondence and other papers containing instructions given on behalf of the plaintiff-Corporation and confidential communications made on behalf of the plaintiff-Corporation to the attorneys of the plaintiff-Corporation with reference to the conduct of this suit."

Mr. *Pugh*, for the defendant.—The affidavit is not sufficient—*Taylor* v. *Batten* (1). The document should be put in bundles and described properly, so that it may be known what the letters claimed to be privileged really are—*Walker* v. *Poole* (2).

Mr. *Hill*, *contra*, cited *Gardner* v. *Irvin* (3); *Taylor* v. *Batten* (1); *Bewicke* v. *Graham* (4).

PIGOT, J.—I think the description in the second part of the schedule should more clearly show, not merely that the correspondence generally contains instructions, &c., but that each letter contains instructions or confidential communications to the attorneys with reference to the conduct of this suit.

[267] [Mr. *Hill* suggests, "correspondence with the attorneys containing instructions for the conduct of this suit." The documents could be placed in books and numbered A, B, C, &c., in fact most of the letters, &c., are in books.]

PIGOT, J.—That can be done, and they should be described as I have indicated. Let costs be costs in the cause. Let all the documents be numbered as directed in *Bewicke* v. *Graham* (4).

Solicitors for the plaintiffs : Messrs. *Barrow and Orr*.
Solicitors for the defendants : Messrs. *Sanderson & Co*.
P. O'K.

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12 C. 267.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

SHAMBHU NATH NATH AND ANOTHER (*Defendants*) *v.* RAM CHANDRA SHAHA AND OTHERS (*Plaintiffs*).* [28th July, 1885.]

Limitation Act (*XV of* 1877), *s.* 19—*Limitation Act* (*IX of* 1871), *s.* 20—*Contents of acknowledgment of debt, Secondary evidence of*—*Evidence Act* (*I of* 1872), s. 91.

Para. 2, s. 19 of the Limitation Act, 1877, belongs to that branch of the law of evidence which is dealt with by s. 91 of Act I of 1872 and ought not to be read in derogation of the general rules of secondary evidence so as to exclude oral evidence of the contents of an acknowledgment which has been lost or destroyed.

[F., 13 C. 292 (295) ; 15 M. 491 (492).]

THIS was a suit for the recovery of a sum of money due on a balance of accounts. The plaintiffs alleged that the defendants had given a written

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* Appeal from Appellate Decree, No. 1863 of 1884, against the decree of Baboo Dwarka Nath Bhuttacharji, Additional Subordinate Judge of Tipperah, dated the 19th of July 1884, reversing the decree of Baboo Protap Chandra Mozoomdar, Munsif of Muradnagore, dated the 25th of September 1883.

(1) 4 Q. B. D. 85. (2) 21 Ch. D. 835. (3) 4 Exch. D. 49. (4) 7 Q.B.D. 400.

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acknowledgment of the debt. The material issue upon the pleadings was whether there was any such acknowledgment. The Munsif dismissed the suit, being of opinion that, as the acknowledgment, which was the only means of avoiding limitation, was said to have been lost, secondary evidence of its contents could not be received (para. 2, s. 19 of the Limitation Act). On appeal the Subordinate Judge decreed the claim, observing [268] that the words of s. 19, namely, "oral evidence of the contents of an acknowledgment shall not be received in evidence," did not mean to override the general rule on the production of secondary evidence in case of loss or destruction of a document.

The defendant appealed to the High Court.

Baboo *Girish Chundra Chowdhri*, for the appellants.

Baboo *Hari Mohun Chakrabati*, for the respondents.

The Court (WILSON and BEVERLEY, JJ.) delivered the following Judgment:—

JUDGMENT.

The only point discussed before us on this appeal is, whether secondary evidence of the contents of an acknowledgment used to keep alive a cause of action beyond the ordinary period of limitation can be given, where the original is proved to have been lost or destroyed, or whether the effect of paragraph 2 of s. 19 of the present Limitation Act XV of 1877 is absolutely and always to exclude secondary evidence in such a case.

This section first provides for keeping alive a claim by acknowledgment, and requires that such acknowledgment shall be in writing and signed, and shall be given before the claim is barred by limitation. Then in the second paragraph it is said: "When the writing containing the acknowledgment is undated oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received." Now the question is, what is the meaning and effect of these words?

In the former Limitation Act (Act IX of 1871) the corresponding section is s. 20; which said that no promise or acknowledgment should have the effect of excluding limitation unless certain conditions were complied with. Then sub-section (*c*) is this: "When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received."

When that Act was passed the present Evidence Act was not in existence; and there was no section in any Act relating to evidence defining clearly the cases in which secondary evidence of a document could be given, but it was known law that amongst [269] the grounds which authorized the admission of secondary evidence was the loss or destruction of the original. In the sentence just read, the only case referred to is the destruction or loss of the document. The effect clearly was to exclude *oral* evidence of an acknowledgment if tendered on either of these grounds; but nothing was said about the case where the document is in the possession of the opposite party, or is a public document, or beyond the jurisdiction of the Court; or the other cases in which secondary evidence of the contents of a document may ordinarily be given.

Then came the Evidence Act. That Act has defined the cases in which secondary evidence is admissible. The first section is s. 64, in which the general rule of law is laid down, that "documents must be proved by primary evidence except in the cases hereinafter mentioned." Then s. 65 gives the various cases in which secondary evidence may be

given. The first is when the document is in the possession or power of the opposite party, or of any person out of the reach of, or not subject to, the process of the Court, or of any person legally bound to produce it but who fails to produce it when required. The second, when the contents are admitted by the opposite party. The third, when the original is destroyed or lost. The fourth, when the original is a public document. The fifth, when the document is one of which a certified copy can be used. And so on.

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Then came the Limitation Act of 1877 with which we are now dealing. The language of s. 19 is altogether different from the language of the prior Act of 1871. The language of the prior Act of 1871, so far as oral evidence is concerned, was necessarily in direct conflict with s. 65 of the Evidence Act, because, according to the Evidence Act, secondary evidence is admissible of the contents of a document generally, if the original is lost or destroyed, but according to the Act of 1871 oral evidence of the contents of an acknowledgment would not be admissible in such a case.

The words now used are different. One branch of the law of Evidence is that already referred to. It is contained in s. 64 and the following sections of the Evidence Act, and it determines the cases in which secondary evidence may be given of the **[270]** contents of a document not produced. Another branch of that law is contained in s. 91 and the following sections. It deals with the question how far *oral* evidence, or evidence of oral communications, may be given to vary, control, or add to the effect of a document.

The first part of the paragraph before us clearly belongs to the latter branch of the law. And, it would seem, the object was to remove any question which might otherwise have arisen whether the rules generally excluding oral evidence to alter the effect of documents might not exclude oral evidence of the date of an undated document, where the date is an essential matter. Accordingly it is said that oral evidence of the date of the document may be given. The paragraph then proceeds : " but oral evidence of its contents shall not be received." These latter words are introduced with a " but," and they speak not of secondary evidence, but of oral evidence. We do not think they ought to be understood as dealing with an entirely different branch of the law of evidence from the earlier part of the sentence and as repealing s. 65 of the Evidence Act, so far as it relates to acknowledgments. We think the words in question are of the nature of a saving clause, guarding against the supposition that the prior words interfere with the general rules as to oral evidence further than the express words require.

The alternative view which we are asked to adopt is to read the words as excluding secondary evidence, oral or otherwise, not only in the cases mentioned in the Act of 1871, but in all cases whatsoever.

There is nothing in the terms of the Act constraining us so to hold, and the consequences of doing so would be serious.

If we interpret s. 19 of the Limitation Act as excluding secondary evidence when the original document is lost or destroyed, it must also exclude secondary evidence of the contents of a document in every one of the cases mentioned in s. 65 of the Evidence Act. For example the party objecting to secondary evidence may have the original in his pocket, and when called upon to produce it may pertinaciously refuse to do so. If secondary evidence cannot be given, justice will be frustrated.

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[271] So again an acknowledgment may be in the form of a public record, as was apparently the case in *Daia Chand* v. *Sarfraz* (1). Or the document may be out of the jurisdiction and control of the Court.

We think that the words in question in s. 19 ought not to be read as excluding secondary evidence of the contents of an acknowledgment which has been lost or destroyed, and that, therefore, the view taken by the lower appellate Court is right. The appeal will be dismissed with costs.

K.M.C. *Appeal dismissed.*

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12 C. 271.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

MOSHINGAN (*One of the Defendants*) v. MOZARI SAJAD (*Plaintiff*).* [6th July, 1885.]

Appeal—Valuation of suit—Costs—Return of plaint—Jurisdiction—Code of Civil Procedure, ss. 15 *and* 57.

On the hearing of a suit in the Court of first instance, the Court came to the conclusion that the value of the property in dispute placed the claim beyond the jurisdiction of the Court; the suit was therefore dismissed with costs. On appeal this decision was reversed with costs, on the ground that the plaint ought to have been returned to the plaintiff for presentation in the proper Court. The defendant appealed to the High Court.

Held, that the defendant ought to have been allowed his costs in both Courts, and that he was entitled to an appeal on that ground.

[R., 16 B. 241 (242); 5 C. L. J. 642=34 C. 878; D., 31 C. 233.]

THIS was a suit for the recovery of land. The first issue was "whether the present suit is cognizable by this Court with reference to the value of the property in dispute or not?" The Court of first instance took evidence on this point, and found that the value of the property in dispute was over Rs. 1,200; and that consequently he had no jurisdiction to entertain the suit. He thereupon dismissed the suit with costs, holding, on the authority of *Jagjivan Javherdas Seth* v. *Magdum Ali* (2), that he was precluded from returning the plaint for presentation to the proper Court after the Court-fee stamp was punched. On appeal the Subordinate Judge held that the Munsif's finding as to the valuation of [272] the suit was correct, but he decreed the appeal with costs, and ordered the plaint to be returned for presentation to the proper Court, on the authority of *Bhadeswar Chowdhry* v. *Gaurikant Nath* (3).

The defendant appealed to the High Court on the following grounds:—(1) that the lower appellate Court has erred in law in returning the plaint after the evidence was taken; (2) that the decision of the lower appellate Court is opposed to the provisions of s. 57 of the Civil Procedure Code; (3) that the lower appellate Court has erred in awarding costs against your petitioners; your petitioners were entitled to their costs in both Courts."

Mr. *Twidale*, for the appellant.

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* Appeal from Order, No. 21 of 1885, against the order of Baboo Mathura Nath Gupta, Subordinate Judge of Patna, dated 22nd of October 1884, reversing the order of Moulvie Amir Ali, Munsif of Behar, dated the 21st of January 1884.

(1) 1 A. 117. (2) 7 B. 487. (3) 8 C. 834.

JUDGMENT.

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The Judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.— We think that according to the principle laid down in *Balkissen Dass* v. *Lutchmeeput Singh* (1), there is an appeal here on the subject of costs. The defendant contended in both the Courts below that the Court in which the plaint was filed had no jurisdiction. In that contention he was successful ; and we think, therefore, that he ought not to be made to pay the plaintiff's costs ; on the contrary, he ought to have his own costs in both the lower Courts. We, therefore, direct that he do get such costs. We feel bound to say that this is a matter which ought to have been set right by the Subordinate Judge without compelling the defendant to appeal to this Court. The appeal is decreed with costs.

The order so far as it directs the plaint to be returned will remain unaffected by our decree. Although there is an appeal on this point, it is not pressed, as the plaint has been returned and the suit is proceeding in another Court.

P. O'K. *Appeal allowed.*

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12 C. 273 = 10 Ind. Jur. 334.

[273] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

IN THE MATTER OF THE PETITION OF BHOLA NATH DASS AND OTHERS.
BHOLA NATH DASS AND OTHERS *v.* SONAMONI DASI.*

[30th July, 1885.]

Appeal—Civil Procedure Code (Act XIV of 1882), *ss.* 2 *and* 396*—Order for partition in execution of decree.*

An order under s. 396 of the Code of Civil Procedure declaring the rights of the parties in a partition suit but leaving their shares to be determined in execution of the decree, is a " decree " within the meaning of s. 2 of the Code, and an appeal therefore lies from such order.

[D., 12 C. 275 (278).]

SONAMONI DASI, the plaintiff in the suit in the execution proceedings in which this rule was obtained, sued for partition of moveable and immoveable property which belonged originally to two brothers, Gopal Chandra Dass, father of the defendants, and Mohesh Chandra Dass, the husband of the plaintiff. Both Gopal Chandra and Mohesh Chandra being dead, the plaintiff as heir of her deceased husband claimed an eight-anna share of the joint properties, and also asked for damages and mesne profits. A deed had been executed by the parties in Pous 1290 (December 1883), whereby it was agreed that of the articles used in performing religious ceremonies those mentioned in sch. 3 should remain in the custody of the defendants, while the plaintiff should enjoy a similar right in respect of the articles specified in sch. 4.

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* Civil Rule No. 796 of 1885, against the order of Baboo Nuffer Chundra Bhatta, First Subordinate Judge of 24-Pergunnahs, dated the 12th of May 1885.

(1) 8 C. 91.

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The plaintiff alleged that the defendants had not delivered to her the articles mentioned in sch. 4, and that the defendants having in contravention of the terms of the deed refused to allow her the use of the articles specified in sch. 3, on the occasion of the Doljatra ceremony, she was, by virtue of the stipulation in the deed, entitled to the possession of these articles. She also claimed an iron chest as belonging to her exclusively. The defence was that a portion of the properties, of which partition was claimed, had been already divided ; that the defendants had not refused to allow the plaintiff to use the articles specified in sch. 3 ; that of the articles mentioned in sch. [274] 4, the defendants had in their hands only eleven lanterns and nothing else ; that the iron chest was joint property ; and that the defendants were not liable for damages and mesne profits.

The Subordinate Judge made the following order :—

"The properties specified in sch. 1 annexed to the plaint and the articles Nos. 1—18 of the sch. 2 annexed to the defendants' written statement will be divided into two equal lots, one of which is to be assigned to the plaintiff and the other to the defendants. The partition will be made by Commissioners, who will have due regard to the convenience of the parties. Compensation may be awarded for equalising the shares. The costs of the partition will be borne equally by the parties.

The plaintiff's claim with reference to the properties mentioned in sch. 3 is dismissed.

"The defendants are directed to deliver to the plaintiff the property No. 74 referred to in sch. 4, or its value Rs. 22, and also the iron chest claimed, or its value Rs. 70. The claim for damages and mesne profits is dismissed."

The defendants appealed and petitioned for and obtained a rule calling on the plaintiff to show cause why partition should not be stayed pending the appeal.

Baboo *Kissen Kumal Bhattacharjee*, for the petitioners.

Baboo *Uma Kali Mookerjee* showed cause.

The judgment of the Court (MITTER and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

It has been contended before us that this Rule ought to be discharged, because the appeal in connection with which it was issued was not filed in accordance with the provisions of the Code of Civil Procedure.

The contention of the opposite party is that the order which has been passed by the lower Court under s. 396 of the Code defining the several rights of the parties interested in the property in dispute is not a "decree" as defined in s. 2 ; that it is merely an interlocutory order against which, it has been urged, no appeal lies.

We are of opinion that this contention is not sound. As regards the question whether the order under s. 396 comes within [275] the definition of "decree" as given in s. 2, there is no difference between such an order and one passed under similar circumstances regarding the partition of an immoveable property paying revenue to Government. There is as much reason to characterize the one as the other a "decree." On referring to s. 265, we and that the Legislature speaks of an order defining the rights of the parties to a suit for the partition of an undivided estate paying revenue to Government as a "decree."

We think that an order passed under s. 396 is a "decree" as defined by s. 2. It has been contended that it does not come within the definition,

because the adjudication of right under s. 396 does not decide the suit; but we think that practically it does. All that remains to be done is simply an enquiry into minor matters necessary for the final disposal of the case. We think that an order under s. 396 of the Code of Civil Procedure is a "preliminary decree" passed in the suit which gives the parties the right of appeal.

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It is not disputed that hitherto, on both sides of this Court, such appeals have been allowed. It is also clear that considerations of the balance of convenience are in favour of an appeal being allowed. We are, therefore, of opinion that the contention of the opposite party is not valid.

The Rule will be made absolute with costs.

J. V. W. *Rule absolute.*

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12 C. 275.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Grant.

BHOOBUN MOYI DABEA AND OTHERS (*Decree-holders*) v. SHURUT SUNDERY DABEA AND OTHERS (*Judgment-debtors*).*
[12th August, 1885.]

Appeal—Civil Procedure Code (Act XIV of 1882), *ss.* 2 *and* 396—*Order in Partition suit leaving proceedings to be taken in execution of decree.*

The proceedings contemplated by s. 396 of Act XIV of 1882 are proceedings in a suit before decree, and in order to enable the Court in that suit to determine exactly the terms of that decree. Where those proceedings, however, were left to be taken in execution of the decree, the High Court treating it as an error in point of form, and without deciding whether or not [276] an objection if it had been taken would have been fatal to the proceedings, dealt with the case in the same way as was done in *Gyan Chunder Sen* v. *Doorga Churn Sen* (1) regarding the further proceedings taken after decree declaring the rights of the several parties as proceedings to obtain a decree on further consideration.

Where in a partition suit an order was made in the course of such proceedings by which the position of some of the parties to the suit was determined, but no declaration was made of the exact rights of each of the parties, *held*, it was a mere interlocutory order and no appeal would lie from it.

Semble, such an order is not a decree within the terms of s. 2, Act XIV of 1882—*Bholanath Doss* v. *Sonamoni Dasi* (2) distinguished.

THE suit in which these execution proceedings arose was a suit for partition of a ten-anna share of a taluk, the remaining six annas of which had been partitioned by metes and bounds in another suit. The decree was obtained for partition of the ten-anna share, and the decree-holders applied to have the partition made in reference to the papers prepared in the previous suit. The Civil Court Ameen was according to the petitions of the respective parties, directed to make the partition in reference to those papers only, and without making a fresh survey of the estate. He submitted his report, to which all the parties took objections before the Subordinate Judge, with the result that he confirmed the allotments made to two of the parties, and directed possession to be given to them of their

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* Appeal from Order No. 125 of 1885, against the order of Baboo Parbati Coomar Mitter, First Subordinate Judge of Mymensingh, dated the 17th February 1885.

(1) 7 C. 318=8 C.L.R. 415. (2) 12 C. 273.

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shares, and with respect to the rest ordered that the allotment should be revised in certain particulars.

On appeal from his order,—

Baboo *Hem Chunder Banerjee* and Baboo *Issur Chunder Chuckerbutty*, appeared for the appellants.

Baboo *Streenath Dass*, Baboo *Grija Sunker Mozoomdar* and Baboo *Mokoondanath Roy*, for the respondents.

The judgment of the Court (PRINSEP and GRANT, JJ.) was as follows :—

JUDGMENT.

The matter before us relates to a partition, through the Court, of certain immoveable property held by the parties. The [277] suit was for partition by metes and bounds, on proof that the parties held respectively certain specific shares. The Subordinate Judge was content with passing a decree declaring the parties entitled to partition as holding certain specific shares, but he has reserved the actual partition by metes and bounds until proceedings taken in execution and an enquiry by a Commissioner. The result has been that the enquiry contemplated by the terms of that order and provided for by s. 396 of the Civil Procedure Code, has been made in proceedings in execution of that decree. Now, as regards the form of these proceedings, we think that they have been mistaken. The proceedings contemplated by s. 396 are proceedings in a suit, and, as we understand it, before the passing of the decree, in order to enable the Court in that suit to determine exactly the terms of that decree. However, the error, such as it is, is merely on a point of form, and as it has not been made the subject of an objection (and we desire to add that we do not wish it to be understood that if it had been made the subject of an objection, it would have been fatal to the proceedings taken), we think we should regard it in the manner in which it was dealt with in the case of *Gyan Chunder Sen* v. *Doorga Churn Sen* (1), that is to say, the further proceedings taken after the decree declaring the rights of the several parties should be regarded as proceedings to obtain a decree upon further consideration, the expression used being one which is familiar to the English Courts of Law. The lower Court has in these proceedings found, on the report of the Commissioner, that two of the parties are entitled to certain parcels of land, but though it has found that the other two parties are entitled to the remaining portion, it has refrained at present from declaring exactly the lands to which each of these parties are entitled as between themselves. One of these last mentioned parties has now appealed to this Court against the order made, giving two of the co-sharers certain specific parcels of land. A preliminary objection has been raised that in the present state of the proceedings no appeal would lie. If the order passed be regarded as an order, it would seem that it is not appealable, as no special provision has been made by [278] s. 588. But it is contended that this order should be regarded as a decree within the terms of the definition given in s. 2. Section 2 declares that a decree means "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suits." It is clear that the present order does not decide the suit, although it may determine the position of one of the parties in that suit. But as an

(1) 7 C. 318 = 8 C.L.R. 415.

authority for the appeal now made to us we are referred to a judgment delivered by Mitter and Macpherson, JJ., in *Bholanath Dass* v. *Sonamoni Dasi* (1) on the 30th July last. In that case the learned Judges held that, in a suit for a partition of immoveable property not being an estate paying revenue to Government, an appeal would lie against an order or decree merely declaring the rights of the parties to certain specific shares, although the principal object of that suit as laid, *viz.*, the particular lands to which each of the co-sharers would be entitled, had not yet been determined. It is sufficient for us at present to state that we should feel some hesitation in applying the principle upon which the Court may have proceeded in that case generally to somewhat analogous matters arising in other suits, and as, in our opinion, the order passed does not apply strictly to the case before us, we do not feel embarrassed by that decision. We should not be disposed to hold, as we have been asked to hold in the present case, that any interlocutory order in the course of a suit or proceeding under which the position of some of the parties to the case may have been determined, could properly be made the subject of an appeal, except under some special provision of the law, until the decree shall have been pronounced, that is to say, until the actual decision of the suit shall have been arrived at. In the present case, although the rights of the Maharani and Nabab Ali, two of the co-sharers, may have been determined with regard to certain specific plots, no final order has yet been passed, because the exact rights of the two other parties have not been determined. It therefore seems to us that, until the entire matter before the Court shall have been concluded, no appeal would lie.

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[279] We think it is to be regretted that in dealing with suits for partition of immoveable property not being estates paying revenue to Government, the lower Courts should be in the habit of passing what are termed decrees in the suits containing merely declaratory orders, leaving still open for determination the main issues. Such matters should be decided before any decree is passed, and this would seem to be contemplated by s. 396 which refers to proceedings in a suit. We are inclined to think that this mode of dealing with cases of this description arises in a great measure from a desire of the lower Courts to clear their files of such suits as involve tedious and lengthened enquiries, and thus not to lay themselves open to animadversion for dilatory proceedings when their work comes before their executive superiors. As we are of opinion that no appeal lies in the present stage of the proceedings, but that, if so advised, the appellant can hereafter raise the points which he desires to raise in the present proceedings, the appeal is dismissed, but, under the circumstances, without costs.

J. V. W. *Appeal dismissed.*

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(1) 12 C. 273.

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APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

KRISTO CHUNDER DASS AND OTHERS (*Defendants*) *v.* O. STEEL (*Plaintiff*).* [11th August, 1885.]

Waste lands—Act XXIII of 1863, *ss* 8, 18—*Suit for possession—Statute, Interpretation of.*

Where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication, declare that those rights shall cease, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further.

There is nothing in Act XXIII of 1863, to prevent a person who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory suit, or who for any other reason is in the advantageous [280] position of a defendant, from defending his rights notwithstanding any sale which the Government may have professed to make under the Waste Lands Act.

Quaere.—Whether the terms of the Act are not sufficiently satisfied, by making it apply to waste lands of Government, and by understanding the claims and objections mentioned in the Act as claims in respect of Government land, and objections wlth the same limitation.

[R. 8 N.L.R. 107.]

THIS was a suit brought to recover a piece of land. The plaintiff's case was that on the 5th August 1878 the proper officer on behalf of Government acting under Act XXIII of 1863 sold to him the proprietary right in certain waste lands, and settled with him in respect of them, the lands being described in waste land pottah No. 58 ; that the land in question was included in that pottah ; that this land continued waste, but that he was in possession, and that in 1881, the defendants Nos. 1 to 13 settled the other defendants upon the land as tenants and so ousted the plaintiff.

The defence of the defendant who appeared was that the land was not waste land, and was not included in the plaintiff's pottah, but formed part of a taluk long vested in the principal defendants and their predecessors in title.

In the first Court the suit was dismissed, the Subordinate Judge holding that the land in question was within the defendants' taluk, and that it was not waste land and not covered by the plaintiff's pottah.

The District Judge on appeal reversed that decision and gave the plaintiff a decree for possession for the land in dispute, coming to the conclusion that the land was included in the plaintiff's pottah, and that he had obtained possession ; and that being so, and none of the defendants having preferred any claim before the Collector in the manner prescribed by Act XXIII of 1863 at or since the time of the sale to the plaintiff, he held that the plaintiff's title must pervail, and that the defendants could not now in a Civil Court set up any adverse title. He, however, came to no decision upon the alleged prior title of the defendants.

* Appeal from Appellate Decree, No. 590 of 1884, against the decree of H. Muspratt, Esq., District Judge of Sylhet, dated the 28th December 1883, reversing the decree of Baboo Ram Coomar Pal, Rai Bahadur, Subordinate Judge of that district, dated the 31st of January 1883.

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The defendants appealed to the High Court.

Mr. *Bell* (with him Baboo *Joygobindo Shome*), for the appellant. —The lower appellate Court has not tried the real question at [281] issue in this case. The land in dispute is claimed by the plaintiff under a settlement from Government under the Waste Lands Act (Act XXIII of 1863). The defendant claims the land as part of his taluk, which is contiguous to certain waste lands of the Government. The lower appellate Court holds that whether the lands belong to the defendants' taluk or not, the title of the plaintiff under the settlement must prevail. For this conclusion ss. 18 and 19 of the Act are relied upon. These sections provide that no claim to any land which has been sold or otherwise dealt with on account of Government as waste land, shall be received after three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with ; and if any claim is made within the three years, the claimant is not to recover the land from the purchaser, but to receive compensation from the Government. But these sections must receive a reasonable interpretation. The word "land" in these sections must refer to waste land the property of Government. This is clear from the preamble and the whole scope of the Act. The Act merely deals with waste lands, the property of Government ; it certainly does not authorise the Collector to take the land of a neighbouring proprietor and sell it to a third party as Government waste land. If he does he exceeds his authority, and the proprietor of the land has his remedy in the ordinary Civil Courts. The Act merely deals with waste lands which belong to Government, and it provides compensation for persons, who have any right, such as right of occupancy or pasturage, in such lands ; but it does not profess to deal with lands which are not the property of Government and are therefore outside the scope of the Act. The Act moreover gives the Collector no jurisdiction to decide disputed questions of boundary between the Government and the neighbouring proprietors ; all such questions must be decided by the Civil Court. The lower Court is wrong in refusing to try the question whether the land in dispute formed part of the waste land of the Government or belonged to the defendants' taluk.

Mr. *Adkin*, for the respondent.

JUDGMENTS.

Judgments were delivered by WILSON and BEVERLEY, JJ.

WILSON, J. (after setting out the facts continued as follows):—[282] I am unable to concur in the view of the law taken by the learned District Judge. In order to make clear the reasons why I cannot do so, it will be necessary to examine the provisions of Act XXIII of 1863 in some detail.

The Act is entitled "an Act to provide for the adjudication of claims to waste lands." The preamble recites that it is expedient to make special provisions for the speedy adjudication of claims which may be preferred to waste lands proposed to be sold, or otherwise dealt with, on account of Government, and of objections taken to the sales or other disposition of such lands. Section 1 says : That when any claim shall be preferred to any waste land proposed to be sold, or otherwise dealt with, on account of Government, or when any objection shall be taken to the sale or other disposition of such land, the Collector shall, if the claim or objection be preferred within the period mentioned in the advertisement to be issued for the sale or other disposition of such land, which period shall be not less

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than three months, proceed to make an inquiry into the claim or objection; s. 2 provides for the procedure to be observed by the Collector and the order to be made by him; s. 3 for stay of sale pending the enquiry; s. 4 for an absolute stay if the Collector finds the claim or objection well founded. By s. 5, if the Collector's decision is adverse to the claimant or objector, his order is final, unless the claimant or objector, within a week after receipt of the order, or such extended time as the Collector may allow, give notice that he wishes to dispute the order. If he does, the matter is to be reported to the Board of Revenue or other superior Revenue authority. If the decision of the higher Revenue authority is adverse to the claimant, that decision is to be communicated to the special Court, constituted under a subsequent section, and the decision is final unless within thirty days the claimant or objector files a suit in the special Court. The latter part of this section is altered in form but not in substance by the subsequent Limitation Act.

Section 6 gives power to the Government to institute a suit in the special Court to dispute the finding of the Collector if in favour of the claimant or objector. Section 7 provides for the constitution of the special Court.

[283] Then follows a very material section, s. 8, "whenever any Court is constituted under this Act notice thereof shall be given by a written proclamation, copies of which shall be affixed in the several Courts, and in the offices of the several Collectors and Magistrates of the districts and from the date of the issue of such proclamation, no other Court shall be competent to entertain any claim or objection belonging to the class of claims or objections for the trial and determination of which such Court is constituted." By s. 10 in suits in this special Court, the parties are to be the claimant or objector and the Government. Sections 11, 12 and 13 relate to procedure. By s. 14 "no appeal shall lie from any decision or order passed under this Act, nor shall any such decision or order be open to revision." Section 15 provides for a reference from the special Court to the High Court on questions of law. Sections 16 and 17 again deal with procedure.

Down to this point in the Act there is no provision for dealing with any claim or objection which has not been submitted to the Collector before the date fixed by advertisement for the sale or other disposition of the land. But by s. 18, "No claim to any land, or to compensation or damages in respect of any land sold or otherwise dealt with on account of Government as waste land, shall be received after the expiration of three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with. If within three years after any lands have been delivered by the Government to the purchaser or otherwise dealt with, any claimant or objector shall prefer a claim to the land so delivered or otherwise dealt with, or an objection to such sale, or to compensation or damages in respect thereof, in the Court constituted under this Act for the district in which the land is situate; and shall show good and sufficient reason for not having preferred his claim or objection to the Collector or other officer as aforesaid within the period limited by s. 1 of the Act; such Court shall file the claim or objection making the claimant or objector plaintiff and the Collector of the district of other officer defendant, and the foregoing provisions of this Act shall be applicable to the trial and determination of the suit."

[284] By s. 19 " in any case in which the land has been sold if the Court shall be of opinion that the claim of the claimant is established, the Court shall not award the claimant possession of the land in dispute, but shall order him to receive from the Government treasury by way of compensation a sum equal to the price at which the land was sold in addition to the costs of suit." Section 20 contains somewhat similar provisions for the case in which the land has been dealt with otherwise than by absolute sale.

By s. 21 " an award under any of the provisions of the two last preceding sections shall be in full satisfaction of the claim of the claimant or objector, and shall bar any future claim on his part in respect of the land in suit, resting on the same cause of action or on a cause of the action which existed prior to the date of the sale or other disposition of the land on account of Government."

Sections 22 and 23 reserve to the Local Government the power of granting compensation, although no claim or objection may have been made within the prescribed period.

We must construe this Act in accordance with the settled rules of construction. Now it is a familiar rule of construction that an act is not to be so interpreted as to interfere with rights of property, except by express words or necessary implication. And that rule has been acted upon in this country no less than in England.

On the one hand, where the Legislature has intended to take away proprietary rights it has expressed that intention in clear language.

Thus in Regulation VIII of 1819, when it was intended that the sale of a tenure for arrears of rent should put an end to intermediate incumbrances, the language of s. 11 stated that intention expressly. So again in the Limitation Act, XV of 1877, when it is intended that on the determination of the period for suing to recover property, the right shall be extinguished, the words of s. 28 clearly say so.

On the other hand, where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or [285] by necessary implication, declare that those rights shall cease to exist, I think the method of interpretation which has been and ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further. A good example of this rule will be found in the case of the provisions as to *benami* purchases, contained in the Revenue Sale Acts, and in those portions of the Procedure Codes relating to execution sales. It has there been enacted that, if a purchaser at any of such sales purchases in the *benami* name of another, no suit shall lie against the *benamidar* to oust him from the property. It has always been held that the effect of these provisions is not to take away the right or title of the true owner, or to vest them in the *benamidar*, but merely to preclude the specific thing forbidden by the words of the law, that is to say, a suit in which the real purchaser is the plaintiff and the *benamidar* is the defendant and the object is to oust the latter.

Applying these principles to the present case, I think that the defendant's title is not barred by the operation of the Waste Lands Act. The only claims dealt with by the Act are claims set up by persons objecting to or complaining of the sale of lands as waste lands. And the section which, if any, bars the present defence is s. 8, which forbids the Civil Courts to entertain any claim belonging to the class for the trial of

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which the special Court is constituted. There are no words in the Act declaring either expressly or by necessary implication, that a purchaser of waste lands shall take an absolute title, or that the rights of any other person shall be barred, or that any such person shall be disabled from asserting his rights in any way whatever, except in the one case in which the Act itself forbids it ; and that is where he is the claimant. I can see nothing in the Act to prevent a person, who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory suit, or who, for any other reason, is in the advantageous position of a defendant, from defending his rights, notwithstanding any sale which the Government may have professed to make under the Waste Lands Act.

On the contrary I think there are indications, in the Act itself, [286] that this distinction was present in the minds of the framers, for by s. 18 the period within which a claim adverse to a sale must be filed begins to run, not from the sale, but from the time when the land has been delivered by the Government to the purchaser.

I think, therefore, that the Court below was wrong ; and that s. 8 has no application in this case, because the persons against whom it is sought to apply it are not plaintiffs but defendants.

This ground is sufficient to dispose of the present appeal. But I think it right to say that upon other grounds also I think the decision of the Court below is open to great question. The learned Judge seems to hold that it is not necessary for the purchaser of waste lands, in order to entitle him to rely upon s. 8 or s. 18, to show that the lands were waste at the time of the purchase ; and indeed that the question cannot be gone into ; but that the fact of the Government having dealt with the land as waste land is conclusive. I think this very doubtful. Throughout the Act, except in one instance, what is spoken of is waste land ; and had it not been for that one instance, I should have thought it clear that the land being waste land was a condition precedent to the Act applying at all. The one instance I refer to is in s. 18, where the words occur "sold or otherwise dealt with on account of Government as waste land." Having regard to the immediate context in which the words occur, and to the connection of that section with the earlier parts of the Act, I very much doubt whether these words extend the scope of the Act, and whether the Act applies at all to any lands which are not waste at the date of the sale or other dealing relied upon. Another question is, whether the Act applies at all to any lands except lands which are the property of Government. An Act interfering with private right is, as I have pointed out, to be construed strictly. And I am by no means sure the terms of the Act are not sufficiently satisfied by making it apply to waste lands of Government ; and by understanding the claims and objections mentioned in the Act as claims in respect of Government land and objections with the same limitation—claims for example of tenants and others claiming to hold under Government, claims to easements and other rights over the [287] land, claims and objections based upon contract. If this be the true construction, the restrictions relied upon do not affect any person claiming under a title adverse to the proprietary right of Government.

The only reported case, as far as I know, decided upon the section in question is *Magun Pollan* v. *Money* (1). In that case none of the questions

(1) 7 W. R. 474.

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which I have considered appear to have arisen. The claimant in that case, who was held to be barred, was the plaintiff in the suit. No question seems to have arisen as to the lands being waste. And the claim was not one adverse to the proprietary right of Government, but a demand for a pottah by one who claimed to have held under Government.

The consequences of holding that the provisions of this Act bar the right of the real owner, especially if those provisions be extended to titles adverse to the proprietary right of Government whom it professes to sell, would be very serious; and the effect might be in many cases not to promote security of titles, but insecurity. For I suppose that if the rule suggested applies to any sale of waste land, it applies to every sale of waste land, and therefore one who purchased waste land to-day, and entered into possession of it might be deprived of it afterwards if by a mistake of the Government officials the same land were included in a subsequent grant to another person.

The consequences of holding that the Act applies to lands sold as waste land, though not so in fact, would be not less serious.

It may well happen that, by a mistake of the officers employed, a grant of lands to one person as waste lands might include land which had been turned into a tea garden by another. If the view of the District Judge be right, the grantee would take his neighbour's tea garden, and the real owner could only recover from Government, under s. 19, the price of waste land. This would be a great injustice.

The result is that, in my opinion, the judgment of the lower appellate Court cannot be supported; and the case should go back to that Court to decide the case upon the merits, that is to say, to try the first part of the fourth issue. Costs should abide the event.

[288] BEVERLEY, JJ. (after stating the facts and proceedings in the lower Courts continued) :—In second appeal it is contended before us (1) that the Judge has put a wrong construction on Act XXIII of 1863, and (2) that the southern boundary of the plaintiff's land being stated to be Bagmara Cheg, the plaintiff was not entitled to recover any land shown to fall within the defendant's taluk.

It is admitted that the land in dispute is included in the plaintiff's grant, as shown in the map annexed to his pottah. This map is only incidentally referred to in the deed, and it was disregarded by the first Court on the ground that it was not "published in the notification." But the notification makes distinct reference to a map which was advertised as being open to inspection in the Deputy Commissioner's Office, and there is no reason to suppose that that map was any other than the map which is annexed to the pottah. Under these circumstances it can hardly be said that the subject-matter of the grant was not notified as defined in the map, and, as has been pointed out above, it was distinctly admitted by the defendants that the land in dispute was as a matter of fact settled with the plaintiff.

And there is no reason for saying that the proceedings were other than regular, and that defendants had not sufficient notice as to the land that was applied for. Even putting aside the map which the defendants, as adjoining proprietors, might be expected to consult, the Judge has pointed out that the notification itself was so worded as to put them on enquiry. The defendant's case is that the northern boundary of Bagmara Cheg is the Erania path and the Pekieharra. Now the notification distinctly mentioned the Erania path as the northern boundary of the land applied for. Here then was a statement in the notification itself that

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should have attracted their attention and which suggested the necessity of further enquiry.

It being conceded, then, that as a matter of fact the land in dispute is covered by the plaintiff's pottah and was in fact granted to him, the next question is whether, that being so, the defendants are barred by Act XXIII of 1863 from asserting their claim to the land in the present suit. The object of that Act is stated in the preamble to be "to make special provision for the speedy adjudication of claims which may be preferred to wastelands [289] proposed to be sold or otherwise dealt with on account of Government and of objections taken to the sale or other disposition of such lands." The special provision referred to is as follows: in the first place the land proposed to be sold or otherwise disposed of is to be advertised for a period of not less than three months, and if during that time any claim or objection be preferred, the sale or other disposition of the lands is to be postponed, pending an enquiry. The Act then goes on to provide for the constitution of special Courts for the investigation and trial of claims, and by s. 8 when proclamation has been made of the establishment of any such special Court "no other Court shall be competent to entertain any claim or objection belonging to the class of claims or objections for the trial and determination of which such Court is constituted." It is admitted that in the district of Sylhet a special Court has been constituted. The next few sections relate to the procedure of the special Court; and s. 14 provides that "no appeal shall lie from any decision or order passed under this Act, nor shall any such decision or order be open to revision.

Then s. 18 says: "No claim to any land or to compensation or damages in respect of any land sold or otherwise dealt with on account of Government as waste land, shall be received after the expiration of three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with." If within such period of three years any claim or objection is preferred it may, under certain conditions, be tried by the special Court, but even if the claim is established the claimant is not to recover the land itself but merely money compensation. Lastly, by ss. 22 and 23, the Government is authorized to award compensation even after the period of limitation in cases in which the claim is proved to its satisfaction.

The object of the Act, therefore, would seem to have been to give a purchaser or lessee of waste land under Government a clear title to the land itself, the Government holding itself responsible to compensate any person who may establish a claim to the land within a certain time.

This view of the Act has been adopted by this Court in the case of *Magum Pollan* v. *Money* (1), in which it was held that [290] claims to land sold under the Act can only be preferred in accordance with the provisions of the Act, and that the jurisdiction of the ordinary Court is barred.

At the same time the Act must be construed strictly so far as it interferes with private rights, and I think there is no doubt that, whatever may have been the intention of its framers, its language, while probably sufficient to bar a suit in the ordinary Courts for the recovery of waste lands sold or otherwise disposed of by Government, does not go to the extent of barring the ordinary Courts form considering claim to such lands when

(1) 7 W. R. 474.

raised by way of defence. There are no words in the Act such, for instance, as those contained in s. 16 of the Land Acquisition Act, giving the purchaser an indefensible title. By s. 8 the ordinary Courts are barred from entertaining claims and objections belonging to the class of claims or objections for the trial or determination of which the special Court is constituted. Such claims and objections could only be put forward before the special Court by a claimant or plaintiff. It is difficult to see how claims or objections raised by way of defence could come before the special Court at all. It seems to follow that what is barred by s. 8 is a claim or objection brought by a plaintiff and not the assertion of a title set up by way of defence.

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It is contended that unless the land is shown to have been actually waste land, the property of Government, the Act will not apply. No definition of waste land is given in the Act, and the expression may therefore be taken to have its usual meaning of unoccupied or uncultivated land. And nowhere in the Act is it said that the waste lands spoken of must be unoccupied lands, the property of Government. It is assumed of course that lands will not be sold unless they are the property of Government; but the very object of the Act is to dispose of claims preferred on the ground that the land sold or otherwise disposed of is not the exclusive property of Government, but that the claimant has a proprietary right or some other interest in it.

I agree with my learned colleague therefore that the case must go back to the lower appellate Court for a distinct finding as to whether the defendants have succeeded in proving their title to the land in suit.

T.A.P. *Case remanded.*

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12 C. 291.

[291] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

NONOO SINGH MONDA (*One of the Defendants*) v. ANAND SINGH MONDA AND ANOTHER (*Plaintiffs*).* [14th August, 1885.]

Civil Procedure Code (Act XIV of 1882), s. 43—Splitting Cause of action—Suit for declaration of title—Subsequent suit for possession.

When a suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession of the land at the time of instituting the suit, a subsequent suit on the same title to recover possession is not barred under s. 43 of the Civil Procedure Code.

A cause of action consists of the circumstances and facts which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint. *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1) followed.

[F., 6 N.L.R. 81=6 Ind. Cas. 926; R., 3 C.P.L.R. 3 (5); 14 M. 23 (24); 16 M. 274 (277); 8 Ind. Cas. 9; Concurred in, 25 M.L.J. 125=(1913) M.W.N. 554 (555)=20 Ind. Cas. 418 (419).]

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* Appeal from Appellate Order, No. 139 of 1885, against the order of G. E. Porter, Esq., Judicial Commissioner of Chota Nagpore, dated the 12th of February 1885, reversing the decree of Lieutenant-Colonel W. L. Samuells, Deputy Commissioner, Lohardagga, dated the 26th June 1884.

(1) 8 C. 819.

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IN this case the plaintiffs sued to recover possession of mouzah Balmoda as being their ancestral *khutkati* property and also for mesne profits.

The plaint set out that one Pahar Singh, the ancestor of plaintiff No. 1 and defendant No. 1, on his death left three sons, *viz.*, Surjan Singh, Chamu Singh and Nonoo Singh (defendant No. 1), and that Surjan Singh being the eldest succeeded to the estate according to family custom, the other sons getting maintenance allowance. In Assar 1929 S. Surjan Singh died, and Chamu Singh (father of plaintiff No. 1) succeeded to the estate, and obtained possession. In Bhadro 1931 S. Chamu Singh died, and plaintiff No. 1 succeeded and leased his rights to plaintiff No. 2. The plaintiffs having sued one of the ryots for rent, and having failed to get a decree, instituted a suit for a declaratory decree, declaring their right to the property as against defendant No. 1, paying stamp duty on the plaint of Rs. 10. That suit was dismissed on the 15th December 1882, the Court finding that the plaintiff No. 1 had not been in possession of the property. Defendant No. 1 thereupon dispossessed the plaintiffs from the [292] property and the plaintiffs accordingly sought in the present suit to recover possession.

The defendants denied that Chamu Singh, or plaintiff No. 1 was in possession, or that by family custom either of them had any right to succeed, as Nonoo Singh was older than Chamu Singh, and a son by a first wife, whereas Chamu Singh was born of the second wife. They also contended that the suit was barred under s. 43 of the Civil Procedure Code, as the plaintiffs should have included their claim for possession in the former suit which ended in the decree of the 15th December 1882, and that they should have then sued for possession as well as a declaratory decree and not merely for the latter.

The first Court decided the case upon the issue raised as to whether the suit was barred or not without going into the merits. It found that after the hearing of the former case the plaintiffs had prayed to be allowed to pay stamp duty on the whole value of the property, but that the Court had declined to allow that course, as it would be changing the whole character of the suit. In that suit there had been four issues raised on the question of who was entitled to succeed to the property, and one issue on the question of possession. On the former issues, the Court found that Chamu was the elder, and as such entitled to succeed Surjan, and upon the latter issue that the defendants were in possession. Upon these facts the first Court came to the conclusion that the question as to who was entitled to succeed to the property was *res judicata*, but that the suit was also barred under s. 43, and the Deputy Commissioner in his judgment held that the decision in the case of *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1), upon which the plaintiffs relied, did not apply to the present case, inasmuch as in the present case, the question of possession was gone into, and he considered that the plaintiffs never *bona fide* believed that they were in possession.

The plaintiffs appealed against that decision, and the lower appellate Court reversed it, and remanded the case for trial upon the merits. That Court was of opinion that the case quoted by the lower Court was exactly in point, and that the cause of action in the two suits was not the same.

[293] Nonoo Singh now preferred this special appeal to the High Court against the order of the lower appellate Court remanding the case.

(1) 8 C. 819.

The only question argued at the hearing of the appeal was whether or not the suit was barred under s. 43 of the Civil Procedure Code. 1885 AUG. 14. — APPELLATE CIVIL. — 12 C. 291.

Baboo *Rash Behari Ghose*, and Baboo *Golap Chunder Sircar*, for the appellant.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Jogesh Chunder Dey*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows:—

JUDGMENT.

This is an appeal against an order of the lower appellate Court remanding the case under s. 562 of the Code, the suit having been dismissed by the first Court on the ground that it was barred by s. 43 of the Code. Other matters were brought to our notice by the appellant's pleader, and he proposed to argue against the order of remand in respect of those other matters, but we confined him to the one point which is before us in this appeal, namely, whether the District Judge was right or wrong in holding that the suit is not barred by s. 43.

The case set up in support of the first Court's decision, was that the plaintiff had previously brought a suit for a declaratory decree alleging himself to be in possession of the property in dispute. That suit was dismissed on the ground that the plaintiff was not in possession.

The present suit is brought to recover possession of the same property. It is urged, and was held by the first Court, that inasmuch as the plaintiff was found to be out of possession when he brought his first suit, he ought then to have brought his suit to recover possession. The lower appellate Court hasset aside that finding following the decision of this Court in *Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1), which decision was followed in another case given in the footnote of the same report. We think that the lower appellate Court was right in following that decision. Section 43 refers to cases brought upon one and the same cause of action. In the case to which the lower appellate [294] Court refers—*Jibunti Nath Khan* v. *Shib Nath Chuckerbutty* (1) —The learned Judge who delivered the judgment says, at page 822, that "a cause of action consists of the circumstances and facts, which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief, or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint." It appears that the circumstances and facts alleged in the present plaint were not the same as those alleged in the plaint in the former suit. That being so, we think that the Judge was right in saying that the two suits were not on the same cause of action.

We accordingly dismiss this appeal with costs.

H. T. H. *Appeal dismissed.*

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(1) 8 C. 819.

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12 C. 294.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

DEBOKI NUNDUN SEN (*Plaintiff*) *v.* HART AND OTHERS (*Defendants*).* [24th August, 1885.]

Civil Procedure Code (Act XIV of 1882), *s.* 295—*Rateable distribution of sale proceeds —Same judgment-debtor—Sale in execution of decree—Execution proceedings.*

Where a judgment-creditor has obtained a decree against two judgment-debtors A and B, and in execution of that decree has attached and caused to be sold joint property belonging to such judgment-debtors, another judgment-creditor holding a decree against A alone, who has also applied for execution, is not entitled to claim under the provisions of s. 295 of the Civil Procedure Code to share rateably in the sale proceeds, the decree not being against the same judgment-debtor, and a Court having no power in execution proceedings to ascertain the respective shares of joint judgment-debtors.

In *Shumbhoo Nath Poddar* v. *Luckynath Dey* (1), it was not intended to lay down that a person who has obtained decree for money against a single judgment-debtor is entitled to come in and share rateably with a person who has obtained a decree against the same judgment-debtor and other persons.

[Overruled 7 C.W.N. 414 = 30 C. 583 (F.B.) ; F. 16 B. 683 (687) ; R., 20 C. 673 (675) ; 3 C.W.N 368 ; 8 O. C. 86 (89) ; 22 M. 241 (244) ; D. 10 A. 35 (38) = 7 A. W. N. 262.]

THIS was a suit under the penultimate clause of s. 295 of the Civil Procedure Code for rateable distribution of sale proceeds which had been paid to the defendant Hart.

[295] The plaintiff was the son and heir of one Gunga Narain Sen, who had obtained a decree against the 4th defendant, Hurish Chunder Ghose. The first defendant, Hart, had obtained a decree against the 4th defendant Hurish Chunder Ghose and the fifth defendant Brojendrabala Dasi. Of the other two defendants, defendant No. 2, Tara Prosunno Mookerjee, held a decree against Hurish Chunder Ghose and his brother Punchanun Ghose who had died, and he was seeking to execute it against Hurish Chunder Ghose and Brojendrabala Dasi, as widow and representative of Punchanun Ghose ; and defendant No. 3 Srikristo Biswas had obtained a decree against the father of Hurish Chunder and Punchanun, which he was also seeking to execute against the same person. In execution of his decree, Hart caused certain property to be attached and sold, and the sale proceeds, Rs. 9,905, were paid into Court. The plaintiff and the defendants, No. 2 and No. 3, who had all applied for execution, thereupon preferred claims to share rateably in the said proceeds under s. 295, but their claims were disallowed in the execution proceedings and Hart was declared entitled solely to draw out the money.

The plaintiff thereupon instituted this suit against Hart to have his right declared to share in such proceeds, and to make Hart refund such share to him. Defendants No. 2 and No. 3 were jointed as defendants, because they also being dissatisfied with the decision in the execution proceedings, had filed suits claiming to share in the same manner as the plaintiff.

*Appeal from Appellate Decree, No. 546 of 1885, against the decree of T. F. Bignold, Esq., District Judge of Beerbhoom, dated the 23rd of December 1884, reversing the decree of Baboo Gobind Chandra Bcse, Sudder Munsif of Suri, dated the 16th of September 1884.

(1) 9 C. 920.

The defence raised on behalf of Hart and Tara Prosunno Mookerjee was mainly that the plaintiff was not entitled to share in the sale proceeds, the subject-matter of the suit, inasmuch as his decree was not against the same judgment-debtor as theirs, being against Hurish Chunder Ghose alone, whereas theirs was against Hurish Chunder Ghose and Brojendrabala Dasi. Tara Prosunno also pleaded that there was no cause of action against him as he had received none of the sale proceeds. The plaintiff alleged in his plaint that Tara Prosunno had succeeded in his suit in obtaining a decree declaring that he was entitled to share, and Tara Prosunno, whilst admitting that, stated that though defendant No. 1 had appealed against that decree and been unsuccessful, still there was a chance of the case being carried on special appeal to the High Court.

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[296] As a matter of fact, Hart did prefer a special appeal in that suit to the High Court, and the case was decided on that appeal and the lower Court's decree varied. [See *Hart* v. *Tara Prosunno Mookerjee* (1).]

In the present case the first Court, relying upon the authority of the ruling in the case of *Shumbhoo Nath Poddar* v. *Luckynath Dey* (2), held that the suit would lie, and gave the plaintiff a decree. That Court considered that there was nothing to prevent the interests of the two judgment-debtors in the property sold being ascertained in the execution proceedings, and in giving the plaintiff the proportionate amount of the proceeds of that portion of the property which was found to belong to Hurish, and that, in the absence of evidence to the contrary, the presumption was that Hurish and Brojendrabala were equally interested in the property.

The decision in the case of *Bissessur Bose* v. *Anund Mohun Ghose* (3) was relied on by the defendant Hart, but held inapplicable by the first Court.

The material portion of the judgment in that case was as follows :—

"This is a matter under s. 295 of the Code of Civil Procedure.

"The decree-holders were Bissessur Bose and Anund Mohun Ghose. Bissessur's decree was against the same judgment-debtors as Anund Mohun's decree and besides those persons it was against one Shama Nath Banerjee. Section 295 requires that the assets under distribution should be "held for execution of decrees against the same judgment-debtor," in order to enable the holder of a decree, other than that actually executed to participate in them. Consequently, as in the present case, there are in one decree judgment-debtors who are no parties in the other decree, the holder of the latter decree cannot reap the benefit of s. 295. * * * The order must therefore be set aside, and Bissessur Bose must be declared to be alone entitled to receive the assets realized in execution."

Upon appeal the lower appellate Court held that the decrees **[297]** were not against the same judgment-debtor within the meaning of s. 295, and that there was no means by which the Court executing the decree could be called on to decide the various interests of judgment-debtors, when more than one, in the property sold.

That Court also held that the case of *Shumbhoo Nath Poddar* v. *Luckynath Dey* (2) had no bearing on the facts in the present case, and that the suit was governed by the decision of Prinsep and Macpherson, JJ., in the unreported case already referred to. It accordingly held that the suit was not maintainable and dismissed it with costs.

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(1) 11 C. 718. (2) 9 C. 920.

(3) Rule No. 774 of 1884, decided by *Prinsep* and *Macpherson*, JJ., on 26th August 1884.

1885 AUG. 24. —— APPEL-LATE CIVIL. —— 12 C. 294.

The plaintiff now preferred this second appeal to the High Court upon the ground that the lower Court was wrong in refusing the plaintiff's claim to rateable distribution, and in holding that he had no cause of action, and that the suit was not maintainable.

Baboo *Sreenath Doss* and Baboo *Baikant Nath Doss*, for the appellant.

Baboo *Tarrucknath Sen*, for the respondents.

The judgment of the High Court (TOTTENHAM and AGNEW, JJ.) was as follows :—

JUDGMENT.

In this case it appears that the plaintiff's father obtained a decree against the defendant Hurish Chunder Ghose. The defendant Hart obtained a decree against the defendant Hurish Chunder Ghose and the defendant Brojendrabala Dasi, the widow and representative of the late Punchanun Ghose, and in execution of his decree sold certain property which belonged to the defendants in equal shares. The defendants Tara Prosunno Mookerjee and Srikristo Biswas also held decrees against the defendants Hurish Chunder Ghose and Brojendrabala Dasi. The defendant Hart drew the proceeds of the sale in execution of his decree out of Court, the claims of the other judgment-creditors to share rateably being disallowed by the execution Court. The plaintiff then instituted the present suit under the penultimate clause of s. 295 of the Civil Procedure Code for the refund and rateable distribution of the assets realised in execution of Hart's decree. The Munsif, on the authority of **[298]** *Shumbhoo Nath Poddar* v. *Luckynath Dey* (1), gave the plaintiff a decree. On appeal the District Judge, relying on an unreported case (2), decided by Prinsep and Macpherson JJ., held that the decrees were not against the same judgment-debtor within the meaning of s. 295 of the Civil Procedure Code, and dismissed the suit. The plaintiff has appealed, and contends that this decree is against the same judgment-debtor as in the cases of the defendants Hart, Tara Prosunno and Srikristo, although in the case of these defendants there is an additional judgment-debtor.

The words of s. 295 are: "Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons." In the case of *Shumbhoo Nath Poddar* v. *Luckynath Dey* (1) decided by Garth, C.J., and Mitter, J., it was held that where property belonging to one judgment-debtor had been attached and sold, a person who held a decree against that judgment-debtor and another person was entitled to come in and share rateably with the first attaching creditor in the proceeds of the sale. In the unreported case the facts were precisely the same as in the present case. The Court said: "S. 295 requires that the assets under distribution should be "held for execution of decrees against the same judgment-debtor" in order to enable the holder of a decree other than that actually executed to participate in them. Consequently, as in the present case, there are in one decree judgment-debtors who are no parties in the other decree, the holder of the latter decree cannot reap the benefit of s. 295."

(1) 9 C. 920. (2) Rule No. 774 of 1884.

In the present case there is no difficulty in ascertaining the shares of the defendants Hurish Chunder and Brojendrabala. But we do not think a Court executing a decree has power to ascertain the shares of the judgment-debtors. In some cases it would be impossible to ascertain the shares of joint judgment-debtors without an enquiry and accounts, and a partition on winding up might be necessary. Such matters as these could **[299]** not be inquired into in execution proceedings, but a regular suit would be necessary. And if an execution Court has no jurisdiction to ascertain the shares of joint judgment-debtors when the execution is complicated and involves inquiries, it cannot have jurisdiction merely because the question is a simple one. Nor could the shares be ascertained in such a suit as this which is simply for the refund and rateable distribution of assets alleged to have been paid to a person not entitled to receive them.

1885 AUG. 24. — APPELLATE CIVIL. — 12 C. 294.

These conditions do not apply to such a case as that of *Shumbhoo Nath Poddar* v. *Luckynath Dey* (1) where it was not necessary to enter into any question as to shares. And we have the authority of Mitter, J., for saying that the Court did not intend in that case to decide that a person who has obtained a decree for money against a single judgment-debtor is entitled to come in and share rateably with a person who has obtained a decree against the same judgment-debtor and other persons.

We think, therefore, that the plaintiff is not entitled to share rateably in the assets realized by the defendant Hart in execution of his decree.

The appeal is dismissed with costs.

H. T. H. *Appeal dismissed.*

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12 C. 299.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Grant.

JHAROO AND OTHERS (*Some of the Defendants*) *v.* RAJ CHUNDER DASS (*Plaintiff*).* [27th August, 1885.]

Lis pendens—*Purchase of Property in which there is a decree in suit on a mortgage bond —Suit for possession against purchaser from mortgagor.*

The plaintiff in 1877 obtained a decree on a mortgage bond in execution of which property belonging to his debtor was put up for sale and purchased by the plaintiff on 5th May 1878. The defendants had, in execution of a subsequent money decree against the same debtor, purchased the same property on the 1st April 1878. In a suit by the plaintiff for possession and mesne profits, *held*, following the case of *Raj Kissen Mookerjee* v. *Radha Madhub Haldar* (2) that the defendants were purchasers *pendente lite*, and were consequently bound by the proceedings in the plaintiff's suit on the mortgage bond.

[F., 15 C. 94 (99); 22 B. 939 (944) ; R., 1 C.L.J. 371=9 C.W.N. 728=32 C. 891.]

[300] THE plaintiff was the purchaser at an auction sale of a four-anna share of taluk Godadhur Sarma, which was sold in execution of a decree he had obtained against Ramjoy Nag, the defendant No. 7. The sale took place on the 5th May 1878. The suit in which the decree was

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*Appeal from Appellate Decree No. 639 of 1885, against the decree of Baboo Sham Chand Dhur, Officiating Second Subordinate Judge of Tipperah, dated the 12th of February 1885 reversing the decree of Baboo Behari Lal Banerji, Munsif of Kusba, dated the 11th of December 1883.

(1) 9 C. 920. (2) 21 W.R. 349.

1885 AUG. 27. — APPELLATE CIVIL. — 12 C. 299.

obtained, in execution of which the sale took place, was brought by the plaintiff on a mortgage bond, dated 18th Assin 1282, Tipperah, and the decree declared the plaintiff's lien in the share mortgaged by the bond. The land in suit was included in the plaintiff's purchase.

The defendants Nos. 3 to 6 alleged themselves to be also auction purchasers of the four-anna share of defendant No. 7. They stated that in execution of a decree for rent, obtained by the zemindar against the entire taluk, it was advertised for sale, when Ainuddeen, a co-sharer, paid the whole amount due to the zemindar to save the estate from sale, and brought a suit in which he obtained a money decree against Ramjoy Nag for his share of the debt due to the zemindar. In execution of this decree the share of Ramjoy was put up for sale and purchased by the defendants Nos. 3 to 6 in the names cf the defendants No. 3 and 5 on 1st April 1878. It appeared that in the proceedings in execution of the decree under which the plaintiff purchased, defendants Nos. 3 and 5 claimed the property, but their claim was disallowed on the ground that they had not established it. The plaintiff sued to recover the land in dispute which was in the *jote* of defendants Nos. 1 and 2. The Munsif, referring to the cases of *Emam Momtazooddeen Mahomed* v. *Raj Coomar Doss* (1) and *Jonmenjoy Mullick* v. *Doss Money Dossee* (2), held that the equity or redemption had already passed to the defendants under their prior purchase, and was not affected by the subsequent sale under the mortgage decree, and that the plaintiff's proper course was to sue to have his lien on the property declared, and not for possession of the mortgaged property. The Munsif therefore dismissed the suit.

The Judge on appeal held that, although the defendant's purchase was prior to that of the plaintiff, the decree in execution of which they purchased was subsequent to the decree of the plaintiff by which a lien in the property was declared. The [301] defendants therefore purchased subject to that lien. The Judge, therefore, reversed the Munsif's decision and gave the plaintiff a decree for possession of the property and for mesne profits from defendants Nos. 3 to 6.

These defendants appealed to the High Court.

Moulvie *Serajul Islam*, for the appellants.

Baboo *Trailakynath Mitter*, for the respondent.

The judgment of the Court (PRINSEP and GRANT, JJ.) was as follows:—

JUDGMENT.

The plaintiff, in 1877, obtained a mortgage decree in respect of the property now in litigation against his debtor. In execution of that decree, he purchased the mortgaged property on the 5th May 1878. The defendant, at a sale held in execution of a money decree against the same debtor, purchased this property on the 1st April 1878, that is to say, before the purchase of the plaintiff. The plaintiff now sues to recover possession from the defendant, and he has obtained a decree from the lower appellate Court. It is contended in appeal that the plaintiff's suit for possession should be dismissed, and that he should be left to bring a suit for possession on the strength of his mortgage against the defendant, so that the defendant might have an opportunity to redeem. The learned pleader for the defendant-appellant relies on the cases of *Nanack Chand* v. *Teluckdye*

(1) 14 B.L.R. 408. (2) 7 C. 714.

Koer (1) ; *Dirgopal Lall* v. *Bolakee* (2) and *Bir Chandra Manickya* v. *Mahomed Afsaroodeen* (3). After having fully considered all those cases we think that none of them are in point. The contention in the first case was between two mortgagees, and the Court held that the puisne mortgagee could not, in a suit for possession, have an opportunity to redeem, and it accordingly directed that possession should be retained by the party who had purchased the rights of the mortgagor leaving the first mortgagee to bring a suit against the second mortgagee. In the other two cases the title of the plaintiff depended upon purchases under money-decrees held by a mortgagee, and it was held that such decrees would not confer the same rights as under a purchase in execution of a mortgage decree. [302] The case before us is similar to that of *Raj Kissen Mookerjee* v. *Radha Madhab Haldar* (4), and for the reasons stated in that judgment, we think that the plaintiff is entitled to a decree. The appeal is therefore dismissed with costs.

1885 AUG. 27. — APPELLATE CIVIL. — 12 C. 299.

J. V. W. *Appeal dismissed.*

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12 C. 302.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

CHUNDRA KAMINY DEBEA (*One of the Defendants*) v. RAM RUTTUN PATTUCK AND ANOTHER (*Plaintiffs*).*
[21st July, 1885.]

Act XI of 1859, *s.* 36—*Construction of—Title of benami purchaser, how limited—Benami property—Its liability to claims against true owner.*

The object of s. 36 of Act XI of 1859 is to prevent the true owner from disputing the title of his *benamidar* (certified purchaser), and not to preclude a third party from enforcing a claim against the true owner in respect of the *benami* property.

[R., 21 A. 29=18 A. W. N. 187.]

THE plaint in this suit was for declaration of right in respect of a certain property in the possession of the plaintiffs. Subsequent to the filing of the plaint, one Chundra Kaminy Debea applied to be and was made a party to the suit. The plaintiffs then presented a petition to the Court in which they added a prayer for undisputed possession. The grounds, among others, on which Chundra Kaminy, who became the principal defendant, resisted the claim were ; (1) that the plaintiffs were out of possession, and therefore a suit for a mere declaratory decree was barred by the proviso to s. 42 of the Specific Relief Act ; (2) that the suit was barred uuder the provisions of s. 36 of the Revenue Sale Law (Act XI of 1859), inasmuch as the property in dispute, which was purchased in execution of a decree against one Nundo Lal, whose widow Chundra Kaminy was, stood in the name of his mother, Sonamoni (deceased), the certified purchaser under whose will Chundra Kaminy asserted her title.

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* Appeal from Appellate Decree, No. 1436 of 1884, against the decree of F. F. Handley, Esq., Acting Judge of Rajshahye, dated the 10th of June 1884, affirming the decree of Baboo Gonesh Chundra Chowdhuri, Subordinate Judge of that district, dated the 12th of March 1883.

(1) 5 C. 265. (2) 5 C. 269. (3) 10 C. 299. (4) 21 W. R. 349.

1885 JULY 21. — APPELLATE CIVIL. — 12 C. 302.

The Subordinate Judge decided both the points in favour of the plaintiffs and referred to *Ameeroonnissa Bibi* v. *Benode Ram Sein* (1) Chundra Kaminy appealed to the District Court. The Judge was [303] apparently of opinion that, although the plaintiffs were out of possession and a suit for a mere declaratory decree therefore came within the operation of the proviso to s. 42 of the Specific Relief Act, their petition to the Court of first instance, in which they prayed for undisputed possession, should be read as a part of the plaint. On the second point the Judge held that s. 36 of the Sale Law was no bar to the plaintiff's claim, and referred to *Ameeroonnissa Bibi* v. *Benode Ram Sein* (1); and *Bukshee Booniadi Lal* v. *Bukshee Dewkee Nundun Lall* (2).

Chundra Kaminy appealed to the High Court.

Baboo *Trailakhya Nath Mitter*, for the appellant.

Baboo *Gurudas Banerjee*, and Baboo *Rash Behary Ghose*, for the respondents.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was as follows :

JUDGMENT.

Two points have been raised before us upon this appeal. The first is this : It is said that the plaintiffs asked only for a declaratory decree in the first instance. The lower appellate Court has held that they are not entitled to a mere declaratory decree, because being out of possession and therefore entitled to ask for possession, they could not, under s. 42 of the Specific Relief Act, have a mere declaratory decree. It is argued that they ought not to have had any relief at all, whereas the lower appellate Court has given a decree declaring their title and giving them possession—a decree which it is said they never asked for.

The answer to that seems to us to be this. In their plaint it is true they asked specifically only for a declaration of their title. They did not ask for confirmation of possession in the form which is so often used in this country ; but for declaration of title and for any other relief which they might be deemed entitled to.

This no doubt is very general, but subsequently, when the difficulty was pointed out, the plaintiffs put in a petition defining what was vague before and specifically asking for possession. In the first Court that petition was rejected, because, from the [304] view that that Court took of the facts it was unnecessary to entertain it, but in the view taken by the lower appellate Court of the facts it was necessary. It seems to us clear that the plaintiffs have asked with sufficient clearness for a declaration of title and for possession.

The second point raised is one of more substance.

The plaintiffs claim under an execution sale, against the estate of one Nundo Lall, and they claim to have purchased the property in question at that sale as the property of Nundo Lall. The property had been purchased by Nundo Lall at a sale held under Act XI of 1859, and he purchased it, not in his own name, but in the name of his mother Sonamoni, and the sale certificate was taken out in her name.

Now s. 36 of the Act says that "any suit brought to oust the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, or on behalf partly of himself and

(1) 2 W. R. 29. (2) 19 W.R. 223.

partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

This suit, so far as the appeal is concerned, may be taken as a suit against Sonamoni, and it is said that by reason of that section the suit to oust her will not lie.

We do not think that this contention is well founded. The object of that section appears to be this, that with the view of discouraging *benami* purchases at sales of this nature, the Legislature says that a suit to oust the *benamidar* shall not lie. The section evidently contemplates this ; that the purchaser having elected to make his purchase in a *benami* name, then wishes to come into Court to have it established that the purchase was a *benami* one and to have the *benamidar* ousted by the Court, and that appears to be what the Legislature intends to prohibit.

But in the vast majority of *benami* transactions no controversy ever does arise between the *benamidar* and the real owner. The real owner is left in possession and derives all the benefit of the estate, notwithstanding that he chooses to run all the risks incident to that method of holding property, and when the real owner is thus left in enjoyment of his property and the *benamidar* raises no dishonest claim against him, it would be a departure from the [305] principle on which these sections are framed and would introduce instead of checking fraud and dishonesty, if we were to construe the section as meaning that where a creditor of the real owner has to bring the property to sale, this sham title of the *benamidar* may be set up against the purchaser. That would be making this provision, which was intended to discourage fraud, and instrument of fraud.

This section and similar sections have frequently been before the Courts ; some of the cases I am about to cite were dealt with upon this section, others upon the sections analogous to it. But all seem applicable to the section we have to deal with.

The earliest of these cases is *Ameeroonnissa Bibi* v. *Benode Ram Sein* (1). It is there said : " As to Fakirpara it was bought in the name of the son of Afzul Ali at a sale under Act I of 1845 ; and it is contended before us that, under s. 21 of that Act, a judgment-creditor of Afzul Ali is precluded from attaching the property in execution of a decree against him. But the section in question was not intended to protect purchases made in the name of third parties from the operation of decrees against the persons beneficially entitled to the purchased property."

Here there is an express decision that, in such a case as the present, the property may be attached and sold as the property of the real owner ; and it certainly would be a monstrous thing if it might be attached and sold as the property of the real owner, and yet the purchaser under such attachment and sale should take no title.

The next case to which I think it is necessary to refer is *Tara Soonduree Debee* v. *Oojul Monee Dasee* (2). I refer to that case, although it is not so nearly in point as some others, because it seems to indicate the real principle which lies at the root of the matter. At page 111, it is said : " The Full Bench decision in *Bihuns Kunwar* v. *Behari Lall* (3), has been quoted to us as a precedent in this case. The ruling laid down in that case was that where a certified purchaser claimed to recover possession from a party in possession, the [306] party in possession could not plead that the certified purchase was merely a fictitious purchase for him. But the decision went

(1) 2 W.R. 29. (2) 14 W.R. 111. (3) 3 B.L.R. F.B. 15=11 W.R. F.B. 16.

1885 JULY 21. — APPELLATE CIVIL. — 12 C. 302.

on to say that " if the *benamidar* should acknowledge the purchase to have been made *benami* and waive the right conferred on him by ss. 259 and 260, and give up possession to the real owner, such act would probably amount to a transfer of the title as well as of the possession to the real purchaser," and then the decision goes on to hold that on the facts of that case there was no difficulty arising from this ruling in the Full Bench case.

I refer to this case as showing that what the section was intended to prohibit were controversies and claims between the real owner and the *benamidar* which the real owner may seek to enforce by suit against the *benamidar*.

Then there is a case in the same volume at page 372 (1). That case seems to be on all fours with the present, with one difference, namely, that in that case the plaintiff was the person claiming under the *benamidar*, and it was held that the *benami* character of the transaction might be set up as a defence to that suit, the defendants being the purchasers at a sale in execution of a decree against the real owner.

Then there is the case of *Bukshee Booniadi Lal* v. *Bukshee Deukee Nundun Lall* (2), in which it was held that the fact of a sale certificate being taken in the name of a *benamidar* did not preclude the raising afterwards of any question as to the real title. That was the case of a sale certificate taken in the name of one member of an undivided family, and it was held that that did not preclude enquiry afterwards, and a finding that the property so purchased was family property purchased in the name of one member of the family.

Then there is also a case to which we have been referred, *Sohun Lall* v. *Lala Gya Pershad* (3), where dealing with an analogous section to the present, it was held that s. 260 of the then Procedure Code "does not apply to a case such as the one under appeal ; for if it did, it would cause great injustice by allowing the judgment-debtor to retain possession of property which in equity ought to be given up to the decree-holder ; and as shown **[307]** above, such a procedure would be opposed to the object of the Code."

These seem to be the authorities on the matter and they all point one way.

The result is that, in our opinion, the objection founded on s. 36 is not well founded. The appeal, therefore, fails on all points and will be dismissed with costs.

K. M. C. *Appeal dismissed.*

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(1) *Brijo Behari Singh* v. *Shah Wajed Hossein*, 14 W. R. 372.
(2) 19 W.R. 223. (3) 6 N.W.P. 265.

12 C. 307.

1885 AUG. 13.

APPELLATE CIVIL. 12 C. 307.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Grant.

RAM LALL MOITRA (*Defendant*) *v.* BAMA SUNDARI DABIA AND ANOTHER (*Plaintiff*).* [13th August, 1885.]

Sale in execution of decree—Power of Munsif's Court to execute decree against property out of its local jurisdiction.

In execution of a decree, property situate in three Munsifs' *viz.*, Serajgung, Pubna, and Nattore, all three being at that time portions of the District and subordinate to the Court of Rajshaye, was attached and sold by order of the Court of the Munsif of Serajgunge. *Held*, by analogy to the principle on which the case of *Kally Prosunno Bose* v. *Dinonath Mullick* (1) was decided, that the sale was not necessarily limited only to the portion of the property situate in the Munsif of Serajgunge, but that that Court might have jurisdiction to make a valid sale of the whole estate, although it might be more convenient in such a case that the sale should be held by a superior Court having jurisdiction over the entire District.

[F., 15 A. 324 (326)=13 A.W.N. 140 ; R., 19 A. 308 (309)=17 A.W.N. 71.]

THIS was a suit for declaration of the plaintiffs' title to certain land, for possession of the said land, and to have declared their right to have their names registered as being entitled to it.

The plaint alleged that one Shama Churn Chowdhry was the proprietor of a share in towji 294 of the Collectorate of Pubna, which consisted of mouzah Koailberh in thana Ullapara, zilla Pubna, and mouzahs Suail, Panch Suail, Charibole and Kabuli in thana Chatmohur, zilla Pubna, and mouzah Kushmail in thana Baraigram, zillah Rajshaye, recorded at a sudder jumma of Rs. 600-14 per annum on the rent roll of the Pubna **[308]** Collectorate. On the death of Shama Churn the said share came into the possession of his son Gopal Chunder, who sold all the mouzahs, except Koailberh, to the plaintiffs by a registered *kobala*, dated 18th Falgun 1287 (28th February 1881) ; that one Soniram Agurwalla had obtained a money-decree against Shama Churn Chowdhury in the Court of the Munsif at Serajgunge, caused attachment and sale of a share of mouzah Koailberh in thana Ullapara and within the jurisdiction of that Court, and purchased it himself; that thereupon the defendant, taking advantage of Shama Churn's death, and Gopal Chunder's absence, and alleging purchase of the share bought at auction by Soniram Agurwalla, applied for registration of his name in respect of the share of Shama Churn in the towji and obtained such registration in 1878 ; that one Nilkomul Moozumdar, the purchaser of another decree, obtained by one Brojonath Bhuttacharjee against Shama Churn, applied for execution of the decree in the Court of the Munsif of Pubna against the son Gopal Chunder, and caused attachment of all the mouzahs of towji 294, with the exception of Koailberh ; that thereupon the defendant preferred a claim alleging that these mouzahs were covered by his purchase, but the claim was rejected on 29th December 1880 ; that it was in order to liquidate this and other debts that Gopal Chunder

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* Appeal from Appellate Decree, No. 2223 of 1884, against the decree of F. McLaughlin, Esq., Judge of Pubna, dated the 23rd of August 1884, reversing the decree of Baboo Bepin Behari Mukherji, Sudder Munsif of that District, dated the 23rd of June 1883.

(1) 11 B. L. R. 56=19 W. R. 434.

1885 AUG. 13. — APPELLATE CIVIL. — 12 C. 307.

sold the property to the plaintiffs, who applied to have their names registered under Bengal Act VII of 1876, but were opposed by the defendant, and their application was rejected by an order of the Deputy Collector on 5th May 1883. They therefore brought this suit, dating their cause of action from that order.

The plaintiffs' contentions were that the auction-purchase of Soniram Agurwalla, the defendant's vendor, covered only mouzah Koailberh, and that the other mouzahs situated within the jurisdiction of the Courts of the Munsif of Pubna and the Munsif of Nattore could not have been sold and were not sold by the Munsif of Serajgunge, and that these mouzahs were never in the defendant's possession; and that the defendant not having attempted to have the order passed in his claim on 29th December 1880 set aside within the year, that order had become final against him.

[309] The defendant alleged that Soniram Agurwalla's purchase covered not only the mouzah of Koailberh, but all the mouzahs included in the towji; that Soniram had sold his purchase to the defendant before taking the sale certificate or possession; and the defendant thereupon took out the sale certificate, and obtained possession through the Court. He contended, therefore, that the sale at which he purchased was not made without jurisdiction; that the plaintiffs had no cause of action as they did not allege they had been dispossessed; that no objection to the sale under his vendor's decree having been taken by Shama Churn or his heir, the present suit for setting it aside was barred by lapse of time; and that the order passed in the claim in no way interfered with his right or possession in the property, and he had no occasion to bring a suit to set aside that order. It appeared that the property attached and sold by the Munsif's Court at Serajgunge was described as follows: "Kismut Koailberh lying in pergunna Sonabjee, thana Ullapara, Dewani Adalut, zilla Rajshaye which is entered in the Collectorate of zilla Pubna in the names of Radhamohun, Joy Chunder, Brojomohun and Bhugwan Chunder Chowdhury and Gour Sundari Debi, mother of Shama Churn, and Shibdyal Chowdhury in a sudder jumma of Rs. 397, the 1-1-1·1 krant share of the judgment-debtor in the said taluk." The sale certificate contained the same description and was granted on the 16th November 1876; the order for registration of the defendant's name being made on 27th September 1878.

The Munsif held that the sale on which the title of the defendant was founded was a valid sale, and made with jurisdiction, and covered not only mouzah Koailberh but all the other mouzahs; that the defendant obtained possession of what he purchased; and that his possession was not disturbed by the order of 29th December 1880 rejecting his claim. He therefore dismissed the suit, mainly with reference to the case of *Kally Prosunno Bose* v. *Dinonath Mullick* (1).

The Judge on appeal held that the sale by the Serajgunge Court was void and inoperative, the land being outside the jurisdiction of that Court. He relied chiefly on the case of *Obhoy Churn Coondoo* v. *Golam Ali* (2).

[310] The Judge also held with reference to the point raised by the defendant that the plaintiffs should have sued to set aside the sale, and not having done so they were barred by limitation, which point had been decided by the Munsif in favour of the plaintiffs, that it was not open on appeal by the plaintiffs, no cross appeal having been preferred on that

(1) 11 B. L. R. 56=19 W. R. 434. (2) 7 C. 410.

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point. The Judge reversed the decision of the Munsiff and decreed the suit. From this decision the defendant appealed.

Baboo *Guru Das Banerjee*, Baboo *Iswar Chundra Chuckerbati*, and Baboo *Upendra Nath Mukerjee*, for the appellant.

Baboo *Mohini Mohan Rai* and Baboo *Baikant Nath Dass*, for the respondents.

The judgment of the Court (PRINSEP and GRANT, JJ.) was as follows :—

JUDGMENT.

In execution of decree the defendant in September 1876 purchased certain property belonging to Shama Churn Chowdhry. In execution of another decree against the same Shama Churn Chowdhry, the same estate which the defendant claims to have purchased was again attached, and the defendant objected, but his objection was overruled. The execution apparently proceeded no further, for the judgment-debtor sold his estate privately to the plaintiff and satisfied this decree and other debts.

The dispute between the parties arose when proceedings were taken under the Bengal Land Registration Act. Plaintiff's claim having been rejected, he brings this suit for possession of the property with a declaration of his right to get his name registered. Plaintiff objects to the title of the defendant on the ground that the sale was held by the Munsif of Serajgunge, within whose local jurisdiction one of the six mouzahs forming this estate, mouzah Koailberh, is situated ; that four of the other mouzahs are situated within the jurisdiction of the Munsif of Pubna, and the remainder within the jurisdiction of the Munsif of Nattore, all these three Munsifs at that time being portions of the district of Rajshahye. In the appeal before us objections are also taken by each of the parties as to the matter of limitation. For the plaintiff it is contended that, as the defendant has not brought a suit under s. 283 [311] of the Code of Civil Procedure of 1882, to get rid of the effect of the order rejecting his claim in the execution proceedings to which the plaintiff was no party, he has forfeited his title to the property purchased by him in 1876. But all that was then decided was that the property was liable to that attachment. No further proceedings were taken in the execution of that decree, and, therefore, the position of the defendant was not affected by that order, nor was it necessary for him to sue to have it removed. Plaintiff's title moreover does not depend upon that order.

Another objection on the point of limitation is raised on behalf of the defendant. It is contended that, as no suit has been brought to set aside the sale, under which the defendant acquired his title, within the term of one year from the date of its confirmation as provided by art. 12 of the Limitation Act of 1877, the present suit is barred. This objection also appears to us untenable, because, if as contended for by the plaintiff the sale was held without jurisdiction, it would be unnecessary for her to bring a suit to set aside this sale ; it would be sufficient to sue generally to establish her title by ejecting the defendant, or any one else who might be in possession, as having no valid title to the property. The main point before us is whether the sale under which the defendant derives his title was a good sale. That sale was held under the Code of 1859, the provisions of which in this respect are not altogether the same as those of the present Code.

The defendant apparently relies on the case of *Kally Prosunno Bose*

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v. *Dinonath Mullick*(1). In this case an estate situated partly in one district and partly in another was sold in execution of a decree by a Court having jurisdiction only in one district, and it was held that the sale conferred a valid title even to the land beyond the local jurisdiction of the Court holding the sale. The Court stated that for the purposes of attachment and sale in execution of a decree, it must be considered that the estate was wholly situated in the district over which the Court holding the sale had local jurisdiction. On the other hand the plaintiff relies on the case of *Unnocool Chandra Chowdhri* v. *Hurry Nath Kundu* (2). It seems to us, however, that the [312] facts of that case are not altogether in point, and that that decision is not really in conflict with the decision first quoted. The property in the first case was an estate, and the judgment of the Court seems to have proceeded mainly on the ground that it was impossible to sell part of an estate, as well as on a consideration of the Code of 1859 in this respect. In the case of *Unnocool Chandra Chowdhri* v. *Hurry Nath Kundu* (2) the property was a taluk, and the Court held there was no reason why a portion of that taluk, a particular mouzah, which alone fell within the local jurisdiction of one Munsiff, should not be sold. As between the two cases we should feel bound to follow that of *Kally Prosunno Bose* v. *Dinonath Mullick* (1). But in the case before us the estate is not situated in two different districts over which no one Court has jurisdiction without a special order, but within the local jurisdiction of three inferior Courts all in the same district and it is therefore contended that, as the jurisdiction over this entire estate could be exercised by one superior local Court, whose jurisdiction extends over the entire district of Rajshahye, therefore no one single Munsif's Court would be competent to sell any land beyond its own local jurisdiction ; and consequently if nothing short of the entire estate could be sold at the same time, the decree should have been transferred to such superior Court. But we think that the principle on the decision in *Kally Prosunno Bose* v. *Denonath Mullick* (1) proceeds is applicable to the present case, that is to say, the principle laid down for the larger jurisdiction of districts is applicable to the smaller jurisdiction of Munsifs. It may be more convenient that the sale in such cases should be held by a superior Court, but we think that a Munsif in whose local jurisdiction only a part of the property is situate is not necessarily incompetent to sell the whole estate. With respect, therefore, to the points with which the judgment of the lower appellate Court deals, we think that that judgment cannot be maintained. We therefore set it aside. We would point out to the Judge that it is competent for the respondent to support the judgment of the Court of first instance by showing that the case should have been decided in his favour on a ground which was given against him, and that in order to do this he is not bound [313] himself to appeal or to take objection by a written memorandum. The terms of s. 561 are clear in this respect.

The case must, however, be remanded to the lower appellate Court to determine what was the subject of the sale in 1876, the entire estate or only mouzah Koailberh ; next whether the defendant on confirmation of his title as auction-purchaser obtained possession of the property purchased by him.

Costs to abide the result.

J. V. W. *Appeal allowed and case remanded.*

(1) 11 B. L. R. 56=19 W. R. 434. (2) 2 C. L. R. 334.

12 C. 313.

1885 AUG. 15.

APPEL-LATE CIVIL.

12 C. 313.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Beverley.

MOHESH CHUNDER CHATTERJEE (*Plaintiff*) v. KAMINI KUMARI DABIA AND OTHERS (*Defendants*).*
[15th August, 1885.]

Document, Alteration of—Document not requiring attestation—Mortgage bond—Material alteration—Interpolation of name of witness, Effect of.

The interpolation of the name of a witness in a document which need not be attested is not a material alteration that would render the document void. *Saffel* v. *Bank of England* (1), explained; *Sitaram Krishna* v. *Dayi Davaji* (2), dissented from.

[F., 15 B. 44 (45); 1 M.L.J. 388 (390); R., 40 P.L.R. 1901; D.. 15 M. 70.]

THIS suit was brought against a widow and heiress for money due from her husband on a mortgage bond. The Munsif found the execution proved, and, upon a contention taken on behalf of the defendant that the bond was inoperative, inasmuch as after its execution the names of two witnesses had been surreptitiously introduced into it, held that the defence was responsible for the alteration and decreed the claim. On appeal, the Subordinate Judge agreed with the Court of first instance on the subject of execution; but found it was the plaintiff who had made the interpolation, and, relying on *Sitraram Krishna* v. *Dayi Davaji* (2), held that such interpolation amounted to a material alteration of the document and dismissed the suit.

The plaintiff appealed to the High Court

Mr. *Pugh* and Baboo *Trailakhya Nath Mitter*, for the appellant.

[314] Baboo *Hem Chunder Banerjee*, for the respondents.

The Court (WILSON and BEVERLEY, JJ.) delivered the following judgment :—

JUDGMENT.

This was a suit brought against the defendant as heiress of her deceased husband to recover money due upon a mortgage bond executed by the deceased in favour of the plaintiff. In both Courts it has been found that the bond was duly executed. But it is clear that the bond has been altered since the execution by the addition of the names of two persons who did not in fact witness the execution to the list of attesting witnesses. The Munsif found that the alteration had been made by the defendant. The Subordinate Judge has reversed that finding. He says : " After anxious consideration I cannot but come to the conclusion that the interpolation was made by the plaintiff." This finding cannot be assailed before us. He has further held that the alteration is a material one which invalidates the bond as against the plaintiff, and has accordingly dismissed the suit.

The question we have to consider is whether, in the case of a mortgage bond which does not require attestation, the alteration of the

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* Appeal from Appellate Decree, No. 877 of 1884, against the decree of Baboo Krishna Mohan Mukerjee, Third Subordinate Judge of Hooghly, dated the 18th of April 1884, reversing the decree of Baboo Jogendra Nath Rai, First Munsif of Hooghly, dated the 13th of June 1883.

(1) 9 Q. B. D. 555. (2) 7. B. 418.

1885 AUG. 15. — APPELLATE CIVIL. — 12 C. 313.

bond by the plaintiff, by the addition of two names to those of the attesting witnesses, invalidates the bond.

It has long been established that in this country, as in England, a material alteration of a written contract, by one party to it without the consent of the other, invalidates the contract. It was so held in *Kally Coomar Roy* v. *Gunga Narain Dutt Roy* (1) and in other cases. The Contract Act contains no provision on the subject, but since the Contract Act it has been held that the law is the same as before—*Gogun Chunder Ghose* v. *Dhuronidhur Mundul* (2). The Negotiable Instruments Act, XXVI of 1881, s. 87, lays down the rule very broadly as to all documents falling under that Act. It says: "Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of such alteration, and does not consent thereto, unless it was made to carry out the common intention of the original parties."

We have, therefore, to say whether the alteration made in the present case is a material alteration.

[315] What alterations are material is a question which has frequently been considered by English Courts. The latest and most authoritative decision is that of the Court of Appeal in *Suffell* v. *Bank of England* (3) in which most of the earlier cases are referred to. It is clear that in the case of a written contract any alteration which changes the obligation of the contract, or alters the transaction embodied in it, is material, such as the addition of a contracting party, or the alteration of the date of payment of money, or the consideration for its payment. And the case just cited shows that in some documents, which are not only contracts but something more, an alteration may be material without its changing their effect as contracts, if it alters them materially in another respect.

But it has never been held in England that an alteration which does not either directly or indirectly affect the nature or operation of the contract embodied in the document, or the identity or validity or effect of the document embodying it, but goes only to the proof of the execution of the document, is a material alteration. In *Suffell* v. *Bank of England* (3) the alteration was an alteration of the number of one Bank of England note, so as to simulate another note for the same amount. That was held to be an alteration of an essential part of the note. The ground of all the judgments was that a Bank of England note is not only a contract but also a part of the currency of the country; and that, though the number on each note may not affect its terms as a contract; the number is an essential part of the note regarded as currency, a part having a variety of important uses and without which it could not pass into circulation. The actual decision in that case, therefore, does not affect the present case. And there are several observations of the Judges which seem to us unfavourable to the view that such an alteration as that now in question should be regarded as material. After citing a proposition laid down in the judgment then under appeal that "the alteration which vitiates an instrument must be a material alteration, *i.e.*, must be one which alters or attempts to alter the character of the instrument itself, which affects or may affect the contract which the instrument contains, or is evidence of," Jessel, M. R., says: "I am by no [316] means satisfied that what is so stated is incorrect, as regards an ordinary commercial instrument which contains nothing but a contract. As I

(1) 10 W. R. 250. (2) 7 C. 616. (3) 9 Q. B. D. 555.

said before, it is difficult to see how in such a case an alteration could be material if the alteration did not affect the contract (1);" though the learned Judge guarded himself against finally deciding the point. Brett, J., also says (at p. 567): "I incline to think, but it is not necessary to determine this now, that where an instrument contains only a contract, or can only be used as evidence of a contract, no alteration of such an instrument, which does not alter or affect the contract, can be a material alteration." Cotton, C.J. (at p. 572), after citing the words of Grose, J., in *Master* v. *Miller* (2) that "any alteration in a material part of any instrument or agreement avoids it because it thereby ceases to be the same instrument," proceeds: "Of course it is not every small alteration in an instrument which will prevent it being the same. It must be a material alteration, so that the party defending himself may be able to say that it is not the same instrument as that which he executed or to which he put his hand." That seems a very different thing from an alteration which enables the defendant to say only: This is in every particular the instrument to which I put my hand; but I did not do so in the presence of the persons who are now represented as saying that they saw me do so.

We should be going beyond anything that has ever been decided by any English Court if we were to hold the addition of a name to those of the attesting witnesses of a document not requiring attestation a material alteration. And we think we should be going beyond anything to which the reasoning of the English Judges properly leads.

On the other hand, we have been referred to the case of *Sitaram Krishna* v. *Dayi Davaji* (3). In that case a Bench of the Bombay High Court had before it the same question with which we have now to deal, and held the alteration to be material, saying: "We think an alteration in a document stating a falsehood, either expressly or by implication, by way of [317] increasing the apparent evidence of its genuineness is also a material alteration—*Suffell* v. *Bank of England*." In that case neither party appeared, so that the Court had not the advantage which we have had of hearing the question fully argued. We are unable to agree in the proposition laid down or in thinking that *Suffell* v. *Bank of England* supports it.

The decree of the lower appellate Court will therefore be set aside, and that of the Munsif affirmed with costs in all the Courts.

K. M. C. *Appeal decreed.*

(1) 9 Q.B.D. 565. (2) 4 T.R. 320=1 Sm. L.C. 8th Ed. 857. (3) 7 B. 418.

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APPELLATE CIVIL.

12 C. 317.

12 C. 317.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

KASHY NATH ROY CHOWDHRY (*Plaintiff*) v. SURBANAND SHAHA AND OTHERS (*Defendants*).* [2nd September, 1885.]

Attachment--Execution of decree--Sale at instance of one attaching decree-holder during pendency of other attachments--Priority of attaching creditors--Rival decree-holders —Civil Procedure Code (Act VIII of 1859), *ss.* 240, 242 *and* 270 *and* (*Act XIV of* 1882), *ss.* 284 *and* 295.

When a property is sold in execution of a decree it cannot be sold again at the instance of another decree-holder, who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold, and when a judicial sale takes place all previous attachments effected upon the property sold fall to the ground.

[**R.**, 22 B. 88 ; 6 C. W. N. 57 (59) ; 23 M. L. J. 585 ; 6 C. L. J. 130 (133)=34 C. 836 ; **Compared,** 19 B. 91 (101).]

THE plaintiff in this case sought for a declaration of his right to, and confirmation of, his possession in a 10-gunda share of taluk Mohadeb Munshi, and also for an order for the registration of his name in respect thereof. The facts of the case were as follows :—The disputed share in the taluk was formerly the property of one Sita Nath Roy Chowdhury (defendant No. 1) against whom two persons named Shama Churn Bundopadhya and Hurrish Chunder Kurmokar had respectively obtained money decrees. Hurrish Chunder attached the property in dispute on the 12th June 1875, and, whilst under that attachment, it was sold on the 9th July 1875, at the instance of Shama Churn in execution of **[318]** his decree, and purchased by Chunder Mohun Sen, ancestor of defendants Nos. 2 and 3 and Sriram Chuckerbutty, defendant No. 4. This purchase was found to be *benami* for the owner of the property, defendant No. 1. Subsequently the property was again sold on the 30th April 1876 in execution of Hurrish Chunder's decree in pursuance of the attachment put on it at his instance on the 12th June 1875, and purchased by the defendant No. 12 *benami* for defendant No. 11. Subsequently defendant No. 11, Chundi Churn Roy Chowdhry, sold the whole of the property in dispute for Rs. 300 to the plaintiff. After his purchase the plaintiff applied to have his name registered as proprietor of the share of the taluk in question, but he was opposed by defendants Nos. 5 to 10, and his application for registration was unsuccessful. He accordingly instituted the present suit.

Defendants Nos. 5 to 10 alone contested the suit upon the ground that they had purchased mouzah Baligram, which formed a portion of the disputed share in the taluk, by a *kobala* dated the 25th August 1875, from Chunder Mohun Sen and Sriram Chuckerbutty and, amongst other pleas immaterial for the purpose of this report, they contended that the property having been once sold at auction in execution of Shama Churn's decree, it could not again be sold at the instance of another decree-holder, and consequently the purchaser at the sale held at the instance of

* Appeal from Appellate Decree, No. 1516 of 1884, against the decree of Baboo Kedar Nath Mozoomdar, Additional Subordinate Judge of Faridpur, dated the 4th July 1884, reversing the decree of Baboo Chandra Kumar Das, Munsif of Madaripore, dated the 20th of May 1882.

Hurrish Chunder could acquire no right to the mouzah Baligram as against them.

The first Court held that the purchase by the defendants Nos. 5 to 10 was invalid as against the plaintiff, inasmuch as their purchase was made on the 25th August 1875, whilst the property was still under attachment at the instance of Hurrish Chunder and that consequently the plaintiff was entitled to succeed and finding the other issues raised in the suit in his favour gave him a decree in the terms of the prayer of his plaint.

Upon appeal the Subordinate Judge was of opinion that it was not proved that the attachment at the instance of Hurrish Chunder was duly made, and he further held that the effect of the auction sale at the instance of Shama Churn on the 9th July 1875 was to annul all previous attachments and that consequently on the 25th August 1875 there was no attachment subsisting [319] on the property, and the alienation then made in favour of defendants Nos. 5 to 10 was valid. He further found that after the sale on the 9th July 1875, Hurrish Chunder had not again attached the property. He accordingly set aside the decree of the lower Court, and directed that the suit be dismissed with costs.

The plaintiff now preferred this second appeal to the High Court, upon the main ground that the lower Court was wrong in holding that the attachment at the instance of Hurrish Chunder came to an end on the sale held on the 9th July 1875, and he also contended that the suit should not have been dismissed altogether at the instance of defendants Nos. 5 to 10, who only claimed to be entitled to a portion of the property, the subject-matter of the suit, as the other defendants did not contest the remainder of his claim.

Baboo *Nilmadhub Bose*, for the appellant.

Baboo *Kashy Kanta Sen*, for the respondents.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

The question which we have to determine in this case is, whether the *kobala*, dated 25th August 1875, executed by Chunder Mohun Sen, ancestor of the defendants Nos. 2 and 3 and Sriram Chuckerbutty, defendant No. 4, in favour of defendants 5 to 10, of mouzah Baligram, was invalid under s. 240 of Act VIII of 1859, it being a private alienation by the judgment-debtor while the property was alleged to be under attachment.

The facts, as found by the Munsif in this case, are as follows :—The property in dispute, *viz.*, a 10-gunda share of taluk Mohadeb Munshi was the property of defendant No. 1. Two persons, *viz.*, Hurrish Chundra Kurmokar and Shama Churn Bundopadhya, held money decrees against the defendant No. 1. Hurrish Chunder attached the property in dispute on the 12th June 1875. While it was under this attachment, it was sold in execution of Shama Churn's decree on the 9th July 1875 and purchased by Chunder Mohun Sen, ancestor of defendants Nos. 2 and 3 and Sriram Chuckerbutty, defendant No. 4. This purchase is found to have been made by the judgment-debtor himself in [320] the *benami* of the two aforesaid persons. Subsequently in Hurrish Chunder's execution the property in dispute was again sold without a fresh attachment on the 20th April 1876, but intermediately the defendants Nos. 5 to 10 purchased mouzah Baligram which is a part of the disputed property, on the 25th August 1875, ostensibly from the auction-purchasers Chunder Mohun Sen

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and Sriram Chuckerbutty, but really from the judgment-debtor, *viz.*, the defendant No. 1.

The Munsif was of opinion that this purchase is invalid against the plaintiff who has purchased the property in dispute from the auction-purchaser in the second sale, *viz.*, that held on the 20th April 1876, because on the date of defendant's purchase, the property sold was under attachment put upon it on the 12th June 1875. The Subordinate Judge was of a contrary opinion. He held that, after the attachment effected in Hurrish Chunder's decree in June 1875, the property in dispute having been sold on the 9th July 1875 under Shama Churn's decree, the attachment of June 1875 came to an end.

We are of opinion that the view taken by the Subordinate Judge upon this point is correct. It was held, under Act VIII of 1859, that priority of attachment does not give a decree-holder the right to set aside a sale made by another decree-holder on a subsequent attachment. See *Mohant Nanak Baksh* v. *Koonwar Roy* (1), *Lala Joogal Kishore Lal* v. *Bhukha Chowdhry* (2), and *Chutka Panda* v. *Gobordhone Dass* (3). It follows therefore that when a judicial sale takes place at the instance of a particular creditor, no other creditor, holding decrees against the same judgment-debtor and who had attached the same property either before or after the date of the attachment effected at the instance of the creditor under whose decree it is sold, has any right to bring it to sale again. Although this view of the law was doubted in some of the cases decided under Act VIII of 1859 [see the observations of Sir Barnes Peacock, C. J., in the case of *Gogaram* v. *Kartic Chunder Singh* (4) and of Sir Richard Couch, C. J., in *Guru Prasad Sahu* v. *Mussamat Binda Bibi* (5)] **[321]** the decisions were not expressly overruled, neither is there any provision in the present Code of Civil Procedure which shows that the Legislature disapproved of the law laid down in the cases cited above. Not only is there no such provision in the present Code of Civil Procedure, but s. 295 which corresponds with s. 270 of the old Code, clearly indicates that the Legislature adopted the view taken in *Mohunt Nanak Buksh* v. *Koonwar Roy* (1) and *Lalla Joogal Kishore Lall* v. *Bhukha Chowdhry* (2). It must therefore be now taken to be settled law, that when a property is sold in execution of a decree, it cannot be sold again at the instance of a decree-holder who had attached it before the attachment effected by the decree-holder under whose decree it is actually sold.

It seems to us that one of the consequences which follows from this ruling is that, on the happening of a judicial sale, all previous attachments effected upon the property sold fall to the ground. The object of attachment is to prevent the judgment-debtor from dealing with the property by way of private alienation. The provisions of s. 295 of the present Code of Civil Procedure show that when a property is sold in execution of a decree it is sold not only for the realization of the money due under that particular decree, but of all other decrees, the holders of which have prior to the sale applied to the Court for execution of their decrees. Although this provision is not exactly similar to the provisions of the corresponding section of the old Code, *viz.*, s. 270, still both are based upon the same principle, *viz.*, that a sale in execution of a decree does not enure to the benefit of that decree-holder

(1) 2 W.R. 62. (2) 9 W.R. 244. (3) 6 C.L.R. 85.
(4) B.L.R. Sup. Vol. 1022 = 9 W.R. 514. (5) 9 B.L.R. 180.

only at whose instance the property is sold, but also of other decree-holders who have fulfilled certain conditions. Therefore the sale which took place under Shama Churn Bundopadhya's decree on the 9th July 1875, was not only a sale for the realization of the money due under his decree, but also of the decree of Hurrish Chunder Kurmokar, who had applied for execution and taken out the process of attachment. Under s. 270 of Act VIII of 1859, Hurrish Chunder was entitled to share in the sale proceeds.

Having regard to the object of attachment as stated above it **[322]** follows that on the sale of the 9th July 1875 the attachment effected by Hurrish Chunder came to an end. If this were not so, the rulings cited above, which as we have shown above, were approved of by the Legislature, would be virtually overruled by the provisions of s. 284 of the present Code of Civil Procedure for the following reason. In the Full Bench case of *Anand Chandra Pal* v. *Panchi Lall Shama* (1) Couch, C.J., in delivering the judgment of the majority of the Court, says, with reference to s. 242 of the old Code, which corresponds with s. 284 of the present Code : " Now it is a rule that when a Statute confers an authority to do a judicial act in a certain case it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested and having the right to make the application. This has been often decided, and it is sufficient to quote the case of *Macdougall* v. *Paterson* (2), *Crake* v. *Powell* (3), and *Bowes* v. *Hope Life Insurance Company* (4). In those cases the word in the Statute was 'may.' According to this rule, the words, ' it shall be competent to the Court,' in s. 242, must not be construed as giving to the Court a power which it may exercise or not as it thinks fit, but as obligatory and conferring on the attaching creditor a right to have the attached property sold and the money realized by the sale paid to him." That being so, if the attachment of Hurrish Chunder continued after the 9th July 1875 on his application, it was obligatory on the Court under s. 242 of the old Code to sell the property again, which would be virtually overruling the decisions cited, *i. e.*, *Mohunt Nanak Buksh* v. *Koonwar Ray* (5) and *Lalla Joogal Kishore Lall* v. *Bhukha Chowdhry* (6).

For these reasons we are of opinion that the Subordinate Judge has taken a correct view of the effect of the attachment under s. 240 of the old Code. The sale, therefore, in favour of defendants Nos. 5 to 10 of mouzah Baligram was not invalid. That being so, the plaintiff's suit as against them, so far as this mouzah is concerned, was rightly dismissed ; but the Subordinate Judge goes further and dismisses the whole suit. We do not see upon **[323]** what ground be has done so. The defendants Nos. 5 to 10 question the plaintiff's title in respect to Baligram only. We, therefore, modify the decree of the lower appellate Court and direct that the plaintiff's suit be dismissed in respect of mouzah Baligram. With this exception the decree given by the Munsif will stand.

Under the circumstances of this case we think that each party should bear his own costs in this Court and in the lower appellate Court.

H. T. H. *Appeal allowed and decree modified.*

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(1) 5 B. L. R. 691. (2) 11 C. B. 755. (3) 2 E. and B. 10.
(4) 11 H. L. C. 389. (5) 2 W. R. 62. (6) 9 W. R. 244.

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12 C. 323.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

ABDUL HAKIM AND OTHERS (*Defendants*) *v.* GONESH DUTT AND OTHERS (*Plaintiffs*).* [3rd September, 1885.]

Easement—Embankment—Drainage—Right to drainage of surplus surface water through natural water-course.

The right of the owner of high lands to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country.

Where the defendants had erected a dam across a natural water-course which was found to interfere with the natural drainage of the surplus rain-water of the adjacent lands of the plaintiff, and where the lower Court had ordered that the dam be altogether removed.

Held, that the Court was wrong in taking it for granted that the plaintiffs were entitled to have the whole dam removed, but should have enquired *how far* the erection of the dam interfered with the plaintiffs' right.

[R., 1 N.L.R. 182 (183) ; 16 M.L.J. 582 (596)=29 M. 539=1 M.L.T. 333 ; 21 Ind. Cas. 62 (63)=25 M.L.J. 276=(1913) M.W.N. 640 (641) ; 8 Ind. Cas. 456.]

IN this case the proprietor of mouzah Kenar sued the proprietors of mouzah Lalpurah for the removal of a dam alleged to have been erected by the latter on the 7th October 1880. The plaintiffs alleged that the water was drained off their lands through a *nigār* or natural water-course into a river named Samdahain which flowed through the defendants' lands, and they further alleged that the defendants had erected a dam across the river below where the water-course fell into it, and that the result had been to stop the drainage from their lands, and cause them damage which they estimated at Rs. 100 for removing the [324] dam, and Rs. 500 far damages caused to their lands. They further claimed damages caused to a ferry, which they held, by reason of the defendants having started another ferry across the river above the dam, which they alleged they were not entitled to do, but that question formed no part of the appeal preferred to the High Court.

The plaintiffs based their claim in the plaint to have the dam removed upon prescriptive right, alleging that their lands had been drained through the channel in question for upwards of 20 years.

The defendants alleged that the dam was not a new one, but had long been in existence, and they relied upon a decree passed in the year 1817 which they said had as long ago as that declared their right to erect the dam at the place it now stood. They further denied that the *nigar* or water-course in question was the natural drain for the plaintiffs' surplus water, and that the plaintiffs had acquired any right to drain their lands in the manner alleged.

The Subordinate Judge found that the plaintiffs had a right to drain their lands in the way alleged ; that, although the defendants had a right to erect a dam, still the one complained of was a new one, and had caused injury to the plaintiffs' lands and that the defendants had no right to erect the dam in such a manner as to shut up the water-course of the

* Appeal from Appellate Decree, No. 1080 of 1883, against the decree of H. Beveridge, Esq., Judge of Patna, dated the 29th of March 1883, modifying the decree of Moulvi Mahomed Nurul Hosein, Second Subordinate Judge of that district, dated the 13th of April 1882.

plaintiffs. He accordingly directed that the defendants should make a sluice 4 feet wide and 1 foot deep in the dam to admit of the surplus water of the plaintiffs' land being discharged through the *nigar*, and that the defendants might close the sluice so long as it did not affect the drainage in question, but he found that no damage was proved, and disallowed the plaintiffs' claim in that respect.

1885 Sep. 3. — Appellate Civil. — 12 C. 323.

The defendants appealed to the District Judge against that decree, and the plaintiffs preferred a cross appeal. The District Judge found that the dam was a recently erected one, and that whatever rights the defendants might have had in or before the year 1817, they had lost by disuse; that, although the plaintiffs based their case upon an easement, they might have placed it much higher ; and that the burden lay on the defendants of proving that they had the right to erect the dam, and interfere **[325]** with what he found to be the natural flow of the surplus water of the plaintiffs' land. Upon these findings he considered that, as the defendants had not discharged that burden, the plaintiffs were entitled to have the dam removed, and that as there was no evidence to show that the sluice ordered to be made by the lower Court would be sufficient to allow the water to flow freely of the plaintiffs' land, he directed the dam to be altogether removed within one month. Upon the question of damages that Court considered that Rs. 600 was not too much for the plaintiffs to claim for injury to their land which measured 55 bighas, and it accordingly awarded them that sum.

The defendants now preferred this second appeal to the High Court against that decree.

Mr. *O'Kinealy* and Munshi *Mahomed Yusuf*, for the appellants.

Baboo *Mohesh Chunder Chowdhry*, and Mr. *C. Gregory*, for the respondents.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

The plaintiffs respondents are the owners of a mouzah called Kenar. To the east of that mouzah lies *chuck* Jugmual, and to the east thereof is Lalpura, the defendants' mouzah. The Courts below have found that the land slopes from west to east, and the surplus rain-water of the plaintiffs' lands is drained through *chuck* Jugmual, and defendants' mouzah Lalpura which are lower in level than the plaintiffs' lands. It has been further found that this surplus rain-water is carried through a *nigar* or a natural out-let which falls into a natural water-course called Samdahain. This river Samdahain passes through the defendants' mouzah Lalpura, and flows towards the east. There is another river called the Chandimohan, which also is wholly situated in the defendants' mouzah. The confluence of these two rivers is to the east of that point in the river Samdahain where the out-let mentioned above from the plaintiffs' lands joins it. The lower Courts have further found that the proprietors of Lalpura have recently constructed a dam across the river which is formed by the confluence of the Samdahain and Chandimohan, the effect **[326]** of which has been to obstruct the drainage of the surplus rain-water falling upon the plaintiffs' lands.

Upon these facts being found, the lower appellate Court has awarded a decree for the removal of the dam awarding damages claimed by the plaintiffs in the plaint against the defendants appellants.

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The defendants have preferred this appeal, and it has been contended on their behalf that the District Judge who decided this case in appeal is in error in holding that, upon the facts found by him (in the absence of any evidence of prescriptive right) the plaintiffs are entitled to drain off the surplus rain-water of the land through the defendants' lands.

It has been contended by the learned Counsel who appeared on behalf of the appellants that the right of the owner of a higher land to drain off its surplus rain-water through the adjacent lower ground is not an incidence of the ownership of land in this country, but can be only acquired by long user.

We are of opinion that this contention is not well founded. That such a right is incident to the ownership of land in this country is well established by decisions of this Court as well as of other High Courts [see *Muthoora Mohan Mytee* v. *Mohendra Nath Paul* (1); *Hameedunnissa* v. *Ananda Moyee Dassee* (2); *Khetternauth Ghose* v. *Prosunno Ghose Gowalah* (3); *Kopil Pooree* v. *Manik Sahoo* (4); *Subramania Ayyar* v. *Rama Chandra Rau* (5)]. The main ground, therefore, taken in this appeal fails.

But the objections taken to the decree of the lower appellate Court as to the removal of the whole *bund* and the award of the damages claimed by the plaintiffs are, in our opinion, sustained. The first Court refused to make any decree for damages, because the plaintiffs failed to establish "the correct amount." The lower appellate Court, simply finding that the plaintiffs have sustained a good deal of damage, thinks that they ought to be allowed the Rs. 600 (six hundred) which they claim. The award of Rs. 600 as damages does not appear to us to be based on a consideration **[327]** of the evidence on the record. The lower appellate Court will, on remand, decide the question of the amount of damages with reference to the evidence on the record.

As to the other relief granted, *viz.*, the removal of the whole dam, it is equally based upon imaginary grounds. The District Judge thinks that, because it has been shown that the defendants have obstructed the drainage of the surplus rain-water of the plaintiffs' land, it must be taken for granted, unless the contrary be proved, that the construction of the dam even to the height of an inch is an invasion of the plaintiffs' right. This opinion does not appear to be based upon any materials on the record. We think that this point, namely, how far the erection of the bund is an invasion of the plaintiffs' right, must be enquired into and determined upon proper materials placed before the Court. The case will, therefore, be remanded to the lower appellate Court to appoint a competent person as Commissioner, to hold a local investigation upon the point, *viz.*, whether to secure to the plaintiffs the enjoyment of the right which they have established, it is necessary to remove the whole of the *bund* or a portion of it, and, if the latter, what portion. The cost of this investigation will be borne by the plaintiffs in the first instance, but ultimately it will be part of the costs of the suit.

H. T. H. *Appeal allowed and case remanded.*

(1) S.D.A. (1860) 301. (2) W.R. F.B. 25. (3) 7 W.R. 498.
(4) 20 W.R. 287. (5) 1 M. 335.

1885 Sep. 11.

APPEL-LATE CIVIL.

12 C. 327

12 C. 327.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

GOBIND CHUNDRA SEN (*Defendant*) v. JOY CHUNDRA DASS (*Plaintiff*).* [11th September, 1885.]

Sale for arrears of Revenue—Under-tenures—Avoidance of tenure—Act XI of 1859, s. 37, *cl.* 4.

Leases of lands which may not have been expressly leased for the purpose of making gardens thereon, but on which gardens have subsequently been made, are, under the provisions of Act XI of 1859, s. 37, cl. 4, protected from avoidance by a revenue auction-purchaser.

[F., 9 C.W.N. 852 (855) = 31 C. 393 ; R., 7 Ind. Cas. 912.]

THIS was a suit for the recovery of land. The plaintiff stated [328] that the zemindari, of which the land in suit formed part, was purchased by Nawab Assanulla at an auction sale for its own arrears of revenue on the 19th February 1877 ; that on the 23rd of July 1878 the Nawab granted a putni lease of the zemindari to the plaintiff's uncle, Raj Coomar Gupta Roy ; and that the latter, by a deed of gift, dated the 16th January 1880, granted the putni taluk to the plaintiff. The plaintiff further stated that the defendant held within the taluk a piece of *bhittanal* land (the boundaries of which were given), which land he had refused to give up to the plaintiff, although he had been duly served with a notice to quit on the 5th of August 1881. The plaint was filed on the 11th of January 1882.

The defence was that the land in question formed part of a permanent taluk called taluk Mokund Ram Das, which had been created long before the permanent settlement ; that the portion of the taluk held by the defendant had been purchased by the defendant's mother, on whose death more than twelve years before the revenue sale, the defendant succeeded. The written statement went on to say that since the purchase by the defendant's mother, "she and I planted new orchards of trees bearing " fruits, and excavated tanks, &c., and also greatly improved the old garden, " &c. The plaintiff is not entitled according to law to obtain *khas* posses-" sion of the aforesaid two kinds of lands, that is, the lands on which " gardens aforesaid are planted and the *diggi* and tank excavated."

The lower appellate Court found that the taluk Mokund Ram Dass had not been proved to have been created before the permanent settlement, though admittedly in existence some years later ; that the defendant was in possession as owner of a portion of taluk Mokund Ram Das ; that with regard to the plots of lands on which tanks had been excavated, the plaintiff's suit must be dismissed under the provisions of Act XI of 1859, s. 37, cl. 4 ; but that, in respect of garden land he held, for reasons which will be found set out in the judgment of the High Court, the plaintiff was entitled to a decree. The following authorities were cited in the lower Court : *Bhago Bibee* v. *Ram Kant Roy Chowdhry* (1) and *Ajgur Ali* v. *Asmut Ali* (2).

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* Appeal from Appellate Decree, No. 1023 of 1883 against the decree of Baboo Nobin Chandra Gangooly, First Subordinate Judge of Dacca, dated the 14th of February 1883, modifying the decree of Baboo Mahendra Nath Dass, Second Munsif of Kaligunje, dated the 17th of July 1882.

(1) 3 C. 293. (2) 8 C. 110.

1885 SEP. 11. — APPELLATE CIVIL. — 12 C. 327.

[329] The defendant appealed and the plaintiff preferred a cross appeal to the High Court against the Judge's construction of Act XI of 1859, s. 37, cl. 4.

Baboo *Durga Mohun Dass*, for the appellant.

Baboo *Mohesh Chunder Chowdhry*, and Baboo *Umbica Churn Bose*, for the respondent.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was as follows :—

JUDGMENT.

The first point for our consideration is, whether lands on which gardens have been made are protected by Act XI of 1859, s. 37, from the effect of a sale for arrears of revenue, unless they may have been expressly leased for that purpose.

No doubt three successive Revenue Sale Laws, Regulation X of 1822, Act XII of 1841 and Act I of 1845, were to this effect, but the language of Act XI of 1859 is different, and is capable of the more liberal interpretation in favour of the tenant. This construction has been adopted by Birch and Mitter, JJ., in unreported special appeal 1796 of 1876, *Sheikh Joofail Ali* v. *Ram Kanto Rai Chowdhuri*, and three appeals decided simultaneously, and also by White and Mitter, JJ., in the case of *Bhago Bibee* v. *Ram Kant Roy Chowdhry* (1).

We were at one time inclined to doubt the correctness of this opinion, but after examination of proceedings in the Legislative Council, we have come to the conclusion that the alteration in the terms of the law was deliberate, so as to protect all tenants coming within the terms specified.

The Subordinate Judge has, however, found that the lands occupied by the defendant cannot be regarded as garden, although there are many trees planted thereon, and he has come to this conclusion because the lands were described as *bhitti* and *chara bhitti* in some old documents, and he consequently finds that the principal object of the tenure being that it should be occupied by the dwelling houses of ryots, the planting of trees would not alter its character, so as to make it come within the protective clause of the Act. The Subordinate Judge does not set aside the **[330]** finding of the Munsif on the evidence from which (from the number of trees planted), it is clear that if the opinion of the Subordinate Judge be erroneous in other respects, they should be regarded as garden lands. Having regard to his opinion already expressed regarding the interpretation of the law as contained in Act XI of 1859, s. 37, we think that the original character of the tenure dees not affect its position in this respect. The number of betel, mango, jack and tamarind trees standing on those lands seems fully to justify the finding of the Munsif, and as the Subordinate Judge has not questioned the correctness of the Munsif's finding on the evidence, we think that we may safely restore the Munsif's finding, instead of prolonging the litigation by a remand.

The order of the Subordinate Judge must therefore be set aside, and that of the Munsif restored. The defendant will receive his costs in this and the lower appellate Court.

P.O'K. *Appeal allowed.*

(1) 3 C. 293.

12 C. 330.

1885 SEP. 8.

APPELLATE CIVIL.

12 C. 330.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Ghose.

KRISHTO KISHORI CHOWDHRAIN AND ANOTHER (*Plaintiffs*) v. RADHA ROMUN MUNSHI AND ANOTHER (*Defendants*).*
[8th September, 1885.]

Principal and Surety—Contract Act (Act IX of 1872), ss. 133, 139—Surety still liable, though remedy against principal barred.

Where a plaintiff sued a principal and a surety for arrears of rent, and it appeared that the principal was dead at the time the suit was instituted, and where the representative of the principal was not made a party till after the right to recover the arrears as against him was barred by limitation—

Held, that the surety was still liable, the suit as against him having been instituted within the period allowed.

Hajarimal v. *Krishnarav* (1) cited and approved.

[Diss., 11 A. 310 (312) = 9 A.W.N. 94; U.B.R. (1892—1896), Vol. II, 308 (310); 2 N.L.R. 42; Appr., 20 M.L.J. 633 = 33 M. 308 = 7 Ind. Cas. 898; R., 14 P.W.R. 1911 = 98 P.L.R. 1911 = 9 Ind. Cas. 742; D., 1 L.B.R. 150.]

IN this case the plaintiffs originally sued two persons, Radha Romun Munshi and Horo Chunder Talukdar. Their claim was to recover Rs. 1,977-11 as arrears of rent, road cess and Public Works cess, together with interest due upon an *ijara kabuliut* and [331] security bond for the year 1285 B.S. (1878-79). They alleged that Horo Chunder Talukdar, the predecessor of the second defendant, had taken an *ijara* of the mehal in question from the years 1279 to 1285, and that the first defendant Radha Romun Munshi had executed a security bond for the due payment of the rent. They further alleged that Horo Chunder was a mere *benamidar* for the first defendant who had in reality taken the *ijara* himself. The suit was filed on the 10th April 1882.

The first defendant in his written statement contended that the suit could not proceed, inasmuch as Horo Chunder had died long before its institution, and his widow and representative Kali Sundari Dabia had not been made a party. He denied that he was the real *ijaradar*, and contended that he was only a surety, and could only be called on to pay the amount if the real *ijaradar* failed. He also contested the accuracy of the amount claimed, or the right of the plaintiff to recover interest.

After his written statement had been filed Kali Sundari Dabia was made a party defendant on the 6th July 1882, but she did not appear or contest the suit.

Amongst the issues raised in the case was one as to whether or not the suit was barred by limitation. The first Court found that the plaintiffs had failed to prove that the first defendant was the real *ijaradar*, and that he was merely a surety; that the suit being for arrears of rent for the year 1285, the cause of action accrued on the 1st Bysak 1286 B.S. (13th April 1879), and that the suit having been instituted on the 29th of Choitro 1288 B.S. (10th April 1882), was not barred by limitation. Upon the question of the amount claimed that Court held that the plaintiff was

* Appeal from Appellate Decree No. 1633 of 1884, against the decree of F. McLaughlin, Esq., Judge of Pubna, dated the 28th of May 1884, modifying the decree of Baboo Jiban Krishna Chaterji, Subordinate Judge of that district, dated the 3rd of May 1883.

(1) 5 B. 647.

1885 SEP. 8. — APPELLATE CIVIL. — 12 C. 330.

only entitled to recover the sum of Rs. 1,621-11, and accordingly gave him a decree for that amount, and costs to be recovered in the first instance from the estate of Horo Chunder, and failing that from the first defendant.

The first defendant appealed, and the plaintiffs preferred a cross-appeal against the lower Court's decision, as to the amount which it had held they were entitled to recover. The lower appellate Court held that the suit was barred as against Kali Sundari Dabia, but as she had not appealed, and the decree as against her was *ex parte*, she had her remedy when it came to be executed. [332] That Court confirmed the finding of the lower Court that the first defendant was merely a surety, and held that, as the plaintiffs had allowed the suit to become barred against the principal, he could not recover from the surety, and accordingly dismissed the suit with costs as against the first defendant.

The plaintiffs now appealed to the High Court.

Baboo *Kishori Lal Sarkar*, for the appellants.

Badoo *Iswar Chunder Chakrabati*, for the respondents.

The judgment of the High Court (WILSON and GHOSE, JJ.) was as follows :—

JUDGMENT.

In this case the defendant became liable, according to the findings of both Courts, as surety for a person who took an *ijara* lease from the plaintiffs. This suit is now brought against the defendant. The first Court gave a decree in favour of the plaintiffs. The second Court has set aside that decree on the ground that the defendant is a surety, that the claim against the principal debtor has been allowed to become barred by limitation, and that, therefore, the claim against the present defendant cannot be sustained. The learned Judge in the Appellate Court says this in paragraph 22 and the following paragraphs of the judgment :—

" 22.—As the plaintiff then has allowed the claim to become barred against the principal, he cannot recover from the surety.

" 23.—And the inevitable result must be that the suit should be dismissed.

" 24.—This Court then finds in his favour the point urged by appellant, that he cannot be held liable when the claim against his principal has become barred."

We are unable to agree in the view taken by the lower appellate Court. The law on this subject is now embodied in s. 133 down to and inclusive of s. 139 of the Contract Act.

The earlier of those sections prescribes what acts on the part of a creditor, by way of releasing, or agreeing to give time, or other transaction with the principal debtor, shall have the effect of discharging the surety. Section 137 says this : " Mere forbearance on the part of the creditor to sue the principal debtor [333] or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety." This is the section applicable to the present case. The law on the subject has been considered by the Bombay High Court in the case of *Hajarimal* v. *Krishnarav* (1), and the view there taken is the same as that which we have expressed.

The decree, therefore, of the lower appellate Court must be set aside. But as there are questions affecting the amount due to the plaintiffs raised

(1) 5 B. 647.

both on the appeal presented to that Court and on the cross-appeal, the case must go back to the lower appellate Court in order that that Court may determine the amount of the liability of the defendant. 1885 SEP. 8.

The appellants will have the costs of this appeal. The costs in the lower Courts will abide the result of the suit. APPELLATE CIVIL.

H.T.H. *Appeal allowed and case remanded.* 12 C. 330.

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12 C. 333.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Grant.

BYKANT NATH SHAHA (*Plaintiff*) v. RAJENDRO NARAIN RAI AND OTHERS (*Defendants*).* [10th September, 1885.]

Civil Procedure Code—Act XIV of 1882, *ss.* 285, 295—*Jurisdiction—Sale by inferior Court pending an unknown attachment by a superior Court.*

At an execution sale held by an inferior Court, at the instance of the decree-holder (the Court itself, the decree holder, and the auction-purchaser being unaware of any objection to the exercise of a jurisdiction which the Court would ordinarily be competent to exercise), *A* purchased certain property and this sale was confirmed. It appeared subsequently that this same property had two years previous to the sale been attached by a superior Court. On a sale of this property being advertised by the superior Court, *A* objected on the ground that he had already purchased it ; this objection was overruled, and a sale was held by the Superior Court, at which *A* again became the purchaser. *A* then brought a suit against the decree-holder and the judgment-debtor in the inferior Court to recover as damages the sum paid by him at the sale. The suit was dismissed. *Held*, that although the superior Court had been wrong in insisting on the second sale and in not requiring the [334] amount received by the inferior Court to have been deposited in the superior Court, and then rateably distributed amongst the creditors of the judgment-debtors, yet the sale by the inferior Court was a good and valid sale and *A's* suit was therefore rightly dismissed. *Obhoy Churn Coondoo* v. *Golam Ali* (1) adopted.

[F., 19 C. 651 (655) ; 21 C. 200 (204) ; 3 Ind. Cas. 105 = 13 C. W. N. 396 = 11 C. L. J. 69 ; Cons., 13 C. P. L. R. 145 (149) ; R., 16 B. 91 (101) ; 18 B. 458 (462) ; 22 B. 88 (94) ; 18 A. 348 (349) ; 25 C. 46 (47) ; 9 M. L. J. 1 (2) = 22 M. 295 ; 6 C. L. J. 130 = 34 C. 836 ; U. B. R. (1910) 3rd Qr., 53 = 8 Ind. Cas. 1176.]

THIS was a suit to recover Rs. 800 as damages.

It appeared that on the 29th September 1882, the plaintiff purchased, for a sum of Rs. 800, certain properties which had been attached and put up for sale under a decree obtained by one Rajendro Narain Rai against Chunder Mohun Misri and Bhugwan Chunder Misri in the Court of the Munsif of Malda. On the 23rd November 1882, the plaintiff having paid the purchase-money into Court obtained an order confirming the sale. It, however, appeared that the same properties had, previous to the attachment and sale abovementioned, been attached on the 18th July 1880 by one Komorrunissa Begum, who had obtained a decree against the same judgment-debtors in the Court of the Subordinate Judge of Rajshaye, the Munsif of Malda at that time being subordinate to the Judge of Rajshaye.

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* Appeal from Appellate Decree No. 1981 of 1884, against the decree of F. F. Handley, Esq., Judge of Rajshaye, dated the 6th of August 1884, affirming the decree of Baboo Ambica Charan Dut, Officiating Additional Munsif of Malda, dated the 10th of September 1883.

(1) 7 C. 410.

1885 SEP. 10. — APPELLATE CIVIL. — 12 C. 333.

The plaintiff having discovered, after he had purchased the properties, that they were again advertised for sale under the decree last mentioned by order of the Subordinate Judge of Rajshaye, put in an objection to the sale on the ground that he had already purchased these properties at the sale held by the Munsif. The Subordinate Judge, however, overruled this objection, deciding that under s. 285 of the Civil Procedure Code the Munsif of Malda had no power to sell the properties.

The plaintiff attended at the sale held by the Subordinate Judge, and again became the purchaser of the properties.

He subsequently to the purchase brought the present suit against the Misris and Rajendro Narain Rai to recover by way of damages the sum of Rs. 800 paid by him at the sale held by the Munsif of Malda, alleging that the attachment of the 18th July 1880 had been fraudulently concealed from him, and contending that the Munsif had no jurisdiction to hold the sale, and that those proceedings were, therefore, null and void.

The lower Courts found that the decree-holder and the Munsif were ignorant of the previous attachment, and that the [335] Munsif was competent to hold the sale in execution of his own decree, and that he had conferred a valid title on the purchaser; and therefore dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Baboo *Srinath Dass* and Baboo *Lal Mohun Dass*, for the appellant, contended that under s. 285 of the Civil Procedure Code, the Munsif had no jurisdiction to hold the execution sale, and that the sale was void; he also relied on the cases of *Chunni Lall* v. *Debi Prasad* (1), *Badri Prasad* v. *Saran Lal* (2) and *Muttu Karuppan Chetti* v. *Mutturamalinga Chetti* (3).

Baboo *Kalikissen Sen*, for the respondents, contended that it was doubtful whether s. 285 applied to immoveable property, and cited *Obhoy Churn Coondoo* v. *Golam Ali* (4).

The judgment of the Court (PRINSEP and GRANT, JJ.) was as follows :—

JUDGMENT.

In execution of a decree obtained in the Court of the Subordinate Judge of Dinagepore, certain property belonging to defendants Nos. 2 and 3 was attached by the Subordinate Judge of Rajshaye. For certain reasons, however, there was delay in holding the sale. Meantime, in execution of another decree held by an entirely different party, the same property was attached by the Munsif of Malda in the same district. At the sale held by the Munsif of Malda, the plaintiff, on the 29th September 1882, purchased the property, paid in the entire purchase-money, and obtained an order confirming the sale on the 23rd November 1882. Proceedings were then taken in the Court of the Subordinate Judge of Rajshaye to bring that property to sale. The purchaser in the Munsif's Court objected; his objection was overruled: but at the sale subsequently held he again purchased. He now brings this suit to realize, from the decree-holder in the Munsif's Court as well as from the judgment-debtors, the amount paid, *viz.*, Rs. 800, as damages, contending that the Munsif had no jurisdiction to hold that sale, and that his proceedings are therefore null and void.

[336] The suit has been dismissed by both the lower Courts. It has been found that the decree-holder and the Munsif were ignorant of the

(1) 3 A. 356. (2) 4 A. 359. (3) 7 M. 47. (4) 7 C. 410.

previous attachment ; that the Munsif was competent to hold the sale in execution of his own decree, and that he conferred a valid title on the purchaser. The appellant's pleader relies on s. 285 of the Civil Procedure Code and some decisions of the High Courts of Allahabad and Madras, which declare that under the circumstances stated an inferior Court has no jurisdiction to hold an execution sale, and that such a sale is null and void.

In the case of *Chuni Lal* v. *Debi Prasad* (1), the judgments delivered did not proceed on the same ground ; and although the learned Judges discussed the meaning of s. 285, their opinions were not altogether in accord. Mr. Justice Spankie held that the section dealt with matters preceding a sale, and that no provisions appear to have been made for a case where a sale has been held, and requires to be confirmed, and where in one Court the sale has been cancelled and in the other it has been confirmed. Mr. Justice Oldfield, on the other hand, was of opinion that that section was intended to give the Courts specified therein exclusive power in all matters connected with sales.

In the matter of the petition of *Badri Prasad* v. *Saran Lal* (2), the same question was again considered. The sale in that case was held by the Munsif, although there was at that time an attachment of the same property by the Court of the Subordinate Judge. The attaching creditors in the Court of the Subordinate Judge made objection to the confirmation of the sale by the Munsif, and, on that objection being disallowed, they invoked the interference of the High Court under s. 622. The Court held that the Munsiff was not competent to hold the sale, and stated : "When several decrees of different Courts are out against a judgment-debtor, and his immoveable property has been attached in pursuance of them, the law contemplates, no matter whether such Courts be of the same or different grades, that *one* Court and *one* Court only shall have the power of deciding objections to the attachment ; of determining claims made to the property ; of ordering the sale there- **[337]** of, and receiving the proceeds, and of providing for their distribution under s. 295." It was accordingly held that that sale was a bad sale as being held in pursuance of the order of a Court that had no jurisdiction to direct it. The same matter was considered by the Madras High Court in the case of *Muttukaruppan Chetti* v. *Mutturamalinga Chetti* (3). In that case the property was attached by the Munsif's Court and advertised for sale, but before the sale took place it was attached by the Subordinate Judge's Court and again sold. The question of title arose between these two purchasers, and it was held that the sale in the Subordinate Judge's Court alone conferred a valid title, the sale in the Munsif's Court being null and void. The appellant's case depends upon these Judgments, and the view of the law thus expressed. This matter has come before this High Court in only one reported case, *viz.*, *Obhoy Churn Coondoo* v. *Golam Ali* (4). The facts of that case are similar to the case now before us. The Judges doubted whether s. 285 applied to immoveable property at all, but they stated that "even assuming that the section does apply to immoveable property, there is nothing in it, so far as we can see, which would absolutely destroy the validity of a sale already made, provided the proceeds of such sale were paid into the Court under whose decree the property was first attached." They accordingly held that, in spite of the opposition made by the second purchaser under the

(1) 3 A. 356. (2) 4 A. 359. (3) 7 M. 47. (4) 7 C. 410.

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first attachment of the superior Court, the first purchaser in the inferior Court was entitled to a decree for rent due from the property purchased. At the same time we observe that the learned Judges, having regard to certain special circumstances connected with the plaintiff's purchase, and, so far as we can learn from the report, not connected with the jurisdiction of the Court which held the sale, reserved liberty to the second purchaser to institute any suit with respect to the title to the land that he might be advised to bring against the plaintiff. The present Code, in directing under s. 295 that the assets realized in execution of a decree shall be divided rateably amongst all persons who, prior to the realization, have applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, as [338] between the several judgment-creditors, has made it immaterial in execution of which of the decrees the sale of the attached property should be held. The object of all the decree-holders is to bring the property to sale, so that they may all participate in the assets realized. The object of s. 285 no doubt is, as has been pointed out by the Allahabad High Court, to prevent confusion in the execution of decrees by providing for certain proceedings to be held by the superior Court, where the Courts of execution are of different grades, or by the first attaching Court where both Courts have equal jurisdiction. Strictly speaking, therefore, no such proceeding should be taken except under the direction of one of these two Courts; but where an execution sale has been held by an inferior Court at the instance of the decree-holder (the Court itself, the decree-holder and the auction-purchaser being without any information of any objection to exercise of a jurisdiction which that Court would ordinarily be competent to exercise), and that sale has been confirmed without any objection raised, we are not prepared to say that a title so obtained is not a valid title. The Subordinate Judge did not exercise a proper discretion in holding that the Munsiff's sale was without jurisdiction and in insisting on a sale in his Court. He should rather have accepted that sale and have required the deposit in his Court of the assets realized, so that they might be rateably distributed amongst all the decree-holders. We are not prepared to hold, under the circumstances stated, that no valid title was conferred by the sale in the Munsif's Court which was regularly held and duly confirmed. The course taken by the Subordinate Judge in re-selling the property was one almost certain to result in loss to the judgment-debtor, for with notice of a previous sale and with the almost certainty of a litigation to settle a contested title, bidders were not likely to offer the full value of the property. That that has been the result in the proceedings before us we have been unable to ascertain. The plaintiff has merely stated the sum paid at the first sale, and there is nothing, so far as we can learn, to show the amount realized at the second sale. The defendant-respondent's pleader, however, maintains that a similar sum was realized. That, however, for the purposes of the case [339] before us is immaterial. We would only refer to the matter to point out to the Subordinate Judge the almost certain consequence of his mistaken action.

As the sale had already taken place and been confirmed, the Sub-Judge would have exercised a better discretion if he had refused to re-sell, and had sent for the assets for distribution in his Court.

We are unable to hold that the sale by the Munsif was null and void, as it was perfectly regular so far as the facts were known to the parties

concerned and the Munsif himself. The existence of an attachment by the Subordinate Judge would not in itself invalidate these proceedings. We accordingly adopt the view taken in the case cited above and dismiss this appeal with costs.

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T. A. P. *Appeal dismissed.*

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12 C. 339.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

ANDERSON, WRIGHT AND CO. (*Plaintiffs*) *v.* KALAGARLA SURJINARAIN (*Defendant*).* [5th September, 1885.]

Civil Procedure Code, Act XIV of 1882, *s.* 43—*Breaches of one term in a contract, how sued upon—Cause of action—Contract.*

Per GARTH, C. J.—A claim for the price of goods sold is a cause of action of a different nature from a claim for damages for non-acceptance of goods pursuant to a contract.

Such claims, therefore, although arising under one and the same contract, may be sued upon separately, s. 43 of the Code of Civil Procedure notwithstanding.

Per WILSON, J.—Where there is one contract for the purchase of goods, and the purchaser takes some of the goods, but breaks his contract, in part by not paying for the goods he takes, and in part by not taking and paying for the remainder, and both breaches occur before any suit is brought, the claim of the person suing is one arising out of one cause of action; and the whole claim must be included in one suit.

[Appr., 19 C. 372 ; R., 8 Bom. L.R. 547 (549) ; A.W.N. (1908) 199 ; 28 P. R. 1907 ; D., 21 B. 267 (271).]

THIS was a reference from the Court of Small Causes.

[340] The defendant on the 8th December 1882 entered into a contract with the plaintiffs for the purchase of 10 bales of Turkey red yarn. In accordance with this contract the defendant in February 1883 took delivery and paid for three of these bales; and on 21st June 1883 the plaintiffs delivered to the defendant four other bales. On the 14th August 1883 the plaintiffs sued the defendant in the Small Cause Court to recover Rs. 166-10-3 as damages by reason of the failure of the defendant to take delivery of three bales under the contract, and on the 9th January 1884 obtained a decree for this sum. On the 11th January 1884 the plaintiffs brought the present suit against the defendant to recover payment for the sum due for the four bales delivered to the defendant on the 1st June 1883 and which remained unpaid for.

The defendant contested the suit on the merits, and also contended that the plaint was bad, inasmuch as it made no mention of the three bales sued for on the 14th August 1883; and that under s. 43 of the Code of Civil Procedure, the suit was not maintainable, inasmuch as the plaintiffs should have included in their former suit the claim now made in the present suit.

The learned Judge of the Small Cause Court decided that the legal defences raised by the defendant could not be supported, and that the case

* Small Cause Court Reference, No. 3 of 1884, made by H. Millet, Esq., First Judge of the Calcutta Court of Small Causes.

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ought to proceed on the merits ; but inasmuch as both parties were desirous, whatever the effect of the learned Judge's decision might be, to have the legal questions referred to the High Court, he refrained from giving a decision on the merits and referred the following questions to the High Court.

(1) Whether the plaint is bad and ought to be rejected, in so far as it makes no reference to the three bales, the balance of the ten bales under the contract sued upon ?

(2) Whether having reference to s. 43 of the Code of Civil Procedure, and the fact that the plaintiffs had already obtained a decree in respect of some of the goods sold, under the same contract as that now sued on, the present suit is maintainable ?

Mr. *Henderson*, who appeared for the plaintiffs on the reference, contended that the claim in the two suits was of a totally different character, although arising out of the same contract, and that this latter fact did not make them one and the same cause of **[341]** action, and cited *Grimbly* v. *Aykroyd* (1) and *Wickham* v. *Lee* (2). The first question referred was abandoned.

Mr. *Gasper*, for the defendant, cited *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (3), *Debi Dial Singh* v. *Ajaib Singh* (4), *Sheo Sunkur Sahoy* v. *Hridoy Narain* (5), and *Shafkatunissa* v. *Shib Sahai* (6).

The opinions of the Court were as follows :—

OPINIONS.

Garth, C.J.—The question referred to us in this case is, whether having regard to s. 43 of the Code this suit is maintainable. The facts are these :

On the 8th of December 1882 the defendant contracted with the plaintiffs to purchase from them 10 bales of Turkey red yarn at a certain price.

In February 1883 three of these bales were delivered and paid for.

On the 21st of June 1883 the plaintiffs say that they delivered four more bales, and this action is brought for Rs. 1,633-8-0 being the contract price of those bales.

On the 14th of August 1883 the plaintiffs sued the defendant to recover Rs. 166-10-3 as damages for the non-acceptance by the defendant of the remaining three bales, and on the 9th of January 1884, they obtained a decree for that sum.

On the 11th of January 1884 the present suit was brought.

A preliminary objection was taken, that the Court had no right to entertain the suit, inasmuch as the plaintiffs' present claim, and the claim in their former suit constituted the same cause of action.

The learned Judge in the Court below was of opinion that the objection was not valid, but he referred the question to this Court before trying the case upon its merits.

I think that the learned Judge is right.

I have always considered that a claim for the price of goods sold, which is essentially a claim for a debt, is a cause of action of a different nature from a claim for compensation for not accepting goods pursuant to contract, which is essentially a claim for **[342]** damages. The two claims appear to me to be of a totally different nature, and the fact of their

(1) 1 Exch. 479 = 17 L.J.N.S. Ex. 157. (2) 12 Q. B. 521. (3) 6 C. 791.
(4) 3 A. 543. (5) 9 C. 143. (6) 4 A. 171.

arising under the same contract does not change their nature, or make them one and the same cause of action.

Claims by a shipowner for freight, and for not loading a ship pursuant to contract, constantly arise under the same charter party, but it could hardly be contended that the two claims would therefore constitute one cause of action.

No doubt claims under the same contract *for several instalments of the same rent, or for several instalments of the same promissory note* have been held over and over again (under s. 43) to be claims for the same cause of action (see the cases of *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (1), *Sheo Sunker Sahoy* v. *Hridoy Narain* (2), and *Mackintosh* v. *Gill* (3).

The claims in these cases are not only of the same nature, but are virtually for instalments of the same debt or obligation; and the illustration given in s. 43 seems to me to show that these are the sort of cases to which the section is intended to apply.

Under s. 63 of the English County Court Act, (9 & 10 Vict. c. 95) the Courts have gone further, and have held that several debts of the same nature, though strictly speaking arising out of several contracts, form part of the same cause of action when they are *of the same nature*, and arise out of the same course of dealing, as for instance, claims upon a tradesman's bill, where, although each item of the account may have accrued due at a different time, the whole bill has been treated by the parties as one entire claim [See *Grimbly* v. *Aykroyd* (4)].

But where the several debts included in the account are not of the same nature, as for instance, where one item of an account is for the price of a horse and another is for rent, and another for goods sold, there it has been held that several suits may be brought in the County Court, although the claims might in the superior Court have all been included in an *indebitatus* count. See *Neale* v. *Ellis* (5) and *Kimpton* v. *Willey* (6).

[343] The case of *Brunskill* v. *Powell* (7) is a very remarkable illustration of this distinction. There the plaintiff, a publican, had been in the habit of supplying the defendant from time to time with liquors, and also with small sums of money as he required them, and he had sent in to the defendant one entire account showing what sums were due for liquors, and what for money lent. As the defendant did not pay, the plaintiff sued him in the County Court, first in one suit for the liquors, and afterwards in another suit for the money lent. It was held by the Court of Exchequer that the claims for liquors and for money lent, although, undoubtedly, they might, in the superior Court, have been included under one count, did not constitute one cause of action, and that the plaintiff was at liberty to bring separate suits.

I have looked very carefully through the English authorities, but in vain, for any case, which would, either directly or indirectly, favour the defendant's view of this question.

In the case of *Grimbly* v. *Aykroyd* above cited, Chief Baron *Pollock* takes some pains to point out the inconvenience on the one hand of construing the words "cause of action" to mean "*cause of action on one separate contract*," and on the other hand of construing them so as to include "all contracts executed" which could be sued for in one *indebitatus*

(1) 6 C. 791. (2) 9 C. 143. (3) 12 B. L. R. 37.
(4) 1 Exch. 479=17 L. J. N. S. Ex. 157. (5) 1 D. & L. 163.
(6) 1 L. M. & P. 280=19 L. J. C. P. 269.
(7) 1 L. M. & P. 550=19 L. J. Ex. 363.

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count. But it never has been suggested in England, so far as I am aware, that a claim upon an executed contract, such as a debt, is the same cause of action as a claim upon an executory contract for damages.

The Court of Exchequer accordingly held in the case I have just mentioned that s. 63 of the Act did apply to the cases of tradesman's bills (such as that with which they were then dealing) "in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item if not paid shall be united to another and form one entire demand.

I quite admit that in actions founded on contract the most diverse causes of action might, under the English system of pleading, have formed the subject of one and the same special count; but it was never suggested on that account, that these [344] diverse claims could be considered in any sense the causes of action.

Thus in an action upon a lease claims might have been made in the same count.

1*st*, for rent; 2*nd*, for not repairing the demised premises; 3*rd*, for not paying rates and taxes; 4*th*, for not insuring the premises from fire; and 5*th*, for improperly cutting down trees.

But no one ever heard, so far as I am aware, of any two of these claims being considered as one cause of action.

I have looked through all the reported cases that I could find, and all the English as well as Indian Digests, for any authority that a *claim for debt* and a *claim for damages*, though arising out of the same contract, has ever been considered as the same cause of action, but I have found none; and I believe that this is the first occasion on which such a proposition has ever been suggested.

The real principle, as it seems to me, which runs through all cases is that, if the several items which make up the claim are of the *same nature* and form part of the same course of dealing *so as to pass under the same description* and *form part of one transaction*, they must be considered as one cause of action and must be joined in one suit, though they may have arisen out of several contracts.

But claims which are diverse in character, which do not answer the same description, and which would require a different class of evidence to support them, may be made the subject of different suits, though they may arise out of the same contract.

And I feel very strongly that the introduction of any new principle upon this subject, which has never been recognized by the Courts, may place numbers of suitors in a very unjust position. The present case, in my opinion, forms a very forcible illustration of the extreme injustice which might be done by interpreting the rule contained in s. 43 so as to compel a plaintiff to include in one suit a claim for debt and a claim for damages.

The first suit, brought by the plaintiff for damages for not accepting the three last bales, depended upon different considerations, and required different evidence to support it from that which would be necessary to support the present claim.

[345] In the former case he could only recover by way of damages the difference between the contract price of the bales and their market price at the time when the contract was broken; and the sum which he actually recovered as damages in that suit was Rs. 166-10-3,

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In the present case he would only have to prove the fact of the delivery of the four bales. Their price Rs. 1,633-8-0 would be ascertained by the contract and if the objection now taken were to be allowed, the defendant would get the four bales for nothing, and the plaintiffs, although guilty of no fraud, and having acted in bringing this suit entirely within the principle that has hitherto been recognized by the Courts, would be losers of no less a sum than Rs. 1,633-8-0.

The object of these technical rules, as I consider, is to prevent unnecessary litigation, by obliging parties, so far as may be consistent with justice and convenience, to include all their claims of one nature in one suit. In order to effect this good object, suitors are deprived of rights, to which they would otherwise be entitled under the general law; and I think we should be very careful, in carrying out such rules to confine their scope and construction within certain recognised limits and principles so as not to take suitors unfairly by surprise, and to do as little injustice as possible in individual cases.

It seems to me that if we were to allow the present objection to prevail, we should be acting without precedent, and we should be transgressing limits and principles which are now tolerably well known, and by which Courts of law have hitherto during a period of some 25 or 30 years been guided. If in this or any other case a Court of law may consider that a plaintiff has been guilty of improper conduct in bringing two suits instead of one, (although his doing so may not amount to a breach of the rule laid down in s. 43), the Court would, in my opinion, act quite rightly in showing its sense of such impropriety by depriving the plaintiff of the whole or a portion of his costs.

But to extend the application of s. 43 beyond what has hitherto been recognized as its legitimate scope, would not only in my opinion do a grievous wrong to the plaintiffs in the present instance but would be productive of serious uncertainty in the future.

[346] WILSON, J.—The facts upon which the questions referred to us in this case arise, are very short.

On the 8th December, 1882 a contract was entered into, whereby the plaintiffs agreed to sell and the defendant agreed to buy ten bales of Turkey red yarn at a certain price. It is not stated in this case when the price was payable, but during the argument the contract was referred to, and Counsel on both sides agreed that it was forty-five days after delivery.

In February 1883, the defendant took delivery of three bales and paid for them. The plaintiffs allege in the present suit that on the 21st June, the defendant took delivery of four bales more, but has not paid for them. The remaining three bales the defendant did not take, and on the 14th August, 1883, the plaintiffs sued the defendant in the Small Cause Court for damages for not taking them. On the 9th January, 1884, the plaintiffs recovered a decree for damages in that suit.

The defendant applied for a new trial, but his application on the 9th February, was dismissed for default.

On the 11th January 1884, the plaintiffs commenced this suit, in which they claim the price of the four bales said to have been delivered on the 21st June, 1883.

The main question referred to us is whether, having regard to s. 43 of the Code of Civil Procedure, this suit is maintainable. That section says: "Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. If a plaintiff omit

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to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted," and the question we have to answer may be shortly stated thus:—Where there is one contract for the purchase of goods, and the purchaser takes some of the goods, but breaks his contract, in part by not paying for the goods he takes, and in part by not taking and paying for the remainder, and both breaches occur before any suit is brought, is his claim a claim in respect of one cause of action, so that he must include the whole in one suit, or may he at his pleasure bring two separate suits ?

I think the whole claim arises out of one cause of action within the meaning of s. 43, and that only one suit will lie. [347] The expression " cause of action " is one frequently used in legislation and not always wiih the same exact meaning. In one sense every breach of a contract is a separate cause of action. But the illustration to s. 43 shows that the framers have not here used the expression in this sense. That illustration is : "*A* lets a house to *B* at a yearly rent of Rs. 1,200. The rent for the whole of the years 1881 and 1882 is due and unpaid. *A* sues *B* only for the rent due for 1882; *A* shall not afterwards sue *B* for the rent due for 1881;" and following the principle embodied in that illustration it was held in *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (1) ; that where two years' rents are due and the landlord sues for the first year's rent, he cannot afterwards sue for the second. In *Sheo Sunkur Sahoy* v. *Hridoy Narain* (2), this case was approved and followed.

In *Mackintosh* v. *Gill* (3), a note was made payable by instalments, and two instalments being due, it was held under s. 34 of Act IX of 1850, (the terms of which so far as material were substantially the same as those of the section before us), that two actions could not be brought. In the course of the argument Couch, C. J., is reported to have stated the rule thus :—

" When, as in this case, there is a single contract and several breaches, all the breaches must be included in one action."

The same expression " cause of action " has been used in the successive Acts relating to the jurisdiction of County Courts in England in the sections forbidding the splitting of claims so as to bring them within the inferior jurisdiction, or multiply suits. Under these sections it has several times been held that "cause of action" is not limited even to claims arising upon one contract, but may include claims upon several contracts, provided they form part of a continuous course of dealing, as in the case of goods supplied from time to time by a tradesman to a customer, though not otherwise—*Grimbly* v. *Aykroyd* (4) ; *Kimpton* v. *Willey* (5) ; *Brunskill* [348] v. *Powell* (6) ; and a like construction was put upon the same words in another but somewhat analogous section in *Wood* v. *Perry* (7) ; and *Bonsey* v. *Wordsworth* (8).

I wish to guard against expressing and opinion wider than is necessary for the purposes of this case. It is enough to say that, in my opinion, where there are two breaches of one term in one contract, and both occur before any suit is brought, the cause of action within the meaning of s. 43

(1) 6 C. 791. (2) 9 C. 143.
(3) 12 B.L.R. 37. (4) 17 L.J.N.S. Ex., 157=1 Exch. 479.
(5) 19 L.J.N.S.C.P. 269=1 L.M. & P. 280.
(6) 19 L.J.N.S Ex. 363=1 L.M and P. 550.
(7) 18 L.J.N.S. Ex. 161=6 D. and L. 194=3 Exch. 442.
(8) 25 L.J.N.S.C.P. 205.

is the non-performance of the promise, and only one suit will lie. In this case I think the cause of action is that the defendant contracted to take and pay for ten bales of yarn and failed to do so. I should therefore answer the second question in the negative.

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The point raised by the first question was abandoned on the argument before us. That question should be answered in the negative.

T.A.P.

Attorneys for plaintiffs: Messrs. *Morgan & Co.*

Attorney for defendant: Baboo *N. C. Bose.*

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12 C. 348 = 10 Ind. Jur. 335.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

BACHHA JHA AND ANOTHER (*Two of the Defendants*) *v.* JUGMON JHA AND OTHERS (*Plaintiffs*) AND OTHERS (*Defendants*).*
[11th September, 1885.]

Hindu Law—Stridhan—Mithila Law—Succession.

The *stridhan* property of a widow governed by the Mithila law, and married in one of the approved forms of marriage, goes to her husband's brother's son in preference to her sister's son.

[F., 13 M. 138 (139); Expl., 21 C. 344 (349); Appr., 20 Ind. Cas. 557 (561); R., 1 M.L.J. 592 (593); 17 B. 114 (124); 10 C.W.N. 802 (P.C.) = 8 Bom. L.R. 446 = 3 A.L.J. 484 = 4 C.L.J. 9 = 30 B. 431 = 1 M.L.T. 211 = 16 M.L.J. 446 = 33 I.A. 176.]

IN this case the plaintiffs sought to obtain possession of certain property left by one Choona Ojhain, deceased, which they alleged had formed portion of the estate of her late husband, and which had been taken possession of by the defendants.

[349] It was admitted that the parties were governed by the Mithila law, and that the plaintiffs were the sons of Choona Ojhain's husband's brother.

Defendant No. 1 was the son of Choona Ojhain's sister, and the other defendants were servants of his, who were alleged to be in possession of the property on his behalf.

Defendant No. 1 claimed that the property in suit was the *stridhan* of Choona Ojhain, and he claimed to be a preferential heir thereto as being her sister's son.

The main questions raised in the case were, whether or not the property in suit was *stridhan*, and which of the parties was the preferential heir, and though there were other questions raised in the lower Court, they were not raised in the appeal, and are immaterial for the purpose of this report.

The findings of the lower Court upon the main questions are sufficiently stated in the judgment of the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Uma Kally Mookerjee*, for the appellants.

Baboo *Nitmadhub Bose*, for the respondents.

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* Appeal from Original Decree No. 202 of 1884, against the decree of J. Pratt, Esq., District Judge of Purneah, dated the 23rd of April 1884.

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APPELLATE CIVIL.

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The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows :—

JUDGMENT.

The contest in this case is between two persons who claim to be entitled to certain properties left by one Choona Ojhain, deceased. The plaintiff substantially claims upon the ground that the said properties belonged to Choona Ojhain's husband and were part of his estate, and that on Choona's death he is entitled to the same under the Hindu law, he being her husband's brother's son. The defendant, on the other hand, contends that the properties were the *stridhan* of Choona, and that he being her sister's son is entitled to the same in preference to the plaintiff. The parties in the case are governed by the Mithila law.

The Court below has found that only some of the properties were Choona's *stridhan*, but has held that, whether the rest were *stridhan* or not, the plaintiff, as her husband's brother's son, is entitled to succeed under the Hindu law in preference to the defendant.

[350] We may here observe that, in addition to the contention mentioned above, some other pleas were raised by the defendant, *viz.*, that he had been adopted as *kurta-pooter* by Choona Ojhain before her death, and that she had made a gift of all her properties to him, but these pleas were found against him by the Court below, and the learned vakeel for the appellant has very properly refrained from insisting upon them before us.

There was also a further question in the Court below as to whether all the properties claimed by the plaintiff belonged to Choona Ojhain or not, and also as to the value of some of the moveable properties. The Court below has determined the said question partly in favour of the plaintiff and partly in favour of the defendant, and as against this part of the case there is no contention raised before us by the learned vakeel for the defendant-appellant.

The questions that have been discussed before us are :—

1*st*—Whether the properties decreed to the plaintiff by the Court below were Choona Ojhain's *stridhan*, within the meaning of the Hindu law as it obtains in the Mithila school, or should they be regarded as part of Choona's husband's estate?

2*nd*—Supposing that they were the *stridhan* of Choona, as contended by the defendant, whether the plaintiff, as the husband's brother's son of the deceased, or the defendant as her sister's son, is the preferential heir according to the Mithila school.

In the view that we take of the second question it is unnecessary to express any opinion upon the first question ; but if it were necessary, we should be inclined to hold that the properties were acquired by Choona Ojhain under circumstances which would give her complete control over them, and would make them her *stridhan* within the meaning of the Mithila law [*see Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (1).]

The second question that has been raised before us and which is the true question in the case is rather a difficult one, and of a novel character. There is not a single decided case bearing upon it, and the Hindu law books of authority in the Mithila school which have been translated into English are altogether silent on the matter.

(1) 5 I. A. 1.

[351] The question is shortly this: whether in default of issue, daughter's son and the like, as also the husband, the *stridhan* property of a woman married in one of the approved forms of marriage, goes to her husband's brother's son in preference to her sister's son.

The Vivada Chintamani, a work of the highest authority in the Mithila school, after stating that a woman's separate property is inherited in the first instance by her children and then by her daughter's son and the like, lays down that the property devolves on her husband if she was married according to one of the approved forms, but if she was married in the Ashura or any other unapproved forms, the wealth goes to her mother and father.

The author of the Vivada Chintamani does not proceed to discuss or lay down who are the next in succession, but he stops short with the husband and the parents, and we are left therefore completely in the dark as to who among the two claimants, according to that authority, would be the preferential heir.

We observe that the author of the Vivada Chintamani in his introduction states that he has compiled the work after studying the "works styled Krito Kalpadruma, Parijata, Ratnakara and others."

Unfortunately these books have not been translated into English.

The learned vakeel for the appellant has provided us with a translation of that portion of Ratnakara which treats of *stridhan*. This book is no doubt one of considerable authority in the Mithila school, and if the matter were clear upon what Ratnakara says on the subject, we should perhaps have no difficulty in deciding the matter.

The author of Ratnakara, after quoting various texts of certain sages, which indicate that the law of succession is very nearly the same as that laid down by the Vivada Chintamani, and after commenting thereupon, cites a text of Vrihaspati which is as follows: "The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law and the wife of an elder brother are declared to be similar to the mother. If they have no issue nor son of their body, nor [352] daughter's son, nor son of these persons, the sister's son and the rest shall take the property." The author then makes the following commentary:—

"The meaning is that in default of the son and the rest, the sister's son, &c., shall take the property of their mother's sister and others."

And with this commentary, and without saying anything further, Ratnakara concludes the chapter on the partition of *stridhan*.

We may here observe that it is upon the above text of Vrihaspati adopted by Ratnakara that the defendant-appellant mainly relies in support of his contention that the sister's son is the preferential heir in this case. The learned vakeel contended that it must be understood that the said text laid down not only that the sister's son was an heir, but also that the several heirs mentioned therein should succeed in the order specified, sister's son being the *first*.

Now the first observation that arises upon the above text of Vrihaspati is that it is extremely doubtful, both as to the exact position of the group of heirs mentioned therein, and as to their relative positions *inter se*. According to the wording of the text, this group of heirs would come in after the issue, and before the husband and the parents. Then, again, the kinsmen of the husband, and of the parents mentioned therein, are enumerated without having regard to the distinction that exists in the devolution of *stridhan* property arising from the form of the marriage,

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We find, however, that the text has received interpretation in certain schools of law in India, and we proceed to notice them.

The Smriti Chandrika, which is the great authority in the Dravida school, in chapter IX, section III, after giving the text of Vrihaspati in verse 36, says in verse 37 as follows :—

"The sons of the sisters of the deceased take the property of their maternal aunt. Likewise it must be understood by the words and 'the like' in the text that the other heirs are to take the wealth of their respective secondary mothers in due order."

It is doubtful whether the author of the Smriti Chandrika meant to lay down that the heirs mentioned in the text succeed in [353] the order enumerated therein, or in the order of their propinquity to the deceased as, we shall presently show, has been enunciated by the Viramitrodaya. We observe, however, that in the law of partition and succession translated by Mr. A. C. Burnell, from the manuscript Sanscrit text of Varadaraja's Vyavaharanirnaya, a work of authority in Southern India, the compiler, after referring to the text of Vrihaspati, gives, and we may assume approvingly, the observation of Colebrooke as follows.

"This text does not take effect if there be *sapindas* as far as the fourth. This text is of effect if there be *sapindas* commencing with the fifth. Thus it is explained by commentators. By others, however, the arrangement is made as follows: If there be six relations, such as sister's son, &c., of the six persons beginning with the mother's sister, then when a husband succeeds to a childless woman's *stridhan* in case of his default, of the three relations who (are so), through the husband, the husband's younger brother first succeeds to the elder brother's wife's wealth by reason of his greater affinity. In his default the husband's brother's son takes (it). In his default the husband's sister's son takes (it). When, however, the mother and father would succeed, then in their default, of the three relations (who are so) through them, the deceased woman's sister's son takes first. In his default her brother's son takes (it). In his default the son-in-law takes it," and so on.

The author of the Dayabhaga in quoting the same text, gives reasons why it could not be held that the heirs mentioned therein would succeed in the order enumerated, and observes that it is contrary to the opinion and practice of venerable persons. He then says: "Therefore the text is propounded not as declaratory of the order of inheritance, but as expressive of the strength of the fact." He ultimately lays down that the order of succession should be in accordance with the various degrees of benefits conferred on the owner by the oblation of food at obsequies. (Dayabhaga, Ch. IV, s. III, verses 35, 37.) (See also Srikrishna Tarkalankar's Commentaries; Colebrooke's Digest, vol. IV, pp. 319-324).

The author of the Viramitrodaya, a book of considerable authority [354] in the Benares School, after laying down that the property of a childless woman dying without issue belongs to her husband, and on failure of him, to the husband's nearest relations, cites the said text of Vrihaspati, and then expounding the reasons why the woman's issue and the issue of her co-wife should succeed, proceeds to observe as follows: "Hence on failure of these the sister's son, and the rest alone, in spite of the *sapindas*, such as father-in-law, are by virtue of this text, which is not reconcileable in any other way, entitled to succeed, according to their comparative propinquity, to the property of their mother's sister and the rest." (Viramitrodaya, pp. 240—244.)

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It is pretty clear, as we understand it, from what the Viramitrodaya says, that according to his view the sister's son, and others mentioned in the text of Vrihaspati, do not succeed in the order they are enumerated therein, but in the order of comparative propinquity to the woman. That the Viramitrodaya could not have meant to lay down that the order of succession should be as the enumeration of the heirs given in Vrihaspati's text would seem to suggest is clear from the following considerations: of the six heirs mentioned therein, two, *viz.*, the sister's son and the brother's son, are the *sapindas* of the woman's father; three, *viz.*, husband's sister's son, husband's brother's son and the husband's younger brother's son, are the *sapindas* of the husband. Now it is well settled that in case of a competition between two *sapindas* the *sogotra sapinda* takes precedence over a *bhinna gotra sapinda*, and therefore as between the sister's son and the brother's son, the latter would be the preferential heir. Then among the three *sapindas* of the husband, the order should be first, the husband's brother, second the husband's brother's son, and the third the husband's sister's son. According to the Viramitrodaya and some other writers on the subject, comparative propinquity is evidenced by the amount of spiritual benefit conferred on the deceased, and the degrees of propinquity are tested by religious merit.

If that principle be followed in this instance, it will be found that the sister's son cannot be regarded as having the most preferential right of succession, as would be the case were we to follow implicitly the order in which the several heirs are enumerated in the text of Vrihaspati.

[355] Then, again, if propinquity be determined by consanguinity only, the preferential heirs would be her brother's son, and sister's son, but we find that the brother's son is mentioned as the fifth in order.

The text of Vrihaspati has been adopted in the Mahratta School. The Vyavahara Mayukha, which is a work of paramount authority in that school, merely quotes the text as showing that the group of heirs mentioned therein comes in after the husband or the parents, as the case may be, with reference to the form of the marriage of the woman; but beyond that, there is nothing to show that in that school the succession is regulated in the order in which the said heirs are enumerated in that text, but on the contrary on a careful consideration of the Vyavahara Mayukha itself (chapter IV, sec. X, verses 22-28) it seems to be doubtful whether the author really meant it to be so. The author, after speaking of the succession of the woman's issue, daughter's son and so forth, quotes the text of Yajnavalkya, *viz.*, " her kinsmen take it if she die without issue; " and then, after referring to the exposition of that text according to the different kinds of marriage, says,—" failing the husband the nearest to her in his family takes it; similarly failing the father the nearest to her in her father's family succeeds. " The author then alludes to the observation of the Mitakshara on the same subject, and to the text of Manu showing that in the case of a marriage according to one of the approved forms, the property goes to the husband, whereas in the case of a marriage in one of the unapproved forms, it goes to her parents. The author then says : ' On failure of the husband of a deceased woman in the case of marriage according to Brahma, or the like form, or on failure of her parents in the case of marriage according to the Asura or the like form, Vrihaspati names the person entitled to the technical *stridhan*." Then follows the text itself.

We are inclined to think that what the author perhaps meant to lay down was that the succession of the heirs mentioned in Vrihaspati's

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text is to be taken to be subject to the rule of law laid down by him in accordance with the Mitakshara (see Shama Churn's Vyavastha Chandrika, vol. II, pp. 537, 538).

While, therefore, on the one hand it is left in doubt whether [356] the authors of the Vyavahara Mayukha and Smrithi Chadrika were of opinion that the text of Vrihaspati was intended to lay down the order of succession, the Dayabhaga school on the other hand distinctly repudiates the said construction, and the Viramitrodaya lays down that the heirs mentioned in the text are to succeed according to their propinquity to the woman.

Upon the above considerations we are unable to accept the construction of the text of Vrihaspati for which the learned vakeel for the appellant contends.

We now turn to the two other books which have been, as already stated, specially mentioned in the introduction of the Vivada Chintamani. They are the Krito Kalpadruma and Parijata. Neither of these books has been translated into English, and we have been unable to obtain the first of them. The other book (Madan Parijata), so far as it bears upon the present subject, does not quote Vrihaspati's text, but, after quoting a text of Yajnavalkya on the subject, says as follows: "It (*stridhan*) goes to her kindred, *i.e.*, husband and others, she being childless, *i.e.*, dying without issue, *i.e.*, without daughter, daughter's son, son, son's son. If a woman is married according to either Brahma, Daiva, Arsha, or Prajapatya form of marriage, the husband takes her property; in his default those that are nearest of kin in the husband's family; in their absence, the nearest of kin in the father's family. This is the construction."

It thus appears that out of the three books referred to in the introduction to the Vivada Chintamani as the principal books consulted by the author in making his compilation, two do not lay down that the succession after the husband should be according to the order in which the sister's son and others are enumerated in Vrihaspati's text, but on the contrary one of them, the Parijata, gives the order in a very different manner and upon a different principle. The order given by this book, we may here observe, is what the plaintiff contends for.

In this state of the authorities in the Mithila school, we must refer to the Mitakshara for our guidance in this matter. It is, as the Judicial Committee says, in the case of *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1) "universally accepted by all the schools, except that of Bengal, as of the highest authority and [357] which in Bengal is received also as of high authority, yielding only to the Dayabhaga on those points where they differ." The author of the Mitakshara, after describing the different classes of woman's property, lays down (Chapter II, s. XI, verse 9) that "if a woman dies without issue, that is bearing no progeny, in other words leaving no daughter nor daughter's daughter, nor daughter's son, nor son, nor son's son, the woman's property, as above described, shall be taken by her kinsmen, namely her husband and the rest, as will be forthwith explained;" and then in verse 11 says as follows: "Of a woman dying without issue as before stated, and who had become a wife, by any of the four modes of marriage denominated, Brahma, Daiva, Arsha, and Prajapatya, the property as before described belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen (*sapindas*)

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(1) 12 M.I.A. 397 = 1 B.L.R. P.C. 1.

allied by funeral oblations." And in verse 25 the author states: "On failure of grandsons also, the husband and other relativas above mentioned are successors to the wealth."

It is thus clear that, according to the Mitakshara, the husband's kinsmen are preferred to the father's kinsmen; and it follows that the plaintiff as the husband's brother's son of the deceased is entitled to preference, as against the defendant, the sister's son.

The result is that the appeal will be dismissed with costs.

H. T. H. *Appeal dismissed.*

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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

HARENDER KISHORE SINGH (*Plaintiff*) v. THE ADMINISTRATOR-GENERAL OF BENGAL, ON BEHALF OF THE ESTATE OF MR. J. S. ROCHFORT, DECEASED (*Defendant*).* [11th September, 1885.]

Limitation—Principal and Agent—Breach of Contract-Account-Registered Agreement—Limitation Act (*XV of* 1877), *sch, II, arts.* 89, 90, 116—*Bengal Act VIII of* 1869, s. 30—*Costs—Administrator-General's Act* (*II of* 1874), s. 35.

A suit to recover from the representatives of a deceased Agent certain sums of money which had been received by such Agent in the course of his [358] duties and misappropriated by him will be governed by the limitation prescribed by art. 116, sch. II, Act XV of 1877, when the contract under which the agent was employed is contained in a duly registered instrument.

In a suit for compensation for breach of a contract in writing and registered, whether such compensation be for a liquidated or unliquidated sum, the limitation applicable is six years, as prescribed by art. 116, sch. II, Act XV of 1877.

In art. 116, sch. II of Act XV of 1877, the word "compensation" seems to be used in the sense in which it appears in s. 73 of the Contract Act IX of 1872.

In April 1875 *A* entered into an agreement in writing with *B*, whereby he agreed to act as the manager of *B's* zemindaries and other landed properties for three years, on certain terms therein mentioned. The agreement was duly registered. On the 15th of June 1882, *B* sued the Administrator-General of Bengal, as administrator of *A's* estate, to recover certain sums of money set forth in detail in the plaint, as having been received by *A* and not accounted for, stating that they had been misappropriated by *A*.

Held, that in respect of such sums as were received by *A* in virtue of his position as manager under the registered agreement, the limitation of six years applied; but that in respect of the sums received by him in the course of transactions which did not come within the scope of the registered agreement the limitation of three years applied.

Held, also that the suit was not such as is contemplated by Beng. Act VIII of 1869, s. 30.

Held, also, that, under the special terms of the Administrator-General's Act II of 1874 the plaintiff (having succeeded as to part of his claim only) was not entitled to any costs as against *A's* estate, but was liable to pay costs on the portion of his claim which was disallowed.

[R., 14 M. 465 (467); 17 C. W. N. 5; 12 M. L. T. 458 = 23 M. L. J. 519 = (1912) M. W. N. 1179; 14 C. W. N. 122; D., 1 C. L. J. 232 (239) = 32 C. 719; 13 C. W. N. 212 (214) = 4 Ind. Cas. 556.]

IN this case the plaintiff stated in his plaint that on the 17th of April 1875, Mr. John Steel Rochfort became the manager of the Bettiah Raj,

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* Appeal from Original Decree, No. 52 of 1884, against the decree of Baboo Amrit Lal Pal, Rai Bahadur, Second Subordinate Judge of Sarun, dated the 18th December 1883.

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under a registered agreement dated the 17th of April 1875, "and managed all monetary dealings of every description connected with the receipts and disbursements of the Raj up to the 2nd December 1878," when he left India; that Mr. Rochfort returned to India about the 20th June 1879, and died in Calcutta on or about the 26th of July 1879, and that the defendant had taken out administration to his estate. The plaintiff then set out a list of 19 items of sums of money alleged to have been received by Mr. Rochfort for the purposes of the Raj on specified dates, which items the plaintiff **[359]** said Mr. Rochfort had misappropriated; and he prayed for a decree for the amount of the several sums with interest from the date on which each was alleged to have been received by Mr. Rochfort and misappropriated. The plaintiff stated that his cause of action arose on the 2nd December 1878, when Mr. Rochfort left the managership and went to England, and he claimed to add to the period of limitation the time during which Mr. Rochfort was absent from British India, namely, from 6th December 1878 to the 20th June 1879. The lower Court disallowed the claim in respect of all the items, except two, on the ground that they were barred by limitation under art. 89 of Act XV of 1877. The plaintiff appealed to the High Court. The agreement of the 11th of April 1885 is as follows:—

"Whereas the said John Steel Rochfort hath agreed with the said Maharajah and Maharaj Koer, to act as manager of the estates of the said Maharajah and Maharaj Koer, upon the terms and conditions hereafter expressed.

Now therefore this agreement witnesseth that the said John Steel Rochfort for himself his heirs executors administrators and assigns, doth hereby covenant and agree with the said Maharajah Rajender Kishore Singh Bahadoor and Maharaj Koer Harender Kishore Singh Bahadoor of Bettiah and with their heirs executors administrators and assigns, and the said Maharajah and Maharaj Koer do hereby covenant and agree with the said John Steel Rochfort his executors administrators &c. that he and the said covenanting parties shall and will duly observe perform and keep all and every covenants provisos and agreements hereinafter contained on their respective parts to be observed performed and kept, that is to say:

1*st.*—That the said John Steel Rochfort shall and will act as the manager of estates consisting of zemindaris talooks &c., known as the Bettiah estate, pertaining to the Raj of Bettiah, and do all acts that are necessary as a manager for the proper preservation, security, welfare and improvement of the said estates, for the term of three years certain from the 17th day of April 1875, and that his duty as such manager shall consist in taking the conduct and management of all collections of the zamindari, &c., of the said estate, in paying Government revenue, making ordinary settlements, in liquidating all liabilities by which the said estates are or may be in any way encumbered, in carrying on, instituting and defending law suits, and doing all such other acts for the management, preservation, and benefit of the said estates as may be necessary or advisable.

2*nd.*—That the said John Steel Rochfort shall, from time to time, and at all times during the said term of three years, conduct himself with all **[360]** due diligence, honesty and propriety, and shall and will, in conducting the said business, conform to, guide and govern himself by all such orders and instructions as may be given to him by the said Maharajah and Maharaj Koer, or either of them, and in all important matters

shall receive instructions and directions from the said Maharajah and Maharaj Koer and act accordingly, and in all important matters where he shall receive no special instructions or directions, that he shall and will act in such manner as may be most conducive to the advantage of the estate.

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3rd.—That the said John Steel Rochfort shall and will, from time to time, and at the end of each Fusli year, account for and transmit (in such manner as is usual and customary in the said *raj* or estate) all moneys that may be collected, or that may be obtained, or that he may receive as such manager for the estate or *raj*.

4th.—That the said John Steel Rochfort shall and will keep proper books of account in English and in the vernacular, in which shall be made plain, regular, and correct entries of all moneys received and disbursed by him for and on account of the said estate or *raj*, and shall also keep a true and correct list and account of all deeds, documents, securities and vouchers, or other papers and writings whatsoever that may come into his hands or custody, or may go out of his hands or custody, directly or indirectly, as manager of the said estate or *raj*, an account of the same, showing by such books of account how the said deeds, documents, securities, vouchers, &c., have been disposed of, or where they are, provided that, in the keeping of such books of accounts, the said John Steel Rochfort shall not be put into any expense, but all expenses incident thereto shall be borne and paid by the estate.

5th.—That the said Maharajah and Maharaj Koer of Bettiah shall and will so long as the said John Steel Rochfort shall act as aforesaid, as manager under this agreement, and shall perform the covenants and conditions herein entered into by him, pay or cause to be paid to the said John Steel Rochfort a salary at the rate of Rs. 1,500 per month, to be computed from the date on which he shall reach Bettiah, and this salary of Rs. 1,500 is to be paid monthly within the first week of each month for the month immediately preceding.

6th.—That the said Maharajah and Maharaj Koer shall, and will so long as the said John Steel Rochfort shall act as such manager as aforesaid under this agreement, provide him with a furnished dwelling house at Bettiah free from the payment of rent or taxes for the same, and also shall and will give him conveyances and horses for the purpose of the business of the estate, and shall and will repay to him all such sums of money as he may have paid or laid out, for or on account of his travelling expenses, when such expenses shall have been *bona fide* incurred on account of the business of the estate: Provided **[361]** always, and it is intended by this agreement, that while the said John Steel Rochfort shall conduct and manage all the affairs of the said estate, he shall nevertheless be at liberty, with the written consent of the said Maharajah or Maharaj Koer, to attend to legal business, provided the demands of the said estate on his time are first satisfied, and provided further, that the attending to such other business shall not in any manner interfere with the time and attendance which the said John Steel Rochfort is by this agreement primarily bound to give to the affairs of the said estate, and the said John Steel Rochfort hereby covenants that without the written consent of the said Maharajah and Maharaj Koer, or either of them, he will not at any time during the term of this agreement undertake or conduct any legal business whatsoever other than the important business of the said Maharajah and Maharaj Koer.

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If the said John Steel Rochfort shall at any time neglect or refuse to perform the duties hereby required of him, or shall be guilty of a breach of any part of this agreement, the said Maharajah and Maharaj Koer shall have power of putting an end to this agreement, by giving to the said John Steel Rochfort two months' notice in writing to that effect, provided that in like manner the said Maharajah and Maharaj Koer shall be bound to carry out the conditions of this agreement, and if they or any one of them shall fail to perform any of the obligations thereby, he shall also have the power of putting an end to this agreement by giving to the said Maharajah and Maharaj Koer two months' notice in writing to that effect.

The said John Steel Rochfort shall be bound to give the said Maharajah and Maharaj Koer a notice in writing, three months before the expiration of the term of this agreement, of his intention to resign at the expiration of the said three years, and in like manner the said Maharajah and Maharaj Koer shall be bound to give the said John Steel Rochfort notice in writing, three months before the expiration of this agreement, of their intention to put an end thereto at the expiration of the said three years and if neither of the said parties shall give such notice to the other or others of them, then in such case the present agreement and all the stipulations herein contained shall continue to be valid and binding and to remain in force, but shall be determined thereafter by either of the said parties, upon giving the other or others of them three months' notice in writing before putting an end thereto.

The plaint was filed on the 15th of June 1882.

Mr. *Allen*, Mr. *Gregory*, Baboo *Jagadanund Mookerjee*, and Baboo *Srinath Banerjee*, for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Lal Mohun Doss*, for the respondent.

JUDGMENT.

The judgment of the Court was delivered by

PRINSEP, J.—By a registered agreement, dated the 17th April 1875, Rochfort was taken into the service of the Maharajah of [362] Bettiah, and his eldest son, as manager of their estates, on certain terms and conditions therein expressed. Among these, the term of three years was agreed on as the term of the service. It was further stipulated that that service might be terminated at the end of that period, after certain notice ; that Rochfort should at the end of each Fusli year account for and transmit in the usual manner, all moneys that may have been collected or may have been received by him as manager ; that he should keep proper books of account, &c.

On the expiry of this stipulated period of three years, Rochfort gave notice to the Maharajah requesting his discharge, with the intention of proceeding to England for urgent family reasons. Eventually Rochfort was permitted to go in December 1878. He returned to Calcutta in the following June, and died in that city during July 1879.

After Rochfort's departure, Mr. T. M. Gibbon was appointed manager of the Maharajah's estate, and directed to examine Rochfort's accounts. Finding that there was a considerable sum unaccounted for, Mr. Gibbon, on behalf of the Maharajah on the 23rd July 1879, called upon Mr. Rochfort to explain certain items furnishing him with a memorandum of account. This letter probably arrived immediately after Rochfort's death, or it may have reached him on his death-bed, for he died on the 26th of that month.

The Maharajah has brought the present suit against Rochfort's estate represented by the Administrator-General, claiming Rs. 67,661-1 anna and 10 dams, as the amount of the sums of money not accounted for by Rochfort, together with interest thereon, amounting in all to over a lac of rupees.

With the exception of very small items, which have not been made the subject of appeal before us, the entire claim has been dismissed by the Subordinate Judge as barred by limitation under arts. 89 and 90, sch. II of the Limitation Act of 1877.

It has been contended before us on appeal that, inasmuch as the contract, the breach of which has entitled the plaintiff to bring the present suit is a registered document, the suit is governed by art. 116, rather than by arts. 89 and 90, which would otherwise govern the case. As authority for this, the case **[363]** of *Nobocoomar Mookhopadhya* v. *Siru Mullick* (1), decided by a Division Bench of this Court, as well as the case of *Husain Ali Khan* v. *Hafiz Ali Khan* (2), decided by a Full Bench of the Allahabad High Court, have been quoted, as well as two cases decided by Division Benches of the same Court (3).

In the construction of art. 116, we follow the rule laid down in *Nobocoomar Mookhopadhya* v. *Siru Mullick* (1). The term "compensation" used in art. 116 seems to have been used in the sense in which it appears in s. 73 of the Contract Act, and, therefore, wherever a suit for such compensation is brought for a breach of contract in writing and registered, whether such compensation be for liquidated or unliquidated damages, the limitation applicable is six years, as prescribed by that article. We are, consequently, of opinion that, so far as it is founded on that agreement, the present suit which has been brought within that period is not barred.

The plaintiff sues to recover certain sums of money set forth in detail in the schedule of the plaint, as having been received by Rochfort, and not accounted for, stating that they have been misappropriated. This cannot, therefore, be regarded as a case for an account, and to recover any sums that may be found to be due as the result of taking such an account. We have rather been asked to determine whether Rochfort did not receive the sums of money specified in the schedule of the plaint, whether he is not bound to account for these, and whether in the absence of a proper account he is not liable to repay them to the plaintiffs.

We find it necessary to mention this, because at the termination of his argument, the learned counsel for the plaintiff asked us to direct that an account may be taken, if we are not satisfied that the sums claimed were due from the defendant. To this we cannot accede. The learned counsel for the appellant has pressed us to accept and act upon the opinion of Mr. Gibbon who examined Rochfort's account, to require the **[364]** defendant to explain the items mentioned by Gibbon, and if any of these items are not satisfactorily accounted for, to make Rochfort's estate liable.

It would be impossible for us to accept the result of Gibbon's enquiry into Rochfort's affairs in connection with the Bettiah estate as evidence against the defendant. Gibbon succeeded Rochfort in plaintiff's service. It would be impossible to receive the result of his enquiry as evidence, for this would amount to regarding him as a commissioner specially

(1) 6 C. 94. (2) 3 A. 600.

(3) *Kishen Lal* v. *Kinlock*, 3 A. 712, and *Gauri Shankar* v. *Surju*, 3 A. 276; see also the case of *Khuni* v. *Nasir-ud-din Ahmud*, 4 A. 255.

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appointed by the Court under authority of law, whereas no such appointment has been made. We are entitled to require from the plaintiff the same evidence which has satisfied Gibbon.

But on the general question, where the suit, so far as it relates to Rochfort's employment on the registered agreement, is not barred by limitation, the character of the transactions under which several of the items are claimed requires that we should consider and determine the nature of the service entered into under that agreement, and whether some of Rochfort's transactions with the plaintiff, such, for instance, as his borrowing money for his employers from native mahajuns, and drawing on those mahajuns, would not be beyond the terms of that agreement so as to make him liable to account, not on that agreement, but merely as the general agent of the plaintiff. The fact that this agreement is a registered document entitles the plaintiff in a suit founded thereon to a special term of limitation exceeding the term allowed for suits arising out of the ordinary relations of agency.

The document, which is in the English language, has the appearance of having been drawn with some care by one having some knowledge of drafting. In some respects its terms are very precise. We think that it should be construed with respect to the employment entered into under it, as expressing the deliberate and complete intention of the parties to it. The intention of the parties is set forth to be the employment of Rochfort "to act as manager of the estate of the Maharajah and Maharaj Koer upon the terms and conditions hereafter specified."

The document then sets out: "Rochfort shall and will act as the manager of estates consisting of zemindaries, taluks, &c. [365] known as the Bettiah Estate pertaining to the Raj of Bettiah, and do all acts that are necessary as a manager for the proper preservation, security, welfare and improvement of the said estates, and that his duty as such manager shall consist in taking the conduct and management of all collections of the zemindaries, &c., of the said estate, in paying Government revenue, making ordinary settlements, in liquidating all liabilities by which the said estates are or may be encumbered, in carrying on, instituting and defending lawsuits, and doing such other acts for the management, preservation and benefit of the said estates as may be necessary or advisable."

So far as we understand these terms, Rochfort was to be employed simply in matters connected with the management of the zemindaries and other landed properties. It was next set out that Rochfort was to conduct himself with "all due diligence, honesty and propriety, and in conducting the said business" to act in accordance with the orders of his employers, and in the absence of such orders to "act in such manner as may be most conducive to the advantage of the estate."

He is next required to "account for and transmit all moneys that may be collected, or that may be obtained, or that he may receive as such manager for the estate or raj."

It is contended "that the words that may be obtained" are general, and were intended to include monies obtained by Rochfort in any capacity. But we cannot accept this interpretation. It seems to us rather that the passage should be read thus, "that may be collected as such manager," or "that may be obtained as such manager," or "that he may receive as such manager," and that it is his acts as manager that are contemplated and thus provided for.

Nor are we able to attach any importance to the use of the expression "estate" sometimes in the singular and sometimes in the plural. We do not understand that from this it was intended that Rochfort should be a general servant of the raj, that he should be employed under the terms of the instrument in any and every matter connected with his master's affairs that might suggest itself to them. The next clause relates to the manner in which accounts shall be kept and rendered. The term raj or [366] estate is used. He is styled "manager of the said estate or raj," and it is provided that "all expenses incident to the performance of the duty shall be borne and paid by the estate." We do not understand that these expressions affect the character of the service entered into, and already specifically described.

The next clause relates to Rochfort's salary.

The next clause to the providing of certain perquisites, such as a furnished dwelling-house, conveyance, and horses for the purpose of the business of the estate, and repayment of all travelling expenses incurred on "account of the business of the state," and he is allowed to attend to legal business "provided the demands of the estate on his time are first satisfied," &c., &c.

A stipulation is then introduced providing for the case of neglect or refusal on the part of Rochfort "to perform the duties hereby required by him," and for the termination of his service after certain notice.

There is, therefore, nothing on the face of this agreement for the performance of any duties other than those connected with zemindari management. No doubt, very soon after his entering the plaintiff's service, Rochfort was employed on other matters unconnected with such management, such as satisfying debts against the plaintiff, contracting loans, and other transactions of a more private character, as shown by some of the items specified in the schedule to the plaint. We cannot, however, from this assume that such duties fell within the terms of the written agreement. It may be that a refusal to perform such services would have led to his dismissal, but that would not have justified such a course, and we cannot hold that acts of this nature (done perhaps to ingratiate himself with his masters) were, because they were done by him, to be taken to have been performed by him under the terms of this agreement, which, as we construe it, does not contemplate or stipulate for them. We must, therefore, hold that all acts not within the ordinary management of a zemindari are not within the terms of the written agreement, but of some understanding or private arrangement, tacit or express, between the parties.

Another point has been taken by the respondent, that the suit was one under the Bengal Rent Act of 1869, s. 30, and [367] that, as it was not brought within three years from the termination of the service, it is barred. We think that the suit is not of that nature, and that the service entered into by Rochfort by the written agreement was something beyond that of a zemindari agent under the terms of that section, whose duty is only to collect money from the tenants and deliver accounts and papers thereof.

Although the case was not so laid before us by the appellant's counsel, we propose to deal with the several items in the order in which they are stated in the schedule of the plaint.

The first item relates to a sum of Rs. 50, being the balance of a sum of Rs. 500 taken by Rochfort, in October 1875, for the wages of syces.

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It was no part of Rochfort's service under the written agreement to perform this duty, and, therefore, any liability to account for this money would be in respect to his position as an agent for that purpose. This item relates to a time more than three years before the institution of this suit, and is, therefore, barred.

The second and third items have not been pressed before us in appeal, and therefore we need not consider them.

Item No. 4 relates to a sum of Rs. 1,000 taken by Rochfort on the 25th October 1876, for the purpose of paying the wages of the servants. It is barred on the same grounds as item No. 1.

Items Nos. 5, 6 and 7 have been abandoned by the appellant.

Item No. 8 amounts to Rs. 16,515, which may be briefly described as the balance in excess of a sum of Rs. 38,000 odd received by the Maharajah for his own private expenses, the amount debited by Rochfort on this account having been wrongly entered as Rs. 55,000.

It appears that in the course of 1876-77, Rochfort, under the authority of the plaintiff *and as his general manager*, in which capacity, however appointed, he seems habitually to have acted, borrowed Rs. 3,00,000 from Madho Das on a bond. The accountant of the Rajah's office, in December 1876, represented the necessity of getting the account from the mahajun, so as to adjust his own account. Eventually this was obtained. And after this was examined in the office, it seemed to Rochfort, from [368] entries in his own English account, that Rs. 55,000 had been paid on account of allowance of the Maharajah and his son, and he directed a similar entry to be made in the corresponding Persian account, where it appears "as on account of the *khas* expense of the Maharajah and the Koer."

Out of the mahajun's account of Rs. 3,00,000, four items amounting to Rs. 55,000 have been selected as representing the lump sum thus exhibited in Rochfort's accounts. These items also appear in the account furnished to Rochfort and signed by him as correctly representing, so far as can be tested here (that is to say, at Benares) the amount received and acknowledged by him. Some stress has been laid on the terms of this endorsement, but we think that it cannot properly be accepted as anything beyond an acknowledgment by Rochfort, that from the information then in his possession he believed that it was a correct account of the disbursements made. From the terms of the account itself and the evidence of Madho Das, the mahajun, of the manner in which payments have been made, it seems that Rochfort did not have sole control over the sum of Rs. 3,00,000 covered by this bond, so as to direct to whom and in what manner disbursements should be made. It seems rather that payments were made at various times to various persons, including Rochfort, in the service of the Maharajah. The payments relied upon as representing the sum of Rs. 55,000 are the following :—

Rs. 10,000 paid on the 3rd Jeyt Budi, corresponding with the 11th May, to Rochfort, " your manager."

Rs. 24,000 paid to the Oriental Bank through Shah Koer Sen and Gya Pershad of Calcutta.

Rs. 15,000 paid on the 15th Kartick Budi (17th October 1876) on a cheque drawn by Rochfort, the manager of the Bettiah Raj, on Madho Das and Bisseswar Das, in favour of Haniram and Sriram, payable at sight after the 17th October 1876, value-whereof is paid to the Benares Bank.

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Rs. 6,000 paid on the 4th Kartick Sudi (21st October 1876) on a *chitti* drawn upon Madho Das and Bisseswar Das, by Rochfort, manager of the Bettiah Raj, in favour of Haniram and Sriram, payable at sight, after 21st October 1876, the amount credited to Shah Koer Sen and Gya Pershad.

[369] The payment of the first sum of Rs. 10,000, made on a receipt granted by the Maharajah and Rochfort, is shown to have been made to the Bank of Bengal at Benares. But on whose account such payment was made, whether on behalf of Rochfort himself, or on account of the Bettiah Raj, is not shewn.

The payment of the next item of Rs. 24,000 was made to the Oriental Bank to the credit of the Maharaj and Maharajah Koer of Bettiah, in the name of their manager. This appears from the receipt itself, and is in accordance with the instructions communicated by Rochfort to the Manager of that Bank. Out of the sum of Rs. 24,000 it is proved that Rs. 14,000 was paid on a draft accepted by the Maharajah, and the balance Rs. 10,000 was drawn out by Rochfort himself.

The next item of Rs. 15,000 is shown to have been paid to the Bank of Bengal at Benares. But on whose credit this payment was made, does not appear. We are, therefore, in the same difficulty, as on the previous item of Rs. 10,000, in determining whether this money came into the hands of Rochfort, or was paid to the credit of the Maharajah with the Bank of Benares. This is a matter which the plaintiff should have cleared up before he could properly have attacked Rochfort for having misappropriated a portion of this particular payment.

But we think that this does not arise out of the employment created by the registered agreement. The three years' limitation applies to it, and the claim is consequently barred. The claim is asserted as having arisen out of Rochfort's dealing with money raised on behalf of the Maharajah to pay the Maharajah's personal debts. There is nothing to show that the loan was raised for the purposes of the estates, or management of them, or in any manner strictly within the terms of Rochfort's employment under the written agreement, or that any of the money drawn by Rochfort were interested to him, or came into his hands for such purposes. It seems rather that he acted with regard to this matter as a general servant or man of all work of the Maharajah, and not within the terms of his written engagement, which cannot be used to make the six years' limit applicable to this item.

Item No. 9, which has been allowed by the lower Court has not been questioned in appeal before us.

[370] Item No. 10 is a sum of Rs. 5,453-8 stated to be due from Rochfort as being the balance on account of sales of saltpetre through Gillanders, Arbuthnot & Co. and drawn from that firm, but not credited to the Maharajah.

The account rendered by Gillanders, Arbuthnot & Co., shows that Rs. 9,755-1 was the amount of the net proceeds of saltpetre sold on behalf of the Maharajah, and that of this sum Rs. 5,100 was paid to Sriram mahajun on the 9th May 1878. It is admitted by the plaintiff that he has received credit for this payment. The account next shows that on the 27th May, Rs. 5,000 was paid to Rochfort on account of saltpetre consignment, and a further sum of Rs. 450 was paid on his order of the same date in favour of J. J. Ross. These two sums, however, exceed the amount standing to the credit of the Maharajah, and it has not been stated by the plaintiff that he has accepted any liability to Gillanders, Arbuthnot & Co., so as to entitle him to claim from Rochfort the excess sum drawn from

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that firm. The most therefore the plaintiff could claim on this account would be the difference between the amount due on the account sale, *viz.*, Rs. 9,755-1 and Rs. 5,100, the amount for which he received credit from Rochfort, that is to say, Rs. 4,655-1.

The learned pleader for the defendant endeavours to show that the plaintiff has received credit from Rochfort for the sum entered as having been paid by Gillanders, Arbuthnot & Co., on the 27th May, namely, Rs. 5,000. But after giving full consideration to his arguments, it seems that they are formed on a mistaken view of the evidence, and that the evidence, on which he relies, relates to the payment of Rs. 5,100, and not to the subsequent payment of Rs. 5,000. The mahajun's books as well as the evidence of the mahajun's servant seem to us to be conclusive on this point. The remark made by Mr. Gibbon in the memorandum of account sent to Rochfort with his letter of the 23rd July 1879, as against this particular claim, does not bear the construction contended for by the learned pleader. It seems that Rochfort obtained credit with Sriram for Rs. 5,000, and in exchange gave him a draft of Gillanders, Arbuthnot for Rs. 5,100. The sum of Rs. 5,000, therefore referred to by Mr. Gibbon as entered " by G. A. & Co. as paid to you " (that is to say **[371]** Rochfort), " but as Sriram and Co. say they have received it, it is not entered against you"—does not refer to the payment made by Messrs. Gillanders, Arbuthnot and Co. on the 27th July, but to the payment of Rs. 5,100 made under the circumstances above stated to Sriram on Rochfort's draft. We are accordingly of opinion that Rochfort's estate must be held liable for the sum of Rs. 4,655-1 being the balance due on account of Gillanders, Arbuthnot and Co. and not accounted for by Rochfort. We think that this claim does come specifically within the description of moneys relating to the zemindari, of which the sale of saltpetre their produce undoubtedly forms a part. It is therefore not barred and must be allowed.

Items Nos. 11 and 12 are not pressed before us on appeal.

[Item No. 13 was disallowed on grounds not material to this report.]

Item No. 14 is a sum of Rs. 18,702-12. It is stated that the Maharajah borrowed Rs. 1,50,000 from Madho Das ; that of this sum Rochfort, on the 15th Assar (14th July), drew Rs. 500, on the 4th Bhador Rs. 15,000, on the same date Rs. 500, and on the 13th Bhador Rs. 5,500, of which last sum Rs. 1,500 was paid to Dalumul Wabi, Rs. 566-4 to Sheo Gobind Singh, and Rs. 231 to Jagan Pershad, leaving a balance of Rs. 3,202-12 as actually paid to Rochfort through his messenger Somnath, and a further sum of Rs. 2,500 similarly paid to Rochfort on the 14th Bhador Sudi. These amount to Rs. 21,702-12, out of which only two sums, Rs. 500 and Rs. 2,500, that is, Rs. 3,000, have been credited by Rochfort, leaving a balance unadjusted of Rs. 18,702-12. The sums claimed, therefore, appear to be items Nos. 1, 2 and 4 of the above account.

At the time that these transactions took place, Rochfort obtained his employer's consent to his resignation, and was in correspondence with the Maharajah regarding the submission and settlement of accounts and his discharge. On the 14th May 1878, the Maharajah of Bettiah directed him to submit the *maskabar* and *satlamam* papers with a view to a settlement of account. On this it would seem that Rochfort called upon his subordinates to send in the papers forthwith in order that they might be submitted to the Maharajah. What followed is not very clear.

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[372] But it would seem from subsequent correspondence that Rochfort was very anxious to get relieved from his duties, while, on the other hand, the Maharajah declined to release him until he had come to a final settlement of his accounts. On the 23rd August the Maharajah wrote that "the manager has written to me several times, and also told me verbally that the period of his *ikrarnama* has expired, that he should get his salary which is due, and that he should get his discharge. Accordingly the prayer of the manager is granted in this way, that he should explain the *jumma kharuch* account in detail, &c., and that after seeing the papers and proceedings and taking accounts, his salary should be paid to him ; and that until the examination of papers and proceedings, no order could be passed.

The evidence shows that at this time the Maharajah was heavily pressed by his creditors, that his affairs were in great confusion and required immediate attention. We learn from Rochfort's reply to the Maharajah's *robakari* of the 23rd August that he wrote on the following day that he had submitted all his papers, that he was prepared to furnish any explanation regarding any unintelligible item, and that he insisted upon getting his discharge on an early date. He further states: "As I think it my first duty to give explanation of any matter which may be required of me, I do not intend to go to Chupra and Benares, nor am I bound to go there." He further states that he gives this information to the Maharajah that he may send some person whom he likes to look after his affairs at Chupra and Benares.

The *robakari* of the Maharajah of the same date shows that he at once acceded to all Rochfort's demands, admitted that Rochfort had submitted all his accounts, and at the same time agreed to pay his salary, travelling allowance and the fees of the manager in cases on the same terms as are contained in the *ikrarnama* with reference to acts done under it, adding, "it is necessary for the manager to go to Chupra and Benares to look after cases."

The evidence and the account show that Rochfort acted in accordance with these conditions, and proceeded to Chupra and Benares on behalf of the Maharajah, and, so far as we can judge from the evidence, with full instructions to act on his behalf in [373] such manner as might appear best calculated to afford immediate relief.

It is necessary to bear all these facts in mind in considering the claims made in item No. 14.

The first payment of Rs. 500 is proved to have been made to Rochfort himself. It nowhere appears in his account, which, although it shows a credit for a sum of Rs. 500, also shows that the amount was received by Rochfort during June, that is to say, before this sum was drawn by him from the mahajun, Madho Das. This amount has not been accounted for, and therefore Rochfort would be held liable, if, as will presently be shown, the claim were not barred by limitation.

The next sum of Rs. 15,000 is stated by the mahajun to have been paid to "you," that is, to the Maharajah, on a *chitti* drawn by the mahajun upon Shah Koer Sen and Gya Pershad in favour of Rochfort. The money was duly paid to Rochfort, and by him paid into the Bank of Bengal at Benares.

The learned pleader for the defendant contends that, inasmuch as Rochfort's account filed by the plaintiff shows that the money was paid by a *robakari*, that is to say, under a written order of the Maharajah, which is corroborated by the terms of the entry in the mahajun's

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books, and as Rochfort's services under the written agreement had terminated by the acceptance of his resignation, it cannot be held that he acted under that written agreement, but that rather having regard to the claim made by Rochfort on account of money due to him for salary, it may fairly be contended that the money was paid to him to satisfy these claims or not in such a manner as to render him accountable for it, and further that, as the *robakari* authorizing the mahajun to make this payment has not been produced to clear up this point, the defendant is entitled to claim that he may be absolved from all liability.

We observe that in the account book of the mahajun of this loan, the transactions with Rochfort are represented very differently from the entries of the earlier loan of Rs. 3,00,000. When this loan of Rs. 3,00,000 was contracted and disbursements were made by the mahajun on this account, Rochfort was the accredited manager of the Maharajah; whereas at a [374] subsequent period, when the loan for Rs. 1,50,000 was contracted and disbursements made on that account, Rochfort had put an end to his service under the written agreement, and was acting under a re-engagement apparently on the same terms as previously, but on a verbal agreement which the necessities of the Maharajah's embarrassed position and his confidence in Rochfort's ability to estimate him induced him to offer on Rochfort's own terms.

This state of affairs seems to us to afford some explanation for the difference in the entries in the account. In the earlier transactions payments were made to Rochfort on his own authority, whereas all the later payments on the second loan were on express authority conveyed by *robakari*.

The claims made under item 14 do not depend on the written agreement, but on a verbal agreement, and therefore the ordinary law of limitation is applicable. This suit has not been brought within three years from the receipt of these moneys, or within three years from the final termination of Rochfort's employment by the Maharajah, that is, from December 1878, when Rochfort left for England, and therefore this claim is barred.

Item No. 15, p. 167 (Paper-book), relates to a charge of Rs. 5,000 on account of "fees of mahajuns and others," and amlas and other persons being given according to permission. No detail is given of this account, but we find (p. 318, Paper-book) that the Maharajah by a *robakari*, dated 12th July 1878, authorized the payment of this sum for the purposes stated. Under such circumstances, it is impossible to hold that Rochfort is liable for this amount. We should be disposed to think that the obvious purpose for which the money was to be expended would preclude the idea that the rendering of an account of their application was contemplated, and as the object of Rochfort's mission was accomplished, it might reasonably be inferred that those moneys were expended for the assigned purpose. But in any case the claim falls within the three years' limit and is barred.

Item No. 16 relates to Rs. 800 entered in Rochfort's accounts for the purchase of knives and forks for table, &c., to provide for the visit of the Lieutenant-Governor. This is a matter unconnected with the duties undertaken by the [375] written agreement, and as more than three years have passed between the furnishing of this account and the institution of this suit the claim is barred.

[Items Nos. 17, 18, and 19 were disallowed on grounds not material to this report.]

The result, therefore, is that in addition to the sum allowed by the lower Court the plaintiff will receive a decree for item No. 10, *viz.*, Rs. 4,655, with interest at 12 per cent. calculated from the date on which this sum was received by Rochfort up to the date of this order, and thereafter at 6 per cent. to the date of realization. Under the special terms of the Administrator-General's Act, plaintiff will be entitled to no costs from Rochfort's estate (1) but will be liable to pay costs calculated on the amount disallowed.

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P. O'K. *Decree varied.*

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APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

RANJIT SINGH (*Minor under the Court of Wards, by his guardian Nobin Krishna Banerjee, Manager of his estate*) *v.* JAGANNATH PROSAD GUPTA (*One of the Objectors*).

GANGADHUR DASS RAE AND ANOTHER (*Objectors*) *v.* JAGANNATH PROSAD GUPTA (*Petitioner.*)* [11th September, 1885.]

Probate and Administration Act (*V of* 1881), *ss.* 18 *to* 23, 37, 44, 45, 46, 83, *and* 86—*Debutter property, Administration in respect of—Idol—"Beneficiary"—Trustee, with power of appointment—Administration, Grant of letters of, to idols property where probate has been previously granted of will dedicating the property.*

A testatrix by her will dedicated certain immoveable property to the *sheba* of an idol, and appointed an executrix, whom she also constituted *shebait*, and to whom she gave power to appoint the next *shebait* The executrix died without having made any such appointment, and thereupon an application was made by the sister's son of the testatrix for letters of administration, with a copy of the will annexed, to be granted to him with respect to the *debutter* property.

Held, that s. 45 of the Probate and Administration Act authorised such a grant to be made, inasmuch as no *shebait* having been appointed there still remained some portion of the estate of the testatrix to be administered.

[376] *Held*, also, that the idol, being the *cestui qui trust*, was a "beneficiary" within the meaning of that term as used in s. 37 of the Act, and that as it could not undertake the management of the estate, under that section, administration might be granted to some person on its behalf.

Held, further, that the applicant, the sister's son of the testatrix, being the heir in the absence of other nearer heirs, as such was entitled to letters of administration, as the original grant in respect of the *debutter* property might have been made to him.

[R., 11 C.L.J. 2=3 Ind. Cas. 408 ; 17 C.L.J. 66 (69)=17 Ind. Cas. 155 ; D., 16 Ind. Cas. 453=16 C.W.N. 798.]

THESE were two appeals preferred against an order of the District Judge of Purneah granting to the respondent, Jagannath Prosad, letters of administration with a copy of the will, annexed, of one Ranee Annapurna.

The will was dated the 6th of July 1877, and the testatrix (Ranee Annapurna) died in January 1878. By her will she dedicated certain properties to *Deb Shiva*, constituted her daughter-in-law Sreemutty Anundmoyee *shebait*, and authorised her to appoint a *shebait* in her place.

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* Appeals from Original Decrees, Nos. 293 and 249 of 1884, against the decrees of T. M. Kirkwood, Esq., Officiating District Judge of Moorshedabad, dated the 13th and 27th of June 1884.

(1) See Act II of 1874, s. 34.

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Anundmoyee in due course took out probate of the said will in May 1878, and subsequently died in September 1883 without, as contended by the applicant Jagannath Prosad, appointing any *shebait* as enjoined by the will.

Jagannath Prosad thereupon applied for a grant of probate to be made to him, alleging that he was the adopted son of Annapurna's sister, and therefore her heir, and also alleging that he was an executor of the will according to the intent thereof; he subsequently presented a petition asking the Court, in the event of its holding him not entitled to probate, to grant him letters of administration.

The application was opposed by several persons—1*st*, the Court of Wards on behalf of one Ranjit Singh, a minor; 2*nd*, Gunga Dass and Honooman Das: 3*rd*, Lutchemee Bibi. The objections of the last-mentioned persons were disallowed by the District Judge upon the ground that she had no *locus standi*; and she did not appeal to the High Court against the order of the Judge.

The main contention of the Court of Wards on behalf of Ranjit Singh, the minor, was that the latter being the adopted son of Kirti Chandra, the grandson of Ranee Annapurna's husband's brother, was the preferential heir to the Ranee, and that they were in possession of the estate on his behalf.

[377] Gunga Dass and Honooman Dass resisted the application upon the following grounds: 1*st*, that the applicant was not executor according to the intent and purport of the will; 2*nd*, that they had been duly appointed *shebaits* by Anundmoyee under a deed of *neog-puttro* dated the 19th Choitro 1287 (31st March 1881) in accordance with the directions of the will of the Ranee; 3*rd*, that the plaintiff was not the lawfully adopted son of the Ranee' s sister; and, 4*th*, that as one of the properties mentioned in the applicant's petition, *viz*., the dwelling-house, was not property left by the Ranee but by Anundmoyee, the applicant, not being the heir of Anundmoyee, could not obtain letters of administration in respect to that property.

The District Judge found that the applicant was the legally adopted son of the Ranee's sister; that the legal heirs of the Ranee, and not of Anundmoyee, were entitled to the administration; that the Court of Wards had not proved that Ranjit Singh was the lawfully adopted son of Kirti Chandra, and that therefore he had no *locus standi*; that Gunga Dass and Honooman Dass had also no *locus standi*, they not having been appointed *shebaits* by Anundmoyee; and that the applicant, as the Ranee's sister's son, was the heir and entitled to administration. The District Judge accordingly ordered letters of administration to be granted to Jagannath Prosad.

These two appeals were now preferred against the order of the Judge —one by the Court of Wards (No. 293 of 1884), and the other by Gunga Dass and Honooman Dass (No. 249).

Baboo *Annoda Prosad Banerjee* (*Senior Government Pleader*), for Ranjit Singh, minor under the Court of Wards, the appellant in appeal No. 293.

Baboo *Girja Sunker Mozumdar*, for Gungadhur Dass and Honooman Dass, objectors and appellants in appeal No. 249.

Baboo *Sree Nath Dass* and Baboo *Lall Mohun Dass*, for Jagannath Prosad Gupta, the respondent in both appeals.

The nature of the arguments appears sufficiently from the judgment of the High Court (NORRIS and GHOSE, JJ.) which, after setting out the above facts, continued as follows :— 1885 SEP. 11.

APPEL-LATE CIVIL.

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JUDGMENT.

The learned Government Pleader, who appeared for the Court of Wards, did not, as we understood him, question in the course [378] of his argument, the conclusion of the Court below that it was not proved that the minor was the adopted son of Kirti Chandra.

As regards the appellants in the other appeal, we are clearly of opinion upon a consideration of the *neog-puttro* that they were not by that instrument appointed *shebaits* as directed by the will executed by Ranee Annapurna, and so they also have no *locus standi*, and on this ground, which is common to both appellants, we should have felt inclined to dismiss both these appeals. But considering the importance of the points raised by the learned Government Pleader, and having in view the provisions of ss. 83 and 86 of the Probate and Administration Act (V of 1881), we think it proper to deal with them.

Baboo Annoda Prosad Banerjee's main contentions were that the application of Jagannath did not properly fall within the scope of the Probate and Administration Act, and that therefore the District Judge had no jurisdiction to deal with the matter and grant letters of administration ; and the applicant's proper course was to bring a regular suit to establish his right, and for the appointment of a *shebait*.

These contentions were not raised in the Court below, but we allowed them to be argued at the bar, as they involved important questions deserving careful consideration.

As already observed, Ranee Annapurna by her will dedicated certain immoveable properties to the *sheba* of certain idols, constituting Anundmoyee as *shebait*, and empowering her to appoint the next *shebait*. The will also by implication appointed Anundmoyee an executor, and as such executor she took out probate. During her lifetime, she fully represented the estate, both as a trustee for the idols, and also as an executor under the will ; but she died without appointing in her place a *shebait* who could administer the estate in accordance with the directions of the will.

Now, looking at the scope and policy of the Probate Act, it is apparent that it was the intention of the Legislature that an estate should not be left unrepresented ; and to this end provisions are made for the grant of a probate and letters of administration in a variety of cases.

In the present case, there being an endowment created by the [379] will in favour of the idol, the trust is of a perpetual character, and therefore the necessity of administration of the endowed property did not and could not cease with the death of the *shebait* Anundmoyee. So long as an administrator is not appointed, the estate would be wholly unrepresented and the idol would run the risk of its *sheba* being not properly performed, and its properties being wasted or mismanaged.

Bearing these considerations in view, let us now consider whether the Probate Act has provided for an administration being granted in a case like the present. Section 45 of the Act provides : "If the executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate."

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In the present case what has happened is, that the executor appointed by the will has died; and the estate of the testator, for reasons already explained, has yet to be administered. In this view it would seem that administration might well be applied for and granted under the Act. We may also refer to s. 37 of the Act as bearing upon this matter.

That section runs as follows :—

"When a person dies, leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interests on his own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his behalf."

Upon the death of Ranee Annapurna, the properties mentioned in the will became the idol's, and Anundmoyee became the sole trustee for the idol. But she died, as already observed, without appointing another trustee, and leaving, as far as we are aware, no general representative, who, by virtue of his or her being such representative, could take charge of the idol's estate. That being so, the administration, according to the wordings of the above section, devolves upon the idol, the *cetui que trust*; but it being impossible for the idol to take the management, somebody else on its behalf may apply for administration.

It may be doubtful whether in using the word "beneficiary" in **[380]** the above section the Legislature ever contemplated the case of an idol. But regard being had to what has for a number of years been understood in our Courts to be the true position of an idol in regard to dedicated properties, we do not see why, as a *cestui que trust*, an idol may not be a "beneficiary" within the meaning of that section.

It has also been contended that it was never the intention of the Legislature that letters of administration should be granted on the death of each trustee to the next succeeding trustee, and that if that were so, the trust estate might be swallowed up by the Court fees that would have to be paid for the taking out of letters of administration. We are unable to accept these contentions; for, as already observed, if no administration is granted, the estate would be wholly unrepresented until the decision of a regular suit, which might take a considerable time, and in the second place the Court Fees Act, s. 19 (*c*) (Chapter III-A) provides that "if a probate or letters of administration has been granted in respect of an estate or part of an estate, and the fee chargeable under the Act has once been paid, no fee shall be chargeable when a like grant is made in respect of the same estate."

Upon these considerations, we are of opinion that the case now before us falls within the scope of the Probate Act, and the learned Judge had ample authority to deal with it.

This disposes of the other question raised by the learned Government Pleader that the applicant ought to have recourse to a regular suit for the declaration of his right, for, if the Judge had authority to deal with the case under the Probate Act, he would equally have the power to deal with such questions as might arise as to the relative rights of the several claimants before him for administration, either as heirs of Ranee Annapurna or otherwise.

The next question that arises is, whether the applicant is entitled to the administration. With reference to this question, we desire to say, in the first place, that upon the death of Anundmoyee without appointing a

Shebait or manager, the said office reverted to the heir of Ranee Annapurna, who made the endowment [see *Jai Bansi Kunwar* v. *Chatter Dhari Sing* (1)].

[381] The Probate Act, after laying down in s. 45 that in cases where the whole of the estate has not been administered by the executor, a new representative may be appointed for administration, provides in s. 46 that in such cases the Court, in granting letters of administration, shall be guided by the same rules as apply to original grants, and shall grant administration to such persons only to whom the original grants might have been made.

Now, it has been found by the learned District Judge that the applicant is the adopted son of the Ranee Annapurna's sister ; and against this finding no question has been raised before us in appeal. The only contention in connection with this matter was that the Judge was wrong to suppose that in the Nosipoor family, the Asura form of marriage prevailed, and to presume that the Ranee was married according to that form, and to hold that *therefore* the applicant being the Ranee's sister's son was the preferential heir to her *stridhan.* We are of opinion that it is not material to consider whether the Ranee was married in the Asura form or not ; because, whether she was married in that form or in any of the approved forms of marriage, the applicant as sister's son would seem to be an heir according to the Hindu law, and be entitled to inherit the Ranee's *stridhan* property, in default of any other preferential heirs ; and in this case it does not appear that there are any such heirs. The Ranee was governed by the Benares school of law ; and although the Mitakshara is silent as to the class of heirs on whom the *stridhan* of a woman married according to one of the approved forms devolves in default of issue, her husband, and his kinsmen, yet we have authority for saying that the sister's son, as one of her kinsmen on the father's side, is an heir. The Vira Mitrodaya, which as the Privy Council has said in the two cases of *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (2), and *Girdhari Lall Ray* v. *The Bengal Government* (3), is a treatise of special authority in the Benares school, and is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares school,—distinctly **[382]** lays it down, following a text of Vrihusputty, that the woman stands in the position of a secondary mother to her sister's son, and that the latter is an heir to her. That seems also to be the case in the other schools of law (see Vira Mitrodaya, p. 243 ; Dayabhaga, chapter IV, s. 3, verses 35 to 37 ; Smriti Chandrika, chapter IX, s. 3, verse 36 ; Vyavahara Mayukha, chapter IV, s. 10, para. 30 ; West and Buhler, volume I, pp. 242-245 ; and Vivada Ratnakara, chapter on the Property of a Childless Woman). It is not necessary in this case to examine what may be the true position of the sister's son as an heir of a woman ; for, as already observed, the persons who contested the heirship of the applicant have been found to have no *locus standi* at all, and it does not appear that there are any heirs of the Ranee, save and except the applicant.

If then the applicant is heir of the Ranee, he is entitled to hold the office of a *shebait* of the idol, and it seems to us clear, looking at the language of s. 46, read in connection with sections 18 to 23, that he is

(1) 5 B. L. R. 181.
(2) 12 M. I. A. 397=1 B. L. R. P. C. 1.
(3) 12 M. I. A. 448=1 B. L. R. P. C. 44.

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entitled to administration ; for, as heir, the original grant in respect to the *debutter* property might have been made to him.

We are also of opinion that if the case falls within s. 37 of the Act referred to above, the applicant is a fit and proper person to obtain letters of administration ; for, as already observed, the office of manager has reverted to him, as heir of Ranee Annapurna who made the endowment, and also because he is one of those persons who was authorized in the will of the Ranee to supervise the acts and the conduct of the *shebait* appointed by her.

There is only one other matter which we need notice, *viz.*, as to whether the dwelling-house mentioned in the will of the Ranee was by that instrument dedicated to the idol. The Judge has held that it was given to Anundmoyee as a life estate. We are not prepared to accept that view ; we are rather inclined to hold, reading the document as a whole, and bearing in mind that the house is the same where the idol was lodged, that it could not have been the intention of the testator to give it to Anundmoyee, even if only for life, in any other capacity than that of a *shebait* of the idol. But it is perhaps immaterial to express any decided opinion on this point, because, even if it was bequeathed **[383]** to Anundmoyee for her life, it reverted on her death to the legal heirs of the testator, and therefore the applicant being an heir of the testator under the Hindu law, and there being nobody else who is shown to have a better claim, the applicant is entitled to administration.

Upon all these considerations, we are of opinion that the order passed by the District Judge is right, and ought to be affirmed with costs.

H. T. H. *Appeals dismissed.*

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12 C. 383.

CIVIL REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter and Mr. Justice Cunningham.

IN RE THE MENGLAS TEA ESTATE.* [19th June, 1885.]

Stamp Act I of 1879—Arts. 21, 60, cl. (b)—Transfer of lease—Transfer of a share of a partnership.

Where a transaction is in substance a sale of a share in a partnership, and the transfer of a share in a lease only forms part of the subject-matter of the sale, as being a part of the partnership assets, the transaction should be regarded not as the transfer of a lease, but as the sale of a share in a partnership, and the duty payable in respect thereof should be that falling under sch. I, art. 21 of Act I of 1879.

[R., 23 C. 283 (289) ; 3 C. L. J. 52 (57) ; D., 17 B. 235 (251).]

THIS was a reference under s. 46 of the Stamp Act.

It apeared that one G. W. Hewitt had entered into partnership with five other persons for the purpose of working a certain Tea Estate, called the "Menglas Tea Garden," and that under the deed of partnership, dated the 1st January 1885, it was open to any one of the partners to sell his share in the estate. The share of G. W. Hewitt in the above-mentioned estate was a 3-16th share ; the land composing the Menglas

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*Civil Reference No. 835 of 1885, made by C. A. Samuells, Esq., Officiating Secretary to the Board of Revenue, L. P., dated the 4th of May 1885.

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Tea Estate was leased to the members of the partnership by Government under three separate leases, each lease being for a term of six years, with option of renewal on certain terms. G. W. Hewitt had, in accordance with certain powers given under this deed of partnership, entered into an arrangement with one A. T. Paterson for the sale [384] to him, for a sum of Rs. 10,000, of a one-sixteenth share in the estate, and for this purpose had executed a conveyance to which his partners were also parties, the contents of which (so far as are necessary for this report) were as follows:—

"And whereas the vendor has already delivered over to, and placed the purchaser in possession of, the said one-sixteenth part or share of, and in all the machinery, plant, implements, carts, bullocks, horses, boats, elephants, and other live and dead stock, whatsoever in or upon the said tea-garden or estate or belonging or appurtenant thereto, and also of and in all tea manufactured and in process of manufacture, and tea seed; and whereas the like one-sixteenth part or share of and in all unadjusted profits, balances, and debts, and sums of money (if any) which have accrued, or become due and owing to the owners for the time being of the estate in respect of the premises since 1st January 1885, and the rents, issues and profits thereof, have already been passed to the purchaser's credit. *Now this Indenture Witnesseth* that, in pursuance of the said agreement, and in consideration of the sum of Rs. 10,000 before the execution hereof paid by the purchaser to the vendor, (the receipt whereof he doth hereby acknowledge, and therefore release the purchaser, his heirs, executors, administrators and assigns for ever), he, the vendor, doth hereby assign and transfer unto the purchaser, his executors, administrators, and assigns, all that one equal and undivided one-sixteenth part or share of and in all those three several pieces or parcels of land in the schedule hereto described, &c., &c., subject to the payment of the rents and the performance and observance of the covenants and conditions in and by the hereinbefore recited leases reserved and contained, and under which the same are held from Government, together with the like part or share of and in the tea-garden formed thereon, and known as the Menglas Tea Estate, &c., &c., together with the like part or share of and in all and every the lands and landed property in any way attached to or considered to be part or parcel thereof, and also of and in all bungalows, tea-houses, godown, out-offices, and other erections and buildings in or upon or anywise appertaining to the said lands, tea estate, hereditaments and premises, and also of and in all tea trees and seedlings, planted and growing thereon, with full power [385] and authority to the purchaser, his heirs, executors, administrators and assigns, &c., &c., to call in, sue for, recover, and receive the said balances, debts, or sums of money which have already been passed to the purchaser's credit, and to give discharges for the same, &c., &c., and of and in all and all manner of rights, including the benefit of contracts with coolies and others, and application for land and other advantages, easements, privileges, profits and appurtenances whatsoever to the said lands, tea estate, hereditaments, and premises or any part thereof, and all the estate, right, title, and interest, property, claim and demand whatsoever of the vendor of, into, out of, or upon the same premises, to have and to hold the said one-sixteenth part or share of and in the said lands, tea estate, hereditaments, and other premises unto the purchaser, his executors, administrators, and assigns for the terms at the yearly rents and under and subject to the conditions under which the

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same, for the time being, be held from Government, and on the part of the lessees to be paid, performed and observed. *And this Indenture doth further witness* that he the purchaser doth, shall and will hereafter become, continue, and be a partner with the other persons forming the partnership for the purpose of working, carrying on, and extending the said tea estate under the deed of partnership of the first January 1882, &c., &c."

The schedule in which the properties purporting to pass under the conveyance were set out, contained mention only of three distinct parcels of land. This deed was stamped under art. 60 (*b*) of the Stamp Act of 1879, as a transfer of interests secured by three leases, and bore, therefore, a stamp of Rs. 15.

The Collector of Stamp Revenue was of opinion that the conveyance was insufficiently stamped ; and that the instrument was intended by the parties as a conveyance on sale to the purchaser of the one-sixteenth share of the property *as a whole*, and as a receipt and acquittance for the entire purchase money ; and that, therefore, the instrument was liable to a stamp duty *ad valorem* on the entire consideration, and not with a stamp of Rs. 15 as a transfer of interests secured by three leases.

The Board of Revenue was of opinion that the very utmost the deed, taken as one of transfer, could cover, would be the land and the legal incidents thereof, which would include the easements **[386]** attached to the land and all things attached to the earth inclusive of the buildings ; and that from the recitals in the deed the terms went beyond those of a mere transfer of a lease ; the Board, therefore, referred the case to the High Court for an opinion on the question of the proper stamp duty chargeable on the instrument.

Mr. *Pugh*, for the Menglas Tea Company.

The Advocate-General (Mr. *Paul*), for the Board of Revenue.

The opinion of the Court was as follows :—

OPINION.

GARTH, C.J. (MITTER and CUNNINGHAM, JJ., concurring).—In this and in all other similar cases, which are referred to us by the Board of Revenue, as to the proper amount of stamp duty chargeable upon a deed of conveyance, I consider that we are bound to look at the substance of the transaction as disclosed by the whole of the deed, and not merely to the language of the operative part or parts of the instrument.

In that view it seems to me very clear that the subject-matter of the sale in question to Mr. Paterson was not a mere transfer of the leases of the 22nd of July 1884, but the sale of a one-sixteenth share of the partnership, called the " Menglas Tea Association," including all of the property and effects belonging to that partnership.

It is recited in the deed that the vendor, who is one of the members of the Association, had contracted with the purchaser for the sale to him of a one-sixteenth part or share in the Association for the sum of Rs. 10,000.

It has been argued by Mr. *Pugh* on behalf of the purchaser, that although this may have been the general nature of the arrangement ; and although the share in the partnership itself as well as of the personality, debts, and other assets of the partnership, may have formed part of the consideration for the Rs. 10,000, the only property which the deed itself professes to convey is the one-sixteenth share of the vendor's interest in the grants from the Deputy Commissioner.

There is no doubt that the deed has been framed with a view to give colour to that argument. It is recited amongst other [387] things that the one-sixteenth share of the personalty, including machinery, plant, bullocks, and other live and dead stock, &c., had been delivered over to the purchaser before the execution of the deed.

But we cannot shut our eyes to the fact that *any actual delivery of a one-sixteenth undivided share of and in the live or dead stock*, or in fact of any other part of the subject-matter of the sale, was practically impossible; and if after the execution of such a deed a question was raised in any Court of law as to whether the one-sixteenth share of the personalty was conveyed by the deed, or independently of it, I cannot doubt that the proper answer would be that the one-sixteenth share in the whole property was intended to pass, and did pass, by the deed itself.

But then it was further argued by Mr. *Pugh* that, even assuming that a one-sixteenth share of the entire property of the partnership was intended to pass by the deed, that property would be divisible for purposes of stamp duty; and that, as the one-sixteenth share of the grants of the land constituted a very considerable part of the partnership assets, the transfer of the vendor's share in each of those grants would be chargeable with Rs. 5, and that an *ad valorem* duty would be chargeable upon the remainder of the property only.

No doubt this is a plausible argument, and it would seem to be in accordance with an unreported judgment of this Court in a reference from the Board of Revenue, *in re* a deed of assignment of the Mohargunj Tea Estate, decided on the 12th of September 1884.

But here again I think we must be guided by what we find to be the true nature of the transaction.

If the transaction is in substance "*the transfer of a lease*" properly so called, but accompanied by a conveyance of some other property, which has been enjoyed with the lease, or is incidental to it, then I think it would be right to treat the instrument (as we did in the Mohargunj case) as coming under art. 60 of the Stamp Act, but to impose also an *ad valorem* duty upon the conveyance of the other property.

[388] On the other hand, if the transaction is in substance a sale of a share in a partnership, and the transfer of a share in the lease only forms part of the subject-matter of the sale, as being a part of the partnership assets, then I think the transaction should be regarded, not as "*the transfer of a lease*" but "*as the sale of a share in a partnership.*"

Suppose that a firm of tradesmen were to sell a share of their business to a new partner, and that in the deed by which that share was conveyed, there was included a share of the lease of the shop, in which the business of the firm was carried on, could such a deed be properly called "the transfer of a lease" within the meaning of art. 60? I think not. I think that in construing the Stamp Acts we are bound, as we are on other occasions, to call things by their right names; and that in such a case no reasonable man in common parlance would call the transaction a "*transfer of an interest in the lease.*" The transfer of the interest in the lease would only be incidental to the sale of the share in the partnership.

I think that the same principle applies here. The subject-matter of the sale for which the Rs. 10,000 were payable was the one-sixteenth share in the Association; and although, having regard to the objects of the concern, the interest in the land formed undoubtedly a very important element in the sale, I think the transaction was a "*conveyance,*" within

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the meaning of the Stamp Act, and not "*the transfer of a lease*" within the meaning of art. 60.

The proper stamp, therefore, in my opinion, is an *ad valorem* duty upon the Rs. 10,000.

I should add that the case entitled a "reference under the Stamp Act, s. 46," decided by the Madras High Court and reported in I. L. R., 5 Mad., p. 15, does not seem applicable to this case. The transfers there, so far as I can gather from the report and also from the record of the proceedings which has been furnished to us by Mr. *Pugh*, embraced only the subject-matter of the original leases, and not any additional property.

T. A. P.

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[389] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

MILLER, OFFICIAL ASSIGNEE (*Plaintiff*) *v.* RUNGA NATH MOULICK AND OTHERS (*Defendants*).* [1st July, 1885.]

Hindu Law—Joint Family—Manager, Power of, to mortgage joint-family property—Limitation—Personal liability of mortgagor—Mortgage—Limitation Act XV of 1877, *sch. II, art.* 132.

An alienation made by a managing member of a joint Hindu family is not binding upon his adult co-sharers unless it is shown that it was made with their consent, either express or implied. In cases of implied consent, it is not necessary to prove its existence with reference to a particular instance of alienation, but a general consent may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family-estate by the other members of the family; and the latter in entrusting the management of the family affairs to the manager must be presumed to have delegated to him the power of pledging the family credit or estate when it is impossible or extremely inconvenient for the purpose of an efficient management of the estate to consult them and obtain their consent before pledging such credit or estate.

By a mortgage bond, dated the 28th Magh 1281, B. S. (9th February 1875), it was provided that if the mortgagors should fail to pay the money secured thereby according to the terms thereof, the mortgagees should immediately institute a suit and realize the amount due by sale of mortgaged property, and that if the proceeds of such sale should not be sufficient to liquidate the debt, the mortgagees should realize the balance from the persons and other properties of the mortgagors. It was further agreed that the principal and interest secured by the bond should be repaid in the month of Magh 1282 (January-February 1876).

In a suit instituted on the 9th October 1882 upon the mortgage to recover the amount due by the sale of the mortgaged property and the balance, if any, from the persons of the mortgagors—

Held, that the bond in question provided for two remedies in one suit, and did not contemplate a second suit being instituted to recover the balance from the persons of the mortgagors in the event of the first remedy against the mortgaged property proving insufficient to pay the debt in full, and consequently that the cause of action against the persons of the mortgagors accrued upon the date on which the mortgage money became due, and as the suit was instituted more than six years after that date, the plaintiff's [390] claim was barred by limitation, so far as the personal liability of the mortgagors was concerned.

Held, also, that art. 132, sch. II of the Limitation Act (XV of 1877), only refers to suits to enforce payment of money charged upon immoveable property *by the sale of such property*.

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* Appeal from Original Decree No. 102 of 1884, against the decree of Baboo Ram Gopal Chaki, Rai Bahadur, Officiating Subordinate Judge of Moorshedabad, dated the 5th February 1884.

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[F., 10 M. 100 (101); R., 19 M. 100 (103); 24 C. 281 (282); 5 C.W.N. 356 (359); 26 M. 686 (714) (F.B.); 7 O.C. 108 (111); 14 B. 377 (380); 23 C. 397 (402); 20 A. 512 (515); 15 C.P.L.R. 29 (31); 6 O.C. 30 (32); 3 C.L.J. 52 (57); 4 C.L.J. 141 (146)=33 C. 867; 4 C. L. J. 246; 4 C.L.J. 510 (517); 11 B. 605 (607); 22 M. 166 (169); 4 Bom.L.R. 587 (596); 9 C.W.N. 879 (881); D., 27 C. 180 (183); 30 C. 998 (1000).]

THIS was a suit instituted on the 9th October 1882 by the Official Assignee of the Court for the relief of insolvent debtors at Calcutta as assignee of the estate and effects of one Kissen Chand Gullicha who, by an order of the said Court, dated the 22nd March 1880, was adjudged to have committed an act of insolvency, and whose estate and effects were, by an order of the same date, vested in the plaintiff as such assignee.

The suit was brought on a mortgage bond, dated the 28th Magh 1281 B.S. (9th February 1875) executed by Indramani, the widow of one Gopal Lall Moulick and Runga Nath Moulick, Sreenath Moulick and Huronath Moulick, sons of Gopee Mohun Moulick and grandsons of the said Gopal Lall Moulick in favour of the said Kissen Chand Gullicha.

The following genealogical table will show the various members of the family of Gopal Lall Moulick :—

KRISNANUND MOULICK.

Gobind Moulick. — Gopal Lal Moulick (died in the month of Pous 1284—December 1867). Widow, Indramani Chowdhrain. — Madhub Churn Moulick (deceased). (Widow, Hurro Sundary.)

Sons of Gobind Moulick: Brojendro (died in lifetime of his father). — Gocool (died). (Widow, Brojo Sundary).

Sons of Gopal Lal Moulick: Gopee Mohun (died in lifetime of his father leaving a widow, Anangamanjari Chowdhrain, deft.) — Benode Mohun (died in lifetime of his father leaving a widow, now alive). — Anund Mohun. — Peari Mohun (died in lifetime of his father leaving widow, still alive). — Koonji Mohun died after his father, but before his mother.

Son of Anund Mohun: Haran Krishna taken in adoption by Gokool's widow, Brojo Sundary, dead).

Sons of Gopee Mohun: Rungo Nath (deft.) — Sreenath (deft.) — Doydra Nath (deft.) — Huri Nath (deft.)

The bond in question contained the following statements: "We Indramani Chowdhrain, widow of the late Gopal Lall Moulick, Runga Nath Moulick, Sreenath Moulick and Hurri Nath Moulick, sons of the late Gopee Mohun Moulick of Durlabpore, division Karimpore, zillah Nuddea, execute this bond to the effect that the zemindari mentioned below being left by my (Indramani's) husband, and we Runga Nath, Sreenath, and Hurri Nath being [391] future heirs to the said property, we all conjointly executed a *karbarnama* in your favour on the 6th Bhadra 1279, to the effect that any one of us should take a loan of up to Rs. 13,000 gradually by separate *hatchittas* from the tevil of your sudder *kuti* (principal firm) at Azimgunge in order to pay off the debts contracted by us to the firm of Komdari Mal Dooli Chand, agreeing to pay an interest at the rate of $1\frac{1}{2}$ per cent. per mensem on mortgage of the same zamindari. According to the said *karbarnama*, we borrowed Rs. 5,500, I, Runga Nath

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Moulick, having entered it in the *hatchitta* on the 10th Bhadra of that year. All that money having been expended in carrying on law suits, and in other matters, and thinking that the remaining portion of the money mentioned in the *karbarnama* would not suffice to pay off entirely the debt to the firm of the said Baboo, the balance of the money was not taken, and therefore we have not as yet been able to pay off that. Now a suit having been instituted for the said debt, a decree was obtained against us, and in execution of the decree in No. 243 of 1874, it has been asked to attach and sell the said zemindaries, and the ensuing 19th February has been fixed as the date for sale. Accordingly we asked you for a loan again in order to save the estate, notwithstanding the above debt due to you, and you consented to give a loan again if we would execute a bond for the money now taken, together with that already due to you, and we agreed to it. The money taken by me Runga Nath by *hutchitta*, according to the purport of the *karbarnama* is found on calculation to amount to Rs. 8,325 principal and interest, up to date due to you by us. The said sum of Rs. 8,325 and Rs. 11,675 taken to-day as per schedule below through your agent, Baboo Meher Chand Mahalat, in order to satisfy the said decree and defray our expenses, by me Indramani, through my aforesaid three grandsons, and by us, Runga Nath, Sreenath, and Hurri Nath, in all Rs. 20,000, being considered as principal, and admitted as due by us, we execute this bond and stipulate that the said sum of Rs. 20,000 shall carry interest at the rate of 1½ per cent. per mensem, up to date of realization. As to payment, we shall pay (worm eaten) the whole amount, principal and interest in next Magh 1282, and take back this bond.

[392] "Besides, if we fail to pay the money according to the terms aforesaid, or, if the property thus mortgaged be put up to sale within the stipulated period for any liability, arrears of Government revenue, &c., you shall immediately institute a suit, and realize the principal amount with interest up to date of realization from the mortgaged property, or the value thereof, and if that falls short, from our person, and our other properties, real and personal, and we will not be able to advance any objection on the ground of the term not having expired, and such objection, if advanced, shall be rejected."

As security for the due payment of the loan, taken under the bond, the following properties were hypothecated :—

"1. Five annas share of mouzah Shibpore, including Modafat with all its appurtenances, Mehal No. 770, recorded in the Rent Roll of the Collectorate of zillah Moorshedabad, sub-registry Dhanian Samshergunge, bearing a sudder *jumma* of Rs. 181-11-9 recorded in the names of our predecessor, the late Gopal Lall Moulick and others.

2. Five annas share of Mehal No. 125 recorded in the Rent Roll of the Collectorate of zillah Maldah, comprising mouzha Raipore, Kamchur, Putra, Alumpore Sukdebpore, and Nijgram Ghottapara, in taruf Notibpore, sub-registry Maldah, dihi Kaliachuk, bearing a sudder *jumma* of Rupees 1,036-10-8, recorded in the names of our predecessor, the late Gopal Lall Moulick and others.

3. Five annas share of Mehal No. 93 in the Rent Roll of the Collectorate of zillah Rajshaye, comprising mouzah Tikhri, including Modafut sub-registry, zillah Rajshaye, division Boulia, bearing a sudder *jumma* of Rs. 79, recorded in the names of our predecessor, the late Hara Sundary Dasi and others."

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The principal relief asked for in the plaint was—

(1) That the defendants might be ordered to pay to the plaintiff the money due under the bond, and that in default the mortgaged properties might be sold by and under the direction of the Court, and the proceeds of the sale applied towards payment of the amount due to the plaintiff.

(2) That if the proceeds of sale should be insufficient to pay the amount due to the plaintiff, the defendants might be directed to pay to the plaintiff the amount of deficiency.

[393] The original defendants to the suit were the executants of the bond, but it appearing that Indramani had died before its institution, the plaint was amended by adding the names of her legal personal representatives, *viz.*, Sreenath Moulick, Runga Nath Moulick, Hurri Nath Moulick, and Doydra Nath Moulick. It was alleged in the plaint that the cause of action accrued to the plaintiff on the last day of Magh 1282, the date fixed in the bond for the repayment of the debt.

The defendants in their written statement admitted the execution of the bond. They pleaded that the plaintiff's claim to make them personally liable for the debt, was barred by limitation. Denying that they were the legal representatives of Indramani, they further alleged that the properties under mortgage belonged to their mother Anangamanjari Dasi, who was in possession of them as the owner thereof, under the terms of two wills, dated the 9th Magh 1269 and 15th Assar 1275, executed by their grandfather Gopal Lall Moulick. As regards one of the properties mortgaged, *viz.*, a five annas share of Tikhri, they advanced a special plea that the right to the said property was acquired by their mother by adverse possession of upwards of twelve years. They, therefore, contended that the mortgaged properties were not liable for the debt contracted under the bond, dated the 28th Magh 1281.

On a preliminary issue, *viz.*, whether or not Anangamanjari Dasi was a necessary party, being argued, the Subordinate Judge decided it in the affirmative. In accordance with this decision Anangamanjari was added as a defendant, though the plaintiff protested against the order.

Anangamanjari alleged in her written statement (1) that she knew nothing of the *karbarnama* nor of the bond of the 28th Magh 1281 ; (2) that the late Gopal Lall Moulick, under the wills mentioned above, gave his wife Indramani a title only to hold his estate for life ; and that she had no right to alienate in any way or encumber it ; (3) that she was in possession of the properties mortgaged, under an absolute right, created in her favour by the aforesaid will ; (4) that in the five annas share of one of the mouzahs mortgaged, *viz.*, Tikhri, the executants of the bond had no sort of right, and that she had acquired a right thereto **[394]** by adverse possession for upwards of twelve years ; and (5) that Indramani had no necessity whatever for contracting the debt alleged by the plaintiff to be secured by the mortgage bond.

The only provisions of the two wills referred to above which it is necessary to state for the purpose of this report were, that Indramani was appointed executrix and manager and given a life-interest in a portion of the estate, and that Anund Mohun was disinherited for reasons stated therein.

The lower Court awarded a partial decree in favour of the plaintiff directing that the money due to him might be realized by the sale of one of the mortgaged properties, *viz.*, mouzah Tikhri. That Court was

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of opinion that, as regarded the personal liability of the surviving obligors of the bond, the plaintiff's claim was barred by limitation; that according to the terms of the two wills of Gopal Lall Moulick, which upon the evidence it found to be genuine, the first two mortgaged properties belonged to the defendant Anangamanjari in her absolute right; that the third property, Mouzah Tikhri, not being covered by the will, was proved to be the property of Indramani Chowdhrain, which devolved on her death on her legal representatives, Runga Nath Moulick, Sreenath Moulick, Doydra Nath Moulick and Hurri Nath Moulick, and that it being not established that the debt due under the bond of the 28th Magh 1281 was contracted for the benefit of the estate of the testator Gopal Lall, Indramani was not competent to create a valid charge upon the first two mortgaged properties covered by the two wills of Gopal Lall. The lower Court accordingly declared that mouzah Tikhri was alone liable for the mortgage debt.

Against that decree the plaintiff now appealed to the High Court.

Mr. *W. C. Bonerjee*, Mr. *Mitter*, Mr. *Mookerjee* and Baboo *Saligram Sing*, for the appellant.

Babu *Gurudas Bannerjee* and Baboo *Kishori Lall Sirkar*, for the respondents.

JUDGMENT.

The judgment of the High Court (MITTER and NORRIS, JJ.) was delivered by

[395] MITTER, J., who (after stating the facts set out above) continued as follows :—

The learned counsel for the appellant in arguing this appeal before us has urged various objections against this decision, and all of them may be classified under the three following heads :—

(1) That the decision as to the claim regarding the personal liability of the defendants being barred by limitation is erroneous.

(2) That the executants of the bond had full power to create a valid charge upon the family property, and that the appellant is entitled to enforce it against the properties mortgaged, whether the surviving executants of the bond have any right in them or not.

(3) That the construction put upon the two wills of Gopal Lall Moulick is erroneous. That under the terms of the aforesaid wills, the surviving executants of the bond have a subsisting saleable interest in the first two mortgaged properties.

We are of opinion that the decision of the lower Court upon the question of limitation is correct. The contention of the learned counsel for the appellant that art. 132 of sch. II of the Limitation Act of 1877, refers to a claim to recover money charged upon immoveable property quite irrespective of the remedy asked for, has been set at rest by the decision of the Judicial Committee of the Privy Council in the case of *Ramdin* v. *Kalka Pershad* (1). That decision was passed with reference to the corresponding article of the Limitation Act of 1871. That article provides a period of twelve years for suits for money charged upom immoveable property. The Legislature in the present Limitation Act has used a different phraseology, *viz.*, "to enforce payment of money charged upon immoveable property." The language of the present Act, *viz.*, "to *enforce*, &c., is more in favour of the contention that the article in question refers

(1) 12 I.A. 12 = 7 A. 502.

only to suits "to enforce payment of money charged upon immoveable property" *by the sale of the said property*. This construction was put by Judicial Committee of the Privy Council upon art. 132 of the Limitation Act of 1871, the language of which did not suggest it so clearly as that of the present Limitation Act. The claim to make the defendants personally liable has [396] therefore been rightly held to be barred by limitation, the present suit having been commenced more than six years after the accrual of the cause of action.

But the learned Counsel further contended that upon a true construction of the terms of the bond, the cause of action, *viz.*, to make the defendants personally liable, has not yet accrued. We do not think that this contention is sound. The bond stipulates that "if the executants thereof fail to pay the money, according to the terms thereof, the creditor shall immediately institute a suit and realize the debt by the sale of the mortgaged property, and that if the proceeds of the sale fall short, from the person and other properties of the mortgagors". This stipulation, in our opinion, contemplates only one suit, and not two successive suits, as contended by the learned Counsel. It provides for two remedies by one suit, but the remedies are not to be simultaneously available. The remedy against the persons and other properties of the mortgagors is to be available only in the event of the first remedy against the mortgaged properties being found insufficient. We are, therefore, of opinion, that the cause of action in respect of this part of the claim accrued to the appellant before this was brought, but that it is barred by limitation.

With reference to the second head of the objections urged against the judgment of the lower Court, it would be convenient to refer first to some of the cases in which the law relating to the power of a manager of a joint Hindu family to alienate in any way or to charge an ancestral property has been discussed.

In *Prannath Das* v. *Calishunkur Ghosal* (1), it was held that a sale by the manager of a joint Hindu family, without any express authority from his adult co-parceners of a joint *taluk*, was valid and binding upon the co-parceners, the conveyance having been executed while the manager was put under confinement by the servants of the superior zemindar for a balance of revenue, there being no other available means for discharging it.

In a note by Mr. Colebrook appended to the answer of the Pundit reported at p. 343, Strange's Hindu Law, Vol. II, he says: I take the law to be that the consent of the sharers [397] express or implied, is indispensable to a valid alienation of the joint property beyond the share of the actual alienor; and that an unauthorized alienation by one of the sharers is invalid beyond the alienor's share as against the *alienee*. But consent is implied, and may be presumed in many cases, and under a variety of circumstances, especially where the management of the joint property, entrusted to the part owner who disposes of it, implies a power of disposal; or where he was the only ostensible or avowed owner; and, generally, when the acts, or even the silence of the other sharers, have given him a credit and the alienee had not notice."

"I rather consider it to be a point of evidence, what shall suffice to raise the presumption of consent, or acquiescence, than a matter on which the Hindu Law has pronounced specifically."

(1) 1 Sel. Rep. 60 = 6 I.D. (O.S.) 45.

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In *Ashutosh Day* v. *Moheshchunder Dutt* (1) it was decided that a manager of a Hindu family has power to bind the rest by a mortgage when the money is raised for family purposes and *bona fide* so applied.

In *White* v. *Bishto Chunder Bose* (2), it was ruled that an alienation made by the managing member of a joint Hindu family cannot be questioned by another member, if he stands by and sees to the application of the purchase money for the benefit of the whole family without refusing to participate in it.

In *Peddamuthulaty* v. *N. Timma Reddy* (3), Frere and Holloway, JJ., were of opinion "that in a case of an alienation by a manager of a joint Hindu family, mere laches or indirect acquiescence, short of the period prescribed by the statute of limitations on the part of the other members of the family is no bar to the enforcement of their right to question the alienation.

In *Shama Churn Chatterjee* v. *Taruknath Mookerjee* (4), Bayley and Pundit, JJ., held that a nephew who was living with and had always acted as agent of his uncle, the manager of a joint family, could not repudiate a mortgage executed by the uncle, without proof that the money so received by the uncle had not been applied by him towards the expenses of the joint family.

Following the case of *Ramlal Thakursidas* v. *Lakhmichand* **[398]** *Muniram* (5) Mr. Justice Pontifex held in *Johurra Bibee* v. *Sreegopal Misser* (6), that a manager of a Hindu family carrying on a family business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family property, and credit for the ordinary purposes of the business."

It was held in *Ram Kishore Narain Singh* v. *Anund Misser* (7), that a member of a joint Hindu family who, being aware of an alienation by the manager, allows some twelve or thirteen years to go by without making the slightest objection, must be presumed to have been a consenting party to it.

In *Gopalnarain Mozoomdar* v. *Mudomutty Guptee* (8), Couch, C. J., held that the debts of a father are by the Hindu law, a charge upon his estate in the hands of his sons, and if the family be in such a state that there must be a manager for the joint family, the manager under the Hindu law has power to sell or mortgage the ancestral property for the payment of the ancestor's debts.

In *Jugjeewan-das Keeka Shah* v. *Ramdas Brijbookun-das* (9), the Judicial Committee of the Privy Council held that a mortgage which was not executed by a member of a Hindu family of a village which was ancestral property, the mortgage being executed by the other members, under circumstances of necessity to carry on a joint family firm, is binding upon all the members of the family including the person who has not joined in the execution of it, if it is proved that he was cognizant of it afterwards.

In *Bemola Dossee* v. *Mohun Dossee* (10), Garth, C.J., and Pontifex, J., held that adult members of an undivided Hindu family governed by the law of the Dayabhaga, who have an interest in a family business carried on by the managing member of the family, and who are maintained out of the profits of such business, must, in the absence of evidence, be

(1) Fulton 389. (2) 2 Hay 567. (3) 2 M.H.C. 270.
(4) 5 W.R. 105. (5) 1.B.H.C. App. 51. (6) 1 C. 470.
(7) 21 W.R. 12. (8) 14 B.L.R. 21. (9) 2 M.I.A. 487.
(10) 5 C. 793 (802).

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taken to possess the knowledge that the business might require financing and to have consented to such financing. Where, therefore, a managing **[399]** member of such a family, in carrying on the family business, obtains an advance necessary for the purposes of the business, by pledging the joint family property, the mortgage is binding on all the members of the partnership.

The result of these cases, in our opinion, is, that an alienation made by a managing member of a joint family cannot be binding upon his adult co-sharers unless it is shewn that it is made with their consent, either express or implied. In cases of implied consent it is not necessary to prove its existence with reference to a particular instance of alienation. A general consent of this nature may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family. The latter, in entrusting the management of the family affairs in the hands of the manager, must be presumed to have delegated to the said manager the power of pledging the family credit or estate, where it is impossible or extremely inconvenient for the purpose of an efficient management of the estate to consult them, and obtain their consent before pledging such credit or estate. *Pronnath Das* v. *Calishunkur Ghosal* (1), *Ramlal Thakursidas* v. *Lakhmichand Muniram* (2), *Johurra Bibee* v. *Sreegopal Misser* (3); *Gopalnarain Mozoomdar* v. *Muddomutty Guptee* (4), *Jogjeewun-das Keeka Shah* v. *Ramdas Brijbookun-das* (5), are instances of the application of the principle enunciated above. *White* v. *Bishto Chunder Bose* (6), and *Ram Kishore Narain Singh* v. *Anund Misser* (7), are cases in which the consent of the subordinate members to a particular alienation was presumed from their acquiescence and other surrounding circumstances.

In the case before us, we are of opinion, upon the evidence adduced, that the charge upon a portion of the family property created by the bond of the 28th Magh 1281 is binding upon all the members of Gopal Lall Moulick's family who take under his wills.

[400] The answers to the interrogatories administered to the defendants in the lower Court not having been put in as evidence, by mere oversight, and we being of opinion that in the interests of justice the appellant should be allowed to rectify this error, without putting the respondents to the inconvenience of an adjournment, allowed the answers of one of the defendants, Runga Nath Moulick, who was present in Court, to be put in, and further allowed the Counsel on both sides to examine *viva voce* the said Runga Nath Moulick, such examination being limited to the matters covered by the interrogatories administered to him in the lower Court. In order to clear up a material point in the case with reference to which we were convinced that Runga Nath Moulick, while under examination, was dishonestly attempting to suppress certain facts, we also allowed the decree in which Indramani Chowdhrain was plaintiff and Haran Krishna Moulick was defendant, to be put in evidence.

From this additional evidence, coupled with that which was taken in the lower Court, it is clear to us that nearly the whole of the money, borrowed under the bond of the 28th Magh 1281, was spent to defray the expenses of a suit which was brought by Indramani to recover the property of Gokul Chunder left by his widow Brojo Sundary. It appears

(1) 1 Sel. Rep. 60 = 6 I.D. (O.S.) 45. (2) 1 B.H.C. App. 51. (3) 1 C. 470.
(4) 14 B.L.R. 21. (5) 2 M.I.A. 487. (6) 2 Hay 567. (7) 21 W.R. 12.

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that on the death of Brojo Sundary, the estate of Gokul was taken possession of by Anunda Mohun Moulick, the third son of Gopal Lall, on behalf of the minor Haran Krishna, who was set up as the adopted son of Gokul and Brojo Sundary. In the second paragraph of Gopal Lall's second will, dated 15th Assar 1275, the testator declared that the whole of the estate of Gokul had devolved upon him as heir-at-law of Gokul. By that will he disposed of that property in a certain way, the details of which it is unnecessary to state here. It seems to us that it was undoubtedly the duty of the managers of Gopal Lall's estate appointed under his wills to recover Gokul's estate, which Gopal Lall declared in his second will to be his. The suit which was brought by Indramani, with the active co-operation and advice of her grandsons for the recovery of Gokul's estate, was, in our opinion, a necessary suit, for a due administration of the testator's estate. It is proved beyond doubt that the money covered by the bond, upon which the **[401]** present suit has been brought, was required for defraying the expenses of that suit. Indramani was successful in the first Court, but failed in this Court, on the appeal preferred, on behalf of Haran Krishna Moulick. There were two hearings of this appeal in this Court, and ultimately there was an appeal by Indramani to the Judicial Committee of the Privy Council, which affirmed the decision of the High Court. The success of the suit depended upon a very difficult question of the Hindu law relating to adoption, and it does not appear to us that Indramani and her grandsons, in taking up this case to the highest tribunal, acted in a way in which a prudent manager would not have acted for the due preservation of the testator's estate. We are further of opinion that in conducting this litigation, and in raising money by mortgaging a portion of the family property for defraying the expenses of this litigation, they acted with the implied consent of all the members of the family, including Anangamanjari. We are, therefore, of opinion that the mortgage created by the bond of the 28th Magh 1281 is binding upon all the defendants in this case, although Anangamanjari and Doydra Nath were not parties to it.

In this view of the case, it is unnecessary to express any opinion upon the remaining question in the appeal, *viz.*, as to the construction to be put upon the two wills of Gopal Lall Moulick. But as this case is appealable to a higher tribunal, we think it proper to record our decision upon that point also.

[His Lordship then proceeded to deal with the third question raised in the appeal, referred to above, and to construe the two wills of Gopal Lall ; and determine the interest of Anangamanjari in the two portions of the mortgaged property found by the lower Court to have been bequeathed absolutely to her, and then concluded as follows] :—

The result is that, in our opinion, the defendants who were the executants of the bond have a certain amount of saleable interest in the properties mortgaged in the bond of the 28th Magh 1281, and which interest at least, is liable for the money due under it. But we have already decided, with reference to the second ground of appeal, that the whole of the mortgaged **[402]** property is liable. The appellant is also we think entitled to recover the costs of this suit in both Courts.

The decree of the lower Court will be reversed, and in lieu thereof we direct that an account be taken of what is now due to the plaintiff for principal and interest on the mortgage bond dated the 28th Magh 1281, and for his costs of both Courts, and that the defendants be directed to pay to the plaintiff, or into Court the amount that may be found due on

the taking of the said account, together with interest thereon, at the rate of 6 per cent. per annum from the date of the decree to the date of payment, within six months from the date of the decree. And we further direct that if defendants make default in paying the amount due within the time mentioned above, the mortgaged property be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale), be paid into Court and applied in payment of what is found due to the plaintiff, and that the balance, if any, be paid to the defendants, or other persons entitled to receive the same.

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H. T. H. *Appeal allowed and decree modified.*

12 C. 402.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

RADHA PERSHAD SINGH AND ANOTHER (*Decree-holders*) v. PHULJURI KOER AND ANOTHER (*Judgment-debtors*).*
[3rd July, 1885.]

Appeal to Privy Council—Security for costs of respondent—Execution of decree against surety—Civil Procedure Code (*Act XIV of* 1882), ss. 253, 602, 603, 610.

A plaintiff having preferred an appeal to Her Majesty in Council, was called upon to furnish security. Thereupon A, on behalf of the appellant executed a security bond for the costs of the respondent. The appeal was dismissed with costs by Her Majesty in Council. On an application (by the respondent in the appeal) for execution to issue against the estate of A, the surety (who had died in the meantime)—

Held, that the liability of the surety under the security bond could not be enforced in execution of the decree of Her Majesty in Council.

Bans Bahadur Singh v. *Mughla Begum* (1) dissented from.

[F., 15 C. 497 (502); 23 C. 212 (217); Cons., 15 M. 203 (211); 25 B. 409 (414).]

THIS was an application by the defendant for execution of a decree of the Privy Council, dated the 28th of May 1872, **[403]** dismissing the plaintiff's suit with costs. Execution was sought against the legal representative of a person who had entered into a security bond for the costs of the respondent in the appeal to the Privy Council (see ss. 602 and 603 of the Code of Civil Procedure, Act XIV of 1882).

The material portions of the judgment appealed from are as follows:—

"The second prayer in the decree-holder's application is, that it may be declared in the certificate that the decree may be executed against the estate of the surety Baboo Radho Kissen, deceased. With regard to this prayer several objections are taken by the daughter and heiress of the deceased surety. Of these, the principal are that the decree is barred by limitation; that it cannot be enforced against the surety in the execution department; and that she has no knowledge of the alleged surety bond, and that the decree-holder is, therefore, bound to prove it.

"It seems to me that the decree, so far as the surety is concerned, is barred under art. 180, sch. II of the Limitation Act. The decree sought to be enforced against the surety's estate is a decree for costs, for which the

* Appeal from Order No. 116 of 1885 against the order of H. W. Gordon, Esq., Judge of Sarun, dated the 5th of March 1885.

(1) 2 A. 604.

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surety went security, passed by the Privy Council on the 28th May 1872. The first application to execute the decree against the surety was made on July 22nd, 1884, *i.e.*, more than 12 years after the date of the decree. The preceding application, dated May 26th, 1882, was for execution against the original judgment-debtor, *i.e.*, the plaintiffs in the original suit alone, and not against the surety. This application did not, I think, keep the decree alive against the surety, and it is accordingly barred under art. 180. Section 230 of the Civil Procedure Code does not, I think, bar the application, because the application of 26th May 1882, which was granted was filed before the present Civil Procedure Code. Act XIV of 1882 (1st June 1882 and was, therefore, made under Act X of 1877, as amended by Act XII of 1879, and not under s. 230 of the Civil Procedure Code. The application of July 22nd, 1884, is the first application for execution made under the present law. However, the decree-holders cannot benefit by this, their application being barred under art. 180, sch. II of the Limitation Act. The second objection raises the difficult question as to whether the decree can be executed against the surety at all in the execution department, or whether the decree-holder should bring a separate suit to enforce the obligation. There is, as far as I am aware, no ruling of the High Court as to the interpretation of ss. 253 and 610 of the present Code. The Allahabad High Court, however, in a Full Bench ruling—*Bans Bahadur Singh* v. *Mughla Begum* (1)—have held that a decree for costs of the Privy Council can be executed against the surety, the words "decree in an original suit," in s. 253 of the Civil Procedure Code, including the decree of the appellate Courts also. I follow this [404] ruling with some hesitation because it seems to me that much may be said in favour of the view taken by the two Hon'ble Judges, Mr. Justice Spankie and Mr. Justice Straight, who dissented from the opinion of the majority of the Full Bench. However, I think I must accept this ruling as correct law in the absence of any authoritative decision on the same point by the Calcutta High Court. Certainly as the heiress of the surety denies all knowledge of the surety bond, it seems reasonable that the decree-holder should satisfy the Court that the deceased Radha Kissen actually executed it. The mere filing of a certified copy of the bond is not sufficient, and did I not hold that the decree-holder's application is barred, I should require them to produce more evidence before according to the application. There are some other objections taken by the lady objector, but in the above view of the case, I think it unnecessary to consider them. The application to be allowed to take out execution against the estate of the surety is refused with costs."

The judgment-creditors appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Raghu Nundun Prosad*, for the appellants.

Mr. *C. Gregory*, for the respondents.

JUDGMENT.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

FIELD, J.—This was an application to recover by execution the amount of security given for the costs of an appeal to the Privy Council, under the provisions of ss. 602 and 603 of the Code of Civil Procedure. The Court below has held that the execution is barred as against the

(1) 2 A. 604.

sureties. The view taken by the Court below, we think, confounds two things that are wholly distinct, that is, the decree of the Privy Council and the security bond. We think, however, that it is not necessary for us to determine whether the recovery of the money secured by the bond is or is not barred, so far as that recovery depends upon the execution proceedings sought to be had in the Court below, because the order appealed against can be supported upon a ground which has been taken by the respondent for the purpose of supporting that order refusing execution. The respondent contends that the proper remedy of the decree-holder is by a separate suit, and that he is not entitled to recover the amount secured by the bond in the execution department of the Court which has charge of the execution of the Privy Council decree. We are not **[405]** aware that the question thus raised has ever been decided by this Court. It has been decided by a Full Bench of the Allahabad High Court in the case of *Bans Bahadur Singh* v. *Mughla Begum* (1), and it was there decided by a majority of three Judges, as against two, that execution could be had in order to recover the amount of the security bond. This view has been dissented from in a case decided by the Madras High Court, of *Balaji* v. *Ramasami* (2).

Section 253 of the Civil Procedure Code provides as follows: "Whenever a person has, before the passing of a decree in an original suit, become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant." Now in the present case it is clear that the persons against whom execution is sought did not become surety before the passing of the decree in the original suit; and, therefore, the express language of s. 253 is not applicable. But it is contended that s. 610 extends the provisions of s. 253 to the case of a surety bond like the present. That section provides as follows: "Whoever desires to enforce, or to obtain execution of any order of Her Majesty in Council, shall apply by petition, accompanied by a certified copy of the decree or order made in appeal and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty by her said order may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly, *in the manner and according to the rules applicable to the execution of its original decrees.*" It is said that s. 253 contains a rule applicable to the execution of original decrees within the meaning of this provision. We do not think so. We agree with the observations of Mr. Justice Spankie, at page 615 of the Allahabad report, that this argument mixes **[406]** up liability and machinery, and treats them as one and the same. We think it confounds liability, which is created by a provision of substantive law which happens to have been inserted in the Code, and procedure, which is adjective law. We may further observe that what the section provides for is the execution of an order of Her Majesty in Council. This is the legal case for which the Legislature proceeds to lay down rules; and in s. 610 this is a different case from the enforcement of

(1) 2 A. 604. (2) 7 M. 284.

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a surety bond which cannot be brought within the purview of an order of Her Majesty in Council. We think, therefore, with all deference to the majority of the Judges of the Allahabad Court, that s. 610 cannot be construed so as to extend the provisions of s. 253 to a case not expressly provided for by the Legislature.

We think, therefore, that a surety bond of this kind cannot be summarily enforced by execution.

The appeal fails and is dismissed, but without costs.

P. O'K. *Appeal dismissed.*

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12 C. 406 (P.C.) = 12 I. A. 198 = 9 Ind. Jur. 400 = 4 Sar. P.C.J 678.

PRIVY COUNCIL.

PRESENT:

Lord Monkswell, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.
[*On appeal from the High Court at Fort William in Bengal.*]

AKHOY CHUNDER BAGCHI AND OTHERS (*Plaintiffs*) *v.* KALAPAHAR HAJI AND ANOTHER (*Defendants*).* [8th July, 1885.]

Hindu Law—Adoption—Construction of authority to adopt—Attempt by two widows to adopt each a son simultaneously.

Two widows of a Hindu each adopted a son to their deceased husband, under an authority from him, thus expressed: "you.....................the elder widow, may adopt three sons successively, and you.....................the younger widow, may adopt three sons successively." *Held*, that this might more reasonably be construed as giving the elder widow authority to adopt three sons successively, and then a similar power to the younger, than as authorizing simultaneous adoptions.

Held also, that supposing that the husband had intended to give such an authority, the law did not allow two simultaneous adoptions.

The opinion of W. H. Macnaghten (1) on the subject referred to and approved.

[R., 8 C.W.N. 266 (271); 17 C.W.N. 319 (322).]

[407] APPEAL from a decree (18th May 1882) of the High Court affirming a decree of the Judge of Rungpore (18th December 1880), which reversed a decree (6th July 1880) of the Munsif of Gaibanda, and dismissed the suit with costs.

The two widows of a deceased Hindu, purporting to act under an authority from him (*anumatipatro,*) each adopted a son to him, simultaneously. The question now raised was whether one of these adoptions was valid; and this, although dependent upon the construction of the authority as to whether the adoptions which it authorized were intended to be simultaneous or not, involved the decision whether or not the Hindu law permitted simultaneous adoptions.

The suit, out of which this appeal arose, was one of twelve rent suits brought by the guardians of the minor Gyanendra Chunder Lahiri, who was adopted on 30th June 1875 by Brahmamoyi Debi, since deceased, widow of the late Kali Krishna Lahiri, whose other widow, Shama Sundari Debi, adopted at the same time another boy, Norendro Chunder Lahiri. Both widows acted under the supposed authority of which the words are set forth in their Lordships' judgment.

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(1) Principles and Precedents of Hindu Law, Vol. II, Chap. VI of Adoption; note to case XIX.

The present suit was brought in the Munsif's Court for Rs. 439, rent and arrears, in respect of land, part of the estate of the deceased Kali Krishna Lahiri, occupied by the defendant Kalapahar Haji; and it was alleged that the plaintiff was entitled to a half-share of the rent payable under a lease, made by his adoptive mother Brahmamoyi Debi, together with Shama Sundari, who, after the death of the former, received the entire rent. The latter was made a defendant, but not Norendro Chunder, the son adopted by her. The relation of landlord and tenant not having been shown to subsist, by payment of rent, or in any other way, between the minor Gyanendra Chunder and Kalapahar Haji, the title of the former had to be established. This depended on the validity of his adoption, which both the defendants denied.

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The Munsif made a decree in favour of the plaintiff, whose title he considered established, for part of the amount claimed. He found that the authority to adopt had been proved, and duly followed; and he did not discuss the legality of the simultaneous adoptions.

[408] On appeal, the District Judge held that the adoption, having been simultaneous with that of Norendro Chunder, was invalid by law, and that it was open to either of the defendants to insist on this defence. He therefore reversed the decision of the Munsif and dismissed the suit.

A Divisional Bench of the High Court (WHITE and MACPHERSON, JJ.) affirmed the decree of the District Judge. Their Judgment is given at length in the report of the appeal *Gyanendra Chunder Lahiri* v. *Kalapahar Haji* (1) as disposed of by the High Court in May 1882.

They were of opinion that as the adoption of one son alone was all that was actually necessary according to the requirements on the part of the father in connection with the observances of the Hindu religion, the adoption of two children to him could not be held to be within the scope of the authority given by him to the widows. They held also, following the authorities on the subject, that where such a thing as a double adoption is attempted, neither of the children becomes the legally adopted son of the deceased, notwithstanding the performance of due ceremonies in regard to each.

Mr. *J. D. Mayne*, for the appellant, argued that the adoption was maintainable; and also that its validity could not be contested in the present proceedings, and between these parties, one of whom had herself taken part in representing the adoption as an actual thing, and in causing action on the part of the plaintiff's parents, as she had been one of the adopting widows.

Amongst other arguments, he urged that the invalidity of second adoptions, held invalid in *Rangama* v. *Atchama* (2), or of adoptions where sons already existed, presented no analogy to affect the validity of simultaneous adoptions. The adoption of a second boy after a first, would, if permitted, deprive the first of part of the rights already vested in him. But the simultaneousness of the adoptions in a case like this prevented any such deprivation. The rights of inheritance attached to both equally from the first moment of adoption. Thus a main argument against concurrent adoptions lost its force, and **[409]** practically the intentions of the husband in such a case might receive effect, consistently with the theory of law on the subject and the habits of the people. He submitted that this case was not governed by the law laid down in

(1) 9 C. 50. (2) 4 M.I.A. 1.

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Monemothonath Day v. *Onathnath Day* (1), followed by *Sidessur Dossee* v. *Doorga Churn Sett* (2), nor by the deduction made by H. W. Macnaghten in his "Principles and Precedents of Hindu Law," Vol. II, chapter VI, of Adoption, note to case XIX. This had been inserted, but without remark, in a lately issued work by Shama Charan Sircar, the "Vyavastha Chandrika," Vol. II, p. 118.

Mr. *R. V. Doyne* and Mr. *J. T. Woodroffe*, for the respondent were not called upon.

JUDGMENT.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The suit which is the subject of this appeal was brought for the rent of some property which was part of an estate formerly belonging to one Kali Krishna Lahiri. He died in 1851, having had two wives—the elder, Shama Sundari Debi, and the younger, Brahmamoyi Debi. By Shama Sundari Debi, he had one son, Koilash Chunder Lahiri, who died in 1856. After the death of Koilash Chunder Lahiri, the two widows simultaneously, as has been found by the lower appellate Court, adopted sons. Shama Sundari adopted one Suresh Chunder, and Brahmamoyi adopted Jogesh Chunder. That adoption took place in 1859, on the 5th of June. Suresh Chunder died in 1866, and Jogesh Chunder in 1867. Some seven or eight years after the death of Jogesh Chunder, each of the two widows made another adoption, which are found by the lower appellate Court to have been simultaneous, and no question will arise whether one was at any moment of time before the other. These adoptions were made on the 30th July 1875.

The suit was brought by Gyanendro, the son who was adopted by the younger widow on that occasion, against a tenant of some of the land, and against Shama Sundari Debi. Nerendro, the son who was adopted by Shama Sundari Debi, is not a party to the suit. The claim for rent is founded upon a lease, which [410] was executed on the 12th February 1870, by both the widows reserving a certain rent, and there is no question now as to whether the amount for which the decree was passed is correct or not.

The only question raised in the case is whether upon what has taken place Gyanendro is entitled to recover half of the rent reserved by the lease; and it may be material to see, before the facts are adverted to, how the case is stated in the plaint. It says: "The late Brahmamoyi Debi, mother of the said minor Gyanendro Chunder Lahiri, being, in right of her husband and deceased adopted son, entitled to, and being jointly and in equal shares with defendant No. 2," that is, Shama Sundari, "possessed of pergunnah Muktipore and others, mehal No. 187 of the Collectorate towzi of zillah Rungpore, being the ancestral zemindari which the said minor is entitled to and possessed of, died on the 2nd Falgoon 1285, leaving her surviving the said minor taken in adoption by her as the sole heir of her and her late husband and son, and as the proprietor of the property." The case seems to be put upon the ground that after what had taken place, Brahmamoyi Debi was entitled to half of the estate, and that her adopted son succeeded to that half.

Now, according to the pedigree, upon the death of Koilash Chunder Lahiri, Shama Sundari would succeed to the property as his heir; but it is contended that the widows having the authority to adopt, the

(1) 2 Ind. Jur. N. S. 22 = Bourke 189. (2) 2 Ind. Jur. N. S. 24 = Bourke 260.

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adoption of Norendro and Gyanendro, if it were valid, would divest the estate from Shama Sundari Debi and also from Brahmamoyi Debi if she took an interest in it, and would make the adopted sons entitled to the estate in equal shares. So that the case really depends upon the validity of the adoptions which were made by the two widows on the 30th July 1875.

Now as to those adoptions two questions arise. The first is whether the authority which was given to the widows by the husband authorised such an adoption as they made ; and secondly, whether, supposing he gave such an authority, it is one which the Hindu law allows. The document itself was not produced, but the contents were deposed to by two witnesses. One of them, Kashi Chunder, said it was as follows : "You, Shama Sundari, [411] the elder widow, may adopt three sons successively, and you Brahmamoyi, the younger widow, may adopt three sons successively, and that (or those) "—the word being capable of being translated both in the singular and the plural—" adopted son (or sons) will be entitled to offer pind ", &c. Another witness deposed to there being the words introduced " and on that being exhausted;" but the lower appellate Court seems to have thought it doubtful whether reliance could be placed upon the memory and impartiality of that witness, and the construction of the document must be taken upon the words s ated by Kashi Chunder.

It appears to their Lordships that these words might be reasonably construed as giving to the widows, not a power to adopt simultaneously, but first to the elder widow power to adopt three sons successively, and then a similar power to the younger widow. The words are capable possibly of another construction, but certainly rather the more natural construction would be that it was a power to adopt successively. It may be observed that if it gave to the younger widow a power to make an adoption simultaneously with an adoption by the elder widow, the elder widow would not be able to adopt three sons successively, because there would be interposed an adoption of a son by the younger widow. That seems to be a reason for not putting such a construction upon the words.

Another reason for putting the construction upon it which their Lordships think is the right one, is what appears to be the state of the law on the subject of simultaneous adoptions at the time when this authority was given, because if it should even appear that the law was in such a state that it was extremely doubtful whether simultaneous adoptions could be made, or that from the state of the law it was not likely that there was a practice of that kind, that would be a reason for construing this document as not intended to give a power of simultaneous adoption. In construing it their Lordships would consider that the person giving the authority intended his widows to do that which the law allowed, and not to do something which was, if not absolutely illegal, very unusual and not practised amongst Hindus.

[412] Their Lordships are, therefore, of opinion upon that part of the case that this document did not give to the two widows an authority to make such an adoption as was made by them in July 1875, when they professed to adopt the two sons Norendro and Gyanendro.

But then there is the other question whether, if the authority did allow them to adopt in this manner, it could be done lawfully according to Hindu law. It had been clearly settled by this Committee in the case

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of *Rungama* v. *Atchama* (1), that a man having an adopted son could not, during the life of that adopted son, adopt a second son. The authorities were very fully gone into : and although there appeared to be a conflict of opinions amongst the pundits upon the subject, that was decided by this Committee. That case, no doubt, is distinguishable from the present. A simultaneous adoption in some respects would differ from the adoption of a son when there was already one son in existence, and the reason given for not allowing such an adoption is that there are different texts which seem to direct that that power of adoption is only to be exercised where the person adopting has not a son either natural born or adopted. But much of the reasoning upon which that case was decided applies to the case of a simultaneous adoption. The observation which appears to their Lordships to be the strongest against such an adoption as this being allowed by the Hindu law is that no authority and no text has been, or apparently can be, produced showing that the Hindu law allows it. It is true that the texts with regard to adoptions are but few, but still they are sufficient to lead to the conclusion that if it was intended that such a power as this should be given to a man with regard to adoption, there would be something in the different authorities in favour of it. That it was not intended by Hindu law may be inferred from the provisions which are made for the case of a son being born after a man has made an adoption. It is laid down by Macnaghten that if a son is born after a son has been adopted, the property is to be divided between the adopted son and the natural-born son in certain proportions, giving, in the case of there being only one adopted son and one natural-born son, to [413] the adopted son a third, according to the law of Bengal, and a fourth according to the doctrine of other schools. Then he goes on to speak of the cases where there are more than one natural born son, and he states the law for the distribution of the property in such cases. But no reference is made in any of the cases to there being more than one adopted son; and as the power of a Hindu either to adopt himself, or to give to his widows the power to do so in his place, depends upon the law, it seems to their Lordships that it is incumbent upon the party who seeks to avail himself of a simultaneous adoption to produce some authority to that effect. The entire absence of any authority in favour of such an adoption is an argument that the Hindu law did not recognise it, and that it has really not been the practice amongst Hindus; for if such a practice had prevailed to any appreciable extent, some anthorities would have been found on the subject.

There is a great absence of decisions upon the question ; in fact their Lordships have only been referred to one case in which the question of the validity of a simutlaneous adoption has been considered, and that is a case in the High Court of Calcutta reported in Bourke's Reports at page 189. There it was held by the learned Judge who tried the case that an adoption of this description was invalid, and in a subsequent case the same learned Judge acted upon the opinin which he had thus given.

So far, then, with respect to there being any authority about it. But there is a note in a recent book published by Shyama Charan Sircar, the author of the Vyavastha Darpana. It is called the Vyvastha Chandrika, and in Vol. II, page 118 of the Precedents, there is this note : "It may on the whole be safely concluded that whatever may have been the law or the practice in former ages, the simultaneous adoption of two sons or the affiliation of one by a person who has a son (either his own issue or

(1) 4 M.I.A. 1.

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adopted) living, "is now illegal according to the concurrent testimony of the most approved authorities." This is the note of Mr. Macnaghten, Hindu Law, Vol. II, p. 201; but it is given without any comment or indication of dissent. Their Lordships do not refer to this book as being any authority as to what the law is. The author, a Hindu gentleman, who is well conversant with the Hindu law, [414] and who must also be well conversant with the customs of Hindus with regard to adoption, appears to consider a simultaneous adoption to be illegal; he does not suggest that what is stated is in any way contrary to the habits of Hindus, or in conflict with their usages. But independently of this and without placing any reliance upon this book as an authority, they are of opinion that by the Hindu law an adoption of this description was not allowed. Therefore, on both grounds, that the power given by the husband did not authorize the widows to make such an adoption as this, and also that the law did not allow it, even supposing the husband had intended to give such an authority, their Lordships are of opinion that the plaintiff has failed to make out his title to recover any portion of the rent which he has sued for.

Their Lordships will, therefore, humbly advise Her Majesty that the decree of the High Court be affirmed and the appeal dismissed, and the appellant will pay the cost of the appeal.

C. B. *Appeal dismissed with costs.*

Solicitors for appellants: Messrs. *Oehme & Summerhays.*

Solicitors for respondents: Messrs. *Watkins & Lattey.*

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PRIVY COUNCIL.

PRESENT:

Lord Monkswell, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.
[*On Appeal from the High Court at Fort William in Bengal.*]

NILAKANT BANERJI (*Plaintiff*) v. SURESH CHANDRA MULLICK AND OTHERS (*Defendants*).* [8th & 9th July, 1885.]

Possession, Suit for, by Mortgagee—Purchase by third parties of morgagee's interest in portions of mortgaged property—Redemption and apportionment of liability of purchaser for the mortgage charge—Joinder of parties—Mortgage account—Form of Decree.

Purchasers of the right, title, and interest, of a mortgagor in certain portions of the mortgaged property, sold in execution of a prior decree against the mortgagor, were added as co-defendants in a mortgagee's suit against the mortgagor for foreclosure on failure to redeem. As against these purchasers the suit was dismissed with costs, on the ground that their claims to portions of the mortgaged property, under titles prior to, and independent of, the mortgagee's title, could not be decided therein. A decree was then made against the mortgagor, and on his subsequent failure to redeem or to [415] pay the debt, his equity of redemption was sold, and was bought by the mortgagee.

In a suit brought by the mortgagee against the representatives of one of the said purchasers, who refused to deliver possession of the portion, *held*, that (*a*) as this purchaser had disclaimed the right to redeem the portion, and had alleged a paramount title, causing the dismissal of the suit as against him, he, and those claiming under him, were precluded from afterwards claiming to redeem; and (*b*) the proportion of mortgage charge for which he was liable could not be apportioned by the taking an account as between him and the mortgagee alone,

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in the absence of the purchasers of the other portions. *Nawab Azimat Ali Khan* v. *Jowahir Singh* (1) referred to.

A decree which ordered that the defendants, without any account being taken at all, should retain possession of the portion purchased as above stated, clear of the proportion of mortgage debt chargeable theron, on payment to the mortgagee of the sum for which he had bought the equity of redemption, was *held* to be incorrect, and was, accordingly, reversed.

[N. F., 18 C.L.J. 181 (184) ; F., 5 C.L.J. 315 = 11 C.W.N. 403 ; 18 Ind. Cas. 457 (459) ; Rel. on, 33 C. 590 = 10 C.W.N. 592 ; R., 9 M.L.T. 399 = 21 M.L.J. 467 = 9 Ind. Cas. 791 = (1911) M.W.N. 221 ; 19 C. 401 (411) ; 3 C.L.J. 205 (210) = 33 C. 425 ; 20 A. 23 (F.B.) = 17 A.W.N. 163 ; 5 C.L.J. 527 (536) ; 35 C. 701 (717) = 12 C.W.N. 657 (668) = 7 C.L.J. 563 (577) ; Cons., 8 C.W.N. 365 (368).]

APPEAL from a decsee (16th March 1882) of the High Court, modifying a decree (27th June 1879) of the Subordinate Judge of East Burdwan.

The question now raised was, whether the respondents, who were the representatives of a purchaser of the right, title, and interest of a mortgagor in a portion of the mortgaged property, such purchase having taken place before the institution of a suit for enforcement of the mortgage by foreclosure or sale, were entitled to retain possession of the portion, as against the mortgagee, the present appellant, upon redemption by them of the mortgage charge upon it. Sale, in default of redemption or payment, having been decreed in the suit and default made, the mortgagee had purchased the right, title, and interest of the mortgagor in the mortgaged property. It was a fact materially affecting the respondents' rights that the purchaser, through whom they made title to redeem, having been made a party to the suit above-mentioned, with other purchasers of similar portions (who were not joined in the present proceedings), had refused to accept the position of a party either to redeem or be foreclosed, and setting up a title paramount to the mortgage had obtained the dismissal of the suit as against himself, with costs.

The mortgage amounting to about Rs. 30,000, was effected by [416] two instruments, dated October and December 1866, respectively. Before that, *viz.*, on the 29th August 1866, a decree was made in the original jurisdiction of the High Court against the owners of the estate afterwards mortgaged (who were the executors of Ashutosh Deb, deceased in 1856) for more than Rs. 1,32,406, and the decree-holder issuing execution (24th December 1866) a writ was delivered to the Sheriff of Calcutta (26th January 1867).

On 10th June 1867 the present appellant, as mortgagee under the instruments of 1866, sued the same representatives of Ashutosh Deb for the payment of the mortgage debt, and in default of payment, for foreclosure or sale of the mortgaged premises. Meantime, the Sheriff had sold a portion of the mortgaged property, in execution of the writ abovementioned, to Khogendra Nath Mullick, the father of the present respondents, and had made similar sales to other purchasers. All of these persons, by an order of the High Court (28th August 1867) were added as defendants to the suit upon the mortgage. Khogendra Nath Mullick, not choosing to assert any right in the mortgaged property as a purchaser of the equity of redemption on a portion thereof but claiming an adverse interest, urged that he had been added as a defendant without due cause. The High Court (12th February 1868) ordered that the suit should be dismissed with costs as against the added defendants. But the decree in that mortgage suit (27th April 1868) ordered that, upon

(1) 13 M.I.A. 404.

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non-payment of the sum that might be found to be due, the right, title and interest of the mortgagors should be sold. The result was that, at a sale which took place in execution of the decree, the mortgagee purchased the right, title and interest of the mortgagors, obtaining a certificate of sale on 27th September 1870.

From the representatives of Khogendra Nath Mullick, who about that time had died, the mortgagee could not obtain delivery of possession, and the suit, out of which this appeal arose, was brought (20th May 1879) for the possession of a moiety of a certain lakheraj mehal in the Burdwan district, a portion of the mortgaged property, the claim being valued at Rs. 9,900. The defence was that there was a superior title obtained by the purchase at the Sheriff's sale above-mentioned. The Subordinate [417] Judge adverted to the dismissal of the mortgagee's suit in 1868 as against Khogendra Nath Mullick, and held that those who claimed under him had no title to redeem after what had occurred, their claim to possession failing together with their right to redeem.

The High Court on appeal (CUNNINGHAM and TOTTENHAM, JJ.) modified the decree of the Court below and gave the respondents, who were defendants in the suit, liberty to redeem the portion of the mortgaged lands within six months, on payment of Rs. 1,600 and costs, with interest, only awarding to the plaintiff, now appellant, possession upon default of such redemption. *Chunder Nath Mullick* v. *Nilakant Bannerjee* (1).

On this appeal,—

Mr. *J. Graham*, Q.C., and Mr. *Woodroffe*, for the appellant, argued that the decree of the High Court had wrongly given to the respondents liberty to redeem on the terms specified. Khogendra Nath's purchase of the portion of the mortgaged property having been made, after the institution of the suit for foreclosure, at an execution sale upon a writ delivered after the date of the mortgage, the property mortgaged, or any part of it, could not be withdrawn from the operation of the decree made in the foreclosure suit. Khogendra Nath having been made a party to that suit, repudiated any right to redeem, alleged a paramount title, and obtained the dismissal of the suit, with costs. Under these circumstances, it could not be argued that his purchase had withdrawn the property, purchased by him, from the operation of the decree, made in the foreclosure suit, under which decree, it being for sale of the mortgaged premises, the plaintiff had himself bought. The respondents, claiming through Khogendra Nath, were precluded from now asserting any right to redeem. They could only assert a title, if any, paramount to that of the mortgagee, and if they were entitled to redeem, the terms on which they were to be allowed to do so by the decree were obviously inequitable. According to those terms, the respondents were to have the property in suit absolutely on paying to the appellant the price which he had paid in order to get in the equity of redemption.

[418] The respondents did not appear.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—In this case the appellant was the plaintiff and the respondents were the defendants in the first Court. The case raised between them was of this nature: In the month of October 1866, the plaintiff advanced money to the representatives of one Ashutosh Deb on

(1) 8 C. 690 (696).

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mortgage of his estate. There was a further charge afterwards, and the total amount advanced was Rs. 30,000. In the month of December 1866 a writ of *fieri facias* was issued by some creditors of Ashutosh Deb upon a decree obtained by them prior to the mortgage. It does not appear at what date the seizure was effected under that *fieri facias*, but the Sheriff sold the property mortgaged, amongst other property, in the month of July 1867, and the portion now in dispute was purchased by one Khogendra Nath Mullick. The present respondents claim under Khogendra, but the issues in the suit have not been varied by the transmission of the title, and the matter may be treated in precisely the same way as if Khogendra was himself before the Court. In the meantime, before the sale in July 1867, and in the month of June 1867, the plaintiff had instituted a suit in the ordinary form for the realization of his mortgage by foreclosure or sale. When he learnt of the purchase by Khogendra he applied to the Court to make Khogendra a party to the suit as a person having an interest in the mortgaged property. Supposing the doctrine of *lis pendens* did not apply to this case, which may be arguable, that was, *prima facie*, at all events, a right thing to do. An order was made by Mr. Justice Macpherson in the High Court, adding Khogendra as a party to the suit, and directing an amendment in the prayer of the plaint accordingly. When Khogendra was brought before the Court he put in a plea or written statement by which he claimed a title paramount to the mortgage. We have not got that written statement before us. We have only got statements of it by the Courts below. The Subordinate Judge says of it: "Khogendra Nath having entered appearance, raised divers other questions adverse to the plaintiff's title. He, however, did not set up a defence as claiming through the mortgagors." The High Court makes a similar statement of Khogendra's position: so that the result was this, that [419] Khogendra, being brought there as having purchased subsequent to the mortgage, sets up a paramount title, and does not accept his position as a person who is either to redeem or be foreclosed. Upon that defence being raised the case came on for settlement of issues before Mr. Justice Markby, and he, finding a defence raised which was quite foreign to a mortgage suit, considered that he had no option but to dismiss Khogendra, which he did with costs. It may be mentioned that there were several other purchasers of other portions of the mortgaged property who were made parties, and who also alleged paramount titles in themselves, so that the suit would have been multifarious and confused in the highest degree if it had gone on in that shape. They were all dismissed with costs. The High Court then went on to make the ordinary decree for mortgage accounts and for sale in default of redemption. It appeared to one of the dismissed defendants, the Subordinate Judge states that it was Khogendra himself, that the ordinary decree was calculated to prejudice the paramount title which he claimed. While it was being drawn up, he appeared to contest it, and persuaded the Court to vary its terms in a way which he thought to be more favourable to himself. In the month of September 1880 the property now in suit was put up to sale, and the mortgagee himself, the plaintiff, purchased the equity of redemption for Rs. 1,600. At that time Khogendra was in possession. It is to be presumed that he got it under the Sheriff's sale, but it is not exactly known how he got it; and why the plaintiff did not then sue him for possession does not appear. There was considerable delay in bringing this suit for possession, but it has been held in both Courts that the delay is not such as attracts the law of limitation. Therefore the suit may be

brought and the legal questions are just the same as if it were brought the day after the plaintiff purchased.

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This suit being brought against Khogendra's representatives, a written statement is put in by the only adult representative to this effect. He pleads that the mortgage was fraudulent, that it does not comprise the lands in suit, and that he has a preferential title. Then he puts in the extraordinary plea that the matter was decided in his favour in the suit of 1867. Finally he [420] complains that being entitled to the equity of redemption, no opportunity has been afforded him to redeem the mortgage.

All the issues raised by the defendants, excepting the right to redeem if it can be said they have raised that issue, have been found against them; or in other words, it has been found that the preferential title which they alleged but did not disclose in the suit of 1867, is an entirely false and fictitious title, and that Khogendra, so far from being improperly made a party to that suit, was a person who had a right of redemption and no other right at all. If the truth had been known when the matter was before Mr. Justice Markby in the suit of 1867, it is clear he would have held either that Khogendra was rightly a party to that suit, or was not so simply because he has purchased *pendente lite*, and that in either case the decree must go against him, that when the mortgage accounts had been taken he must redeem or be bound by the sale.

Upon these circumstances the Subordinate Judge held that Khogendra was bound by the decree he himself had asked to have; that he had virtually asserted in the suit of 1867 that he could not be put to redeem, but had a paramount title which could not be tried in that suit; that he was dismissed and got his costs on that ground; that he could not now be heard to say that he wished to redeem; and therefore he gave the plaintiff a decree for possession.

It may here be mentioned that the case is a little confused by the introduction of s. 13 of the Code of 1877. That section has nothing to do with this case. This is not a question whether a person is bound by a decree made in some other suit. The question is whether he is bound by the decree made in this very suit of 1867 in which the plaintiff bought the land, and whether after that decree was passed his rights were not entirely gone.

The High Court have reversed the decree made by the Subordinate Judge, and it must be asked on what grounds they do so. The grounds are these: First, they say that the suit of 1867 did not override the interest acquired by Khogendra at the execution sale, and then they draw this inference: "We think, therefore, that the plaintiff is not entitled in virtue of having filed [421] his suit previous to the defendants' *fieri facias* purchase, to ignore that purchase and to hold the mortgaged property free from any right which the defendants acquired by the *fieri facias* sale. We think that we are bound to give effect to the well-recognised rule that the interest of a person who has purchased the mortgagor's equity of redemption is not affected by any decree in a suit to which he is not a party, and to hold accordingly that the defendants having purchased the mortgagor's interest in the estate, *viz.*, the right of redeeming the existing mortgage, did not lose that right of redemption in consequence of the decree obtained in a suit against the representatives of Asutosh." Whether the High Court are right in their limitation of the doctrine of *lis pendens* may, as above intimated, be doubted, but it is not worth while to pursue that question, because, assuming that they are right, the fact is that the plaintiff did not ignore the

1885 JULY 9. — PRIVY COUNCIL. — 12 C. 414 (P.C.) = 12 I.A. 171 = 9 Ind. Jur. 439 = 4 Sar. P.C.J. 685.

purchase by Khogendra. So far from ignoring it, he assigned to Khogendra the precise position which the High Court now assign to him in their judgment, and, doing so, made him a party to the suit of 1867 in order that he might redeem if he were so minded, and if he were not so minded he might be for ever shut out. It is not the case that the equity of redemption is affected by a decree in a suit to which the owner of it is not a party. He was a party to the suit, and he declined to accept the position of a party to the suit, and he insisted upon it that the Court should dismiss him and treat him as if he were not a person who could be put to redeem at all. He even did more. He insisted on being present when the order for sale was settled, and on having a voice in its terms, and he actually got them varied to his satisfaction. That is the first ground taken by the Court.

Then they go on: "The next question is whether the defendants having been joined in the mortgage suit on the plaintiff's motion, and having got the suit dismissed as against them, are now precluded from setting up their claim to the mortgaged premises. We are of opinion that the orders passed in that suit, so far as regards the present defendants, had no effect beyond deciding that whatever their claims might be, they could not conveniently be tried in that suit."

It was the paramount claims that could not be conveniently [422] tried in that suit. If Khogendra had accepted the position of a person who was entitled to redeem, then, so far from his claims not being conveniently tried in that suit, he was (apart from the doctrine of *lis pendens*) a necessary party to that suit, and his claims could not be conveniently or properly tried in any other suit; but, not accepting that position, his claims were tried in that suit so far as concerned the question whether or no he was entitled to redeem, and it was held on his own showing that he was not entitled to redeem, and on that ground he was dismissed.

The next ground is this: "An objection has also been grounded on the form of the present suit, and it has been urged that the plaintiff, having sued for direct possession, the suit ought, if he be found not entitled to direct possession, to be simply dismissed. We think, however, that we are at liberty to follow the course taken, in a very analogous case regarding the same property by Pontifex, J., in *Khasimunnisa Begum* v. *Nilrutton Bose* (1) and to give the plaintiff a decree for possession conditional on the defendants' failure to redeem, and that we are at liberty to decide what are the equitable terms on which the defendants may be permitted to redeem. The plaintiff has himself purchased several of the mortgaged properties, and he cannot therefore throw more than a proportionate share of the mortgaged charge on another portion of the mortgaged premises." That doctrine of apportionment is stated somewhat broadly, and is not applied correctly. The true application of it is this, that the Court may direct accounts, to which the purchasers of fragments of the equity of redemption must be parties, with a view of settling between them all what is the proportion to be charged on each fragment. This is shown by the case which the High Court cite from Moore (2) as an authority for their decision. In that case an equity of redemption had been sold in parcels, and the mortgagee had purchased some. The purchaser of a parcel then sued the mortgagee alone for redemption of that parcel alone on payment of its proportion of the debt

(1) 8 C. 79. (2) *Nawab Azimat Ali Khan* v. *Jowahir Singh*, 13 M.I.A. 404.

and his suit was dismissed because he was bound to add the other purchasers as parties, and to offer to redeem their parcels.

[423] It is quite a new thing to hold that the purchaser of a single fragment of the equity of redemption may come, without bringing the other purchasers before the Court, and have an account as between himself and the mortgagee alone, so that the mortgagee may be paid off piecemeal. Such a law would result in great injustice to the mortgagee. It would put him to a separate suit against each purchaser of a fragment of the equity of redemption though purchasing without his consent, and he would have separate suits against each of them, and suits in which no one of the parties would be bound by anything which took place in a suit against another. Different proportions of value might be struck in the different suits, and the utmost confusion and embarrassment would be created.

But so far from contemplating accounts between all the parties concerned, the High Court do not direct any account at all; not even the ordinary account on which a redemption decree must be founded. They go at once to say of their own discretion what shall be the price paid for this mortgaged property. They say: "In the present instance the plaintiff paid Rs. 1,600 as the price of the mortgaged property. And we think that the equities of the case will be met by giving the defendants six months within which to redeem by payment of this sum, together with interest at 6 per cent. from the date of the plaintiff's purchase, 27th April 1870; the plaintiff in default of such redemption within six months to be entitled to *khas* possession." So a sale having taken place with the knowledge of Khogendra under the decree which gave him his costs and dismissed him as one having no interest subordinate to the mortgage, and the plaintiff having paid Rs. 1,600 for the equity of redemption at that sale, he is to have the whole property taken away from him by Khogendra on receipt of what he has paid for the equity of redemption alone, and not to have a single farthing for that proportion of his mortgage debt which the Court themselves say ought to be charged upon the property. Nor is he to have anything for Khogendra's costs which he paid, or for his own costs of that suit which failed by Khogendra setting up a fictitious title. The hardship of such a decree upon the plaintiff is apparent in stating the facts. Their Lordships think that it is founded [424] upon entirely wrong grounds. It is not consistent with itself, because it does not give to the mortgagee what the Court says he is entitled to have, but besides the inconsistency it is founded upon wrong grounds. Their Lordships hold that Khogendra is bound by the decree in the suit of 1867, and that he could not, after that decree was passed, ever come in to redeem this property.

The result is, that in their Lordships' judgment the High Court ought to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to make that decree, reversing the decree of the High Court, and so restoring the decree of the Subordinate Judge. The costs of this appeal must be paid by Chandra Nath Mullick, who appears on his own behalf and also as next friend of the minor respondents.

With reference to the costs their Lordships have to observe that the bulk of the record has been unduly swelled by the insertion of a schedule upwards of 80 pages in length, containing particulars of either the property in suit or the whole of the property mortgaged, it does not matter which; in either case they are particulars which could not by any possibility have

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come into controversy or have aided the controversy in this present appeal. They will therefore intimate their opinion to the Registrar that in taxing the costs of this appeal, he shall disallow all costs occasioned by that bulky schedule.

C. B.

Appeal allowed.

Solicitors for the appellant: Messrs. *Watkins and Lattey.*

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12 C. 424.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Macpherson.

TRAILOKYA NATH GHOSE (*Defendant*) *v.* CHUNDRA NATH DUTT *alias* SINGH (*Plaintiff*).* [13th August, 1885.]

Cause of action—Defamation—Slander—Damages—Consequential Damage.

A suit for damages for defamation of character involving loss of social position and injury to reputation will lie without proof of special damage.

[425] *Parvathi* v. *Mannar* (1) and *Srikant Rai* v. *Satcouri Saha* (2) followed (3).

[R., 3 C.L.J. 140; 4 C.L J. 388=34 C. 48; 26 C. 653; U.B.R. (1905) 1st Qr. Tort, Defamation, 1.]

THE plaintiff in this case sued for damages on the allegation, that the defendant had maliciously, in the presence of a large number of his villagers. called him a *pode,* although he is in fact a *kyasta,* in consequence of which he has lost his social position.

The plaintiff and defendant were both residents of Moradpore, where the plaintiff had always passed as a *kyasta,* and married a *kyasta's* daughter. The defendant having, as he alleged, heard from some informer that the plaintiff was not a *kyasta,* but a *pode,* told the priest who performed rites for the plaintiff as well as the defendant. The priest told the plaintiff what the defendant had communicated to him, and the plaintiff thereupon, taking a number of the villagers with him, went to the defendant, and asked him if he had made the statement, and the defendant then admitted having made it. As a result, the priest refused to perform rites and ceremonies for the plaintiff, and the neighbours ceased to associate with him. He therefore brought this suit for damages. The plaintiff proved the above facts, and there was some evidence of there being bad feeling between the parties in consequence of a quarrel between the defendant and some relative of the plaintiffs. The defence was that the statement was made *bona fide* to the priest, and owing to religious scruples on the part of the defendant, who, had it been true, would have lost his caste, had the same priest performed his ceremonies as well as those for the plaintiff. The defendant called only one witness however, his alleged informer, who denied that he had given him the information. The first Court, while of opinion that the suit was maintainable, dismissed it on the merits. The Subordinate Judge reversed his decision and gave the plaintiff damages Rs. 50.

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* Appeal from Appellate Decree, No. 451 of 1883, against the decree of Baboo Nuffer Chandra Bhutto First Subordinate Judge of 24-Pergunnahs, dated the 6th of December 1882, reversing the decree of Baboo Janoki Nath Dutt, Munsif of Alipore dated the 17th November 1881.

(1) 8 M. 175. (2) 3 C.L.R. 181. (3) See *Ibin Hossein* v. *Haidar,* 12 C. 109.

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The defendant appealed to the High Court.

Baboo *Rash Behari Ghose* and Baboo *Troylokya Nath Mitter*, for the appellant.

Baboo *Baikanta Nath Dass*, for the respondent.

[426] The judgment of the Court (PRINSEP and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

This is a suit for damages on account of slander of the plaintiff by the defendant, inasmuch as the defendant maliciously, in the presence of a large number of villagers, said that the plaintiff was a *pode*, he being known not to be a *pode* but a *kyasta*. In consequence of this it is stated that the plaintiff has lost his social position, his neighbours of his own caste refusing to associate with him, and his priest refusing to perform the usual religious ceremonies.

The facts alleged have been found by both the lower Courts.

The Munsif dismissed the suit, because he found that the slander was confidentially and in good faith communicated to the priest as a caution, and that the publicity given to it was in consequence of the plaintiff's act in assembling the villagers in order that he might in their presence challenge the defendant to repeat the observation.

The Subordinate Judge on appeal found that the defendant had acted maliciously in consequence of a quarrel between him and the plaintiff, and he also found that the injury so done to the plaintiff socially and mentally according to a Hindu point of view, was such as would entitle him to damages. He accordingly set aside the order of the lower Court.

The Subordinate Judge has not considered the point raised on appeal before us that no action for slander will lie without proof of special damages estimated in money, although this point was raised before him on the cross-appeal of the defendant. There is no special law in this respect for India, beyond what is contained in the Penal Code, regarding the offence of defamation, and the few reported cases bearing on the point are not altogether consistent.

The point has been very recently discussed in *Parvathi* v. *Mannar* (1), where all these cases have been cited and considered. We concur in the opinion there expressed which is in accordance with the latest decision on the subject in this Court in the case of *Srikant Rai* v. *Satcouri Saha* (2). Although we think that actions for verbal slander should not be encouraged, we find it **[427]** impossible to hold, having regard to the customs amongst Hindus, that on the facts found by the lower appellate Court, plaintiff has not suffered seriously from the slander of the defendant, inasmuch as his social position has been materially affected by the suspicion cast upon him, and his priest has refused to perform the usual rites and ceremonies for him.

The damages awarded are moderate. The appeal is, therefore, dismissed with costs.

J. V. W. *Appeal dismissed.*

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(1) 8 M. 175. (2) 3 C. L. R. 181.

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CRIMINAL REVISION.

12 C. 427.

12 C. 427.

CRIMINAL REVISION.

Before Mr. Justice Mitter and Mr. Justice Agnew.

IN THE MATTER OF THE PETITION OF BHOLA NATH DAS.*
[4th December, 1885.]

Police Act (V of 1861), *s.* 29—*Police Constable—" Neglect of duty"—" Lawful order" Extra drill.*

A District Superintendent of Police directed his constables to cut down the jungle in the vicinity of their lines and on their refusal to comply ordered them extra drill every day. One of such constables not turning out to such extra drill was thereupon prosecuted and convicted of neglect of duty under s. 29, Act V of 1861.

Held, that s. 29 provided for no such offence, and that any neglect of duty short of a violation of duty does not amount to an offence under that section.

Held, further, that the omission to attend such extra drill did not amount to an offence under that section, as the words " lawful order" used in the section mean an order which the authority mentioned therein is competent to make, and it did not appear that a District Superintendent of Police was competent to order his constables to cut down the jungle in the vicinity of their lines and, on their refusal to do so, to order them extra drill.

IN this case the accused, who was a constable in the Goalpara Police Force, was charged with neglect of duty under s. 29, Act V of 1861.

It appeared from the statement of the complainant, who was an Inspector, that the District Superintendent of Police had recently ordered his men to cut down the jungle in the vicinity [428] of their lines. Some of the men, and amongst them the accused, considered this work derogatory and refused to obey the order. The District Superintendent thereupon as a punishment ordered these men extra drill every day. On the 3rd July, the first day on which such extra drill was ordered, the accused absented himself. The present charge was, therefore, brought against him, and he was convicted of an offence under the above-mentioned section, the Deputy Commissioner being of opinion that the District Superintendent was perfectly right in ordering the men to clear the jungle and in punishing them for their disobedience. The Deputy Commissioner being of opinion that the accused was one of the ring-leaders, sentenced him to three months' rigorous imprisonment. The accused then sent an application for revision to the High Court, and upon the papers being laid before Prinsep and Grant, JJ., a rule was issued against the Deputy Commissioner to show cause why his order should not be set aside, and pending the hearing of the rule, the accused was directed to be released on bail.

The rule came on to be heard in the vacation on September 18th, before a Bench consisting of Pigot and O'Kinealy, JJ., who considered that the question of whether the District Superintendent of Police had power to order extra drill as a punishment was of some difficulty and of importance to the police authorities, and that they should have an opportunity of being heard. The case was, therefore, adjourned till after the vacation, and accordingly now came on for hearing before a Bench consisting of Mitter and Agnew, JJ.

Baboo *Dwarkanath Chakrabati*, for the petitioner.

*Criminal Revision No. 302 of 1885 against the order of Lieutenant-Colonel T. B. Michell, Deputy Commissioner of Goalpara, dated the 6th of July 1885.

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The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

Baboo *Dwarkanath Chakrabati*, for the petitioner, contended that failure to appear to undergo punishment is not a neglect of duty, as liability to undergo punishment is hardly a duty. Assuming it to be so, there is no finding by the Court below that the failure to appear was "wilful" as contemplated by s. 29, Act V of 1861; the District Superintendent of Police had no authority to order extra drill, which is a [429] corporal punishment, therefore failure to obey that order is not a breach or violation of duty under s. 29, Act V of 1861. Section 7 authorises the District Superintendent of Police to punish his subordinates, but it does not authorise him to inflict corporal punishment. The order to cut jungle was illegal, it not being the duty of a constable to cut jungle; therefore the punishment awarded for failing to do what was unlawful is illegal, and therefore omission to comply with the order would not be an offence under s. 29.

The *Deputy Legal Remembrancer.*—The order to cut jungle is legal, because the Police Manual provides that the constables are to keep their lines clean. The power to order extra drill, although not expressly provided, has been recommended in the Police Manual in the case of officers receiving very small pay.

Baboo *Dwarkanath Chakrabati* in reply.

The judgment of the High Court (MITTER and AGNEW, JJ.) was as follows:—

JUDGMENT.

The petitioner in this case has been convicted by the Deputy Commissioner of Goalpara in a summary trial of the offence of neglect of duty under s. 29 of Act V of 1861, under the following circumstances:—

The petitioner, who is a constable in the Goalpara Police Force, was ordered by the District Superintendent of Police to cut down the jungle in the vicinity of the lines occupied by the said Police Force. On his refusal to obey this order, the District Superintendent ordered extra drill every day for the petitioner and other similar delinquents. The petitioner not having attended the extra drill thus ordered has been convicted as aforesaid and sentenced to three months' rigorous imprisonment.

The offence of which the petitioner has been found guilty is that "of neglect of duty under s. 29 of Act V of 1861." The section in question does not provide for any such offence. It deals with offences constituted either by any violation of duty or wilful breach, or neglect of any rule or regulation, or lawful order, made by competent authority, on the part of a police-officer. Any neglect of duty short of a violation of duty does not amount to an offence under s. 29 of Act V of 1861. But apart from this error it seems to us that, [430] under the circumstances of this case, the omission on the part of the petitioner to attend the extra drill ordered by the District Superintendent of Police did not amount to an offence under this section. The words "lawful order" used in the section mean an order which the "authority" mentioned therein is competent to make. It has not been shown to us that the District Superintendent of Police in this case was competent to order his constables to cut down the jungle in the vicinity of their lines, and that on their refusal to do so, to order extra drill in respect of them. That being so, the prosecution in this case, in our opinion, failed to establish that there

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was any violation of duty or wilful breach or neglect of any lawful order made by competent authority on the part of the petitioner. We, therefore, set aside his conviction and the sentence passed upon him upon that conviction.

H. T. H. *Conviction quashed.*

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12 C. 430.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Field.

UMACHURN BAG AND ANOTHER (*Plaintiffs*) *v.* AJADANNISSA BIBEE AND OTHERS (*Defendants*).* [4th December, 1885.]

Road Cess Act (*Bengal Act X of* 1871), *ss.* 3, 9, 10, 23, 25 *and* 26—*Sale for arrears of Road Cess, Effect of—Right of Purchaser.*

In a suit on a bond by which certain land, admittedly lakheraj, was mortgaged, the purchaser of a portion of the mortgaged property at an auction sale for arrears of road cess due under Bengal Act X of 1871 was added as a defendant, and the lower Courts holding that the effect of such a sale was to pass the property to the defendants free of encumbrances made a decree, excluding that portion from liability in respect of the mortgage bond.

Held, on the construction of Bengal Act X of 1871 that the sale had no such effect, and that the whole of the property was liable to be sold in satisfaction of the plaintiffs' claim.

Although the effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places in the Act in which that [431] word occurs, it is not the effect of an interpretation clause that the thing defined has annexed to it every incident which may seem to be attached to it by any other Act of the Legislature. It does not follow, therefore, that because lakheraj property is defined in the Road Cess Act, 1871, to be a tenure, all the interests and consequences attached by other Acts to tenures generally, or to particular classes of tenures, become annexed to lakheraj property.

[F., 27 C. 27 (29).]

THE plaintiff sued on a registered mortgage bond in usufructuary form, executed by two of the defendants on 17th Bysack 1275, in which it was stipulated that the money was to be repaid in Falgun 1287, and pledging certain properties, admittedly lakheraj, as security for the repayment. The money not having been repaid, the suit was brought to recover the amount of the bond by sale of the mortgaged property. The executing defendants did not appear. The only defendant who contested the suit was Ajadannissa Bibee who was added as a party as being a purchaser of a portion of the mortgaged property.

She stated that on 11th December 1878 she purchased a 6½ anna share of mouzah Sonamukhi, a portion of the mortgaged property, at an auction sale held on account of arrears of road cess, and that she had since transferred a three-anna share of her purchase to one Mahendi Narayan Deo. She submitted that her purchase ought to be regarded in the same way as the purchase of a jote in arrears under the provisions of Bengal Act VIII of 1869, and was free from any lien on account of the plaintiff's mortgage.

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* Appeal from Appellate Decree, No. 1457 of 1885, against the decree of Baboo Brojendra Coomar Seal, Judge of Bancoorah, dated the 15th of April 1885, affirming the decree of Baboo Nil Madhab Mookerjee, Rai Bahadur, Munsif of that district, dated the 2nd of December 1884.

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The Munsif, on the issue what was the effect of the sale to the defendant Ajadannissa, referred to the case of *Saroda Prosad Gangooly* v. *Prosono Coomar Sandial* (1), upheld her contention, and made a decree "that the plaintiffs may recover the whole of the money and costs from the properties pledged, with the exception of the 6½ anna share of mouzah Sonamukhi."

On appeal the Judge held that a sale for road cess had the effect of a sale for arrears of rent or revenue, so as to vest the property in the purchaser free from encumbrances. He therefore upheld the Munsif's decision.

The plaintiffs appealed to the High Court.

[432] Baboo *Sreenath Dass* and Baboo *Ashotosh Mookerjee*, for the appellants.

Mr. *R. E. Twidale* and Baboo *Rashbehari Ghose*, for the respondent.

The judgment of the Court (WILSON and FIELD, JJ.) was as follows:—

JUDGMENT.

The suit in this case was brought to enforce a mortgage. The plaintiff made not only the mortgagors, but the person who had become the purchaser of the mortgaged premises, defendants. The property sued for is confessedly lakheraj property. The purchaser, the defendant No. 3, alone appeared, and her defence was, that another person, the owner of the estate within the local boundaries of which the lakheraj in question is included, had paid the road cess in respect of that lakheraj; that he had taken proceedings to recover from the lakherajdar the road cess so paid, and obtained a decree; and that in execution of that decree he put up for sale the lakheraj property, and the defendant No. 3 became the purchaser. The effect was, as she says, to pass to her a good title free from all incumbrances, including the plaintiff's mortgage.

The lower appellate Court has decided in favour of the defendant No. 3.

It appears to us that the decree cannot be supported. The matter turns upon the enactment of Bengal Act X of 1871, which was then in force with regard to road cess.

It will be convenient here to point out, what is known to everybody, that, according to the general scheme of the Road Cess Act, the owner of an estate pays for everything within the ambit of the estate, and recovers their share from those holding under him. The tenure-holder again pays for everything within the ambit of his tenure and recovers their share from his tenants. The third class, the ryots, pay for themselves alone. As regards lakheraj property, which might be said not to form a part of a tenure of estate, they are specially dealt with. Section 3 says that, "*tenure* includes every interest in land, whether rent-paying or not, save an estate as above defined, and save the interest of a cultivating ryot." This is a definition for the purposes of the Act, and [433] it must always be remembered that the effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places of the Act in which that word occurs. And, therefore, wherever we find the word "tenure" in Bengal Act X of 1871, it must, unless the contrary plainly appear, be understood in accordance with the meaning put upon it by the interpretation clause. But it is by no means the effect of an interpretation clause

(1) 8 C. 290.

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that the thing defined shall have annexed to it every incident which may seem to be attached to it by any other Act of the Legislature. Thus with regard to the word "tenure" it by no means follows that because lakheraj is defined to be a tenure in this Act, therefore all the interests and consequences attached by other Acts to tenures generally, or to particular classes of tenures, become annexed to lakheraj property. One other thing which it may be well to point out, is this: These Acts must be considered according to the settled principles of interpretation. And it is a well settled principle of interpretation that no statute is to be construed to take away private right of property, unless such an intention appears by *express words*, or by necessary implication.

With these preliminary remarks let us refer to the sections in Bengal Act X of 1871, which bear directly upon the question at issue.

Section 26 of the Act says: "All lands held without payment of rent other than lands mentioned in s. 9, and not being estates entered on the register of revenue-free tenures of the district, shall, for the purposes of this Act, be deemed to form a part of the tenure within the local boundaries of which they may be included, and if they be not included within the local boundary of any tenure, then to be a part of the estate within the local boundaries of which they are included, and if they be not included within the local boundaries of any estate, then to be a part of such conterminous estate as the Collector, in whose district such conterminous estate is situated, shall, by an order under his seal appoint. And road cess in respect of such lands shall be payable by the holder of the estate or tenure of which they are deemed to form a part, and shall be recoverable under the provisions of s. 23 or s. 25 as the case may be." The effect [434] of that section, is that for the purpose of ascertaining who is to pay the road cess in the first instance, and how it is to be recovered, we are to consider the lakheraj falling within this section as if it were a part of the tenure or estate in which it lies. We have next to see what is meant by the words "shall be recoverable under the provisions of s. 23 or s. 25." Section 23 provides for a case where road cess is to be recovered directly by the Collector. It says: "If any instalment of such road cess or part thereof payable to the Collector shall not be paid, the person making default shall, at any time within three years next after the same has become payable, be liable to pay the amount of the arrear, and such amount may be levied by an order in writing of the Collector, and the provisions of s. 10 shall apply to such order." The provisions of s. 10 enable the Collector to recover fines by means of the certificate procedure, a procedure which is well known. Section 23 goes on to provide an alternative method of recovery. It says: "Or the Collector may, if he see fit after recording his opinion to that effect," serve a notice as provided in sch. C, the effect of which is to sequestrate, if I may use the expression, the tenure or other property concerned, and to enable the Collector to receive the rents until the amount of road eess arrear is satisfied.

These remedies are of a summary kind : but neither the one nor the other results in affecting the interests of any third person as distinguished from the person, or any of the persons, whose lands are liable in respect of road cess.

Section 25 deals with the corresponding case, where the recovery of road cess is not to be by the Collector, but by the person who has paid, and is entitled to recover it. It says: "Every holder of an estate or tenure to whom any sums may be payable under the provisions of this Act

may recover the same in the same manner and under the same penalties as if the same were arrears of rent due in respect of the land in respect of which such sums may be payable" These are the words on which the decision of this case turns. Now all that is said in this section is, that all sums payable may be recovered in the same manner and under the same penalties as if they were arrears of rent due in respect of the land in respect of which such sums may be **[435]** payable. The construction put upon these words by the Court below in this case is this: that the effect of them is to make a sale in execution of a decree for these sums operate in the same way as the sale of a *putni* or of an under-tenure specially defined in s. 59 of the Rent Act.

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It appears to us that there are two fatal objections to this construction. The first is this: In order to give such an effect to the words, it is necessary to read them as if the section ran thus: that the sums may be recoverable in the same manner and under the same penalties as if they were arrears of rent due in respect of the land in respect of which such sums may be payable, and the thing sold were a *putni* tenure under the *putni* Regulation, or an under-tenure described in s. 59 of the Rent Law. There are no such words in the section; and we have no right to import them.

Secondly, we should further have to add words to the effect that the proceedings taken should have the same effect as proceedings for rent in the cases referred to, and that as against third persons who are not parties.

These two objections are fatal to the construction placed by the Court below on the language of s. 25 of the Road Cess Act, 1871.

We are dealing here entirely with the case of a sale under Bengal Act X of 1871. At present a different law is in force, that is to say, these matters are now governed by Bengal Act IX of 1880, and the amending Act of the Government of India (X of 1881). In saying this I desire to guard, against being understood to say that there has been any change in the law under the new Act. It is not necessary to decide that question now. I do not for a moment suggest that there has been any such change.

The result is that the decree of the Court below will be varied by striking out of it the words, "with the exception of the 6½ annas share of mouzah Sonamukhi."

The plaintiffs will have costs in all the Courts.

J. V. W. *Appeal allowed.*

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12 C. 436.

[436] APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Ghose.

DINENDRA NATH SANNYAL (*Judgment-debtor*) v. CHANDRA KISHORE MUNSHI (*Decree-holder*).* [22nd December, 1885.]

Transfer of Property Act (IV of 1882), *ss* 2, 67, 99—*Mortgage decree—Execution.*

A decree-holder, who had obtained a decree in the year 1880 against his judgment-debtor declaring his title on certain mortgage properties and authorising a

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* Appeal from Order No. 205 of 1885, against the order of Baboo Nilmani Dass, Subordinate Judge of Pubna, dated the 20th of June 1885.

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sale, sought, after several previous applications keeping the decree alive, to execute his decree again on the 15th April 1885. The judgment-debtor objected on the ground that no suit had been instituted or decree obtained under s. 67 of the Transfer of Property Act as directed by s. 99.

Held, that s. 99 of that Act was not intended to apply to decrees already obtained declaring a lien and authorizing a sale, but even assuming that it was so intended, s. 2 of the Act saved the right of the decree-holder to obtain a sale of the mortgaged properties. *Ganga Sahai* v. *Kishen Sahai* (1) distinguished.

[F., 19 M. 382 (384) ; R., 10 M. 129 (131) ; D., 21 C. 34 (38).]

IN this case one Chandra Kishore Munshi obtained, on the 15th December 1880, a decree upon a mortgage bond declaring his lien upon certain properties mortgaged to him and authorizing the sale of these properties against Dinendra Nath Sannyal, and on several occasions previous to this present application had executed this decree against his judgment-debtor. On the 15th April 1885 he again applied for execution, but the judgment-debtor objected to the application, on the ground that under s. 99 of the Transfer of Property Act the property could not be brought to sale without instituting a suit and obtaining a decree thereon under s. 67 of that Act.

On the 20th June 1885, the Subordinate Judge overruled the objection and ordered execution to proceed.

The judgment-debtor appealed to the High Court.

Baboo *Hem Chunder Banerjee* and Baboo *Sharoda Charan Mitter*, for the appellant, contended that the Transfer of Property Act applied, and cited *Ganga Sahai* v. *Kishen Sahai* (1).

Baboo *Iswar Chundra Chakerbati*, for the respondent.

[437] The judgment of the Court (McDONELL and GHOSE, JJ.) was as follows :—

JUDGMENT.

It appears that the decree-holder in this case obtained against the judgment-debtor a decree upon a mortgage bond, declaring his lien upon the properties hypothecated therein and authorising the sale of the said properties. This decree was passed on the 15th December 1880 before the Transfer of Property Act (IV of 1882) came into operation. The decree was, from time to time, enforced without any objection on the part of the judgment-debtor, but upon an application, out of which this appeal arises, having been made on the 15th April 1885, the judgment-debtor objected that, under s. 99 of the Transfer of Property Act, the decree could not be executed, and the property brought to sale, without instituting a suit and obtaining a decree under the provisions of s. 67 of that Act. The lower Court refused to give effect to this objection and the appeal is against the order of the Subordinate Judge allowing execution to proceed.

It is contended before us that s. 99 of the Transfer of Property Act applies to all decrees, whether they be money decrees or mortgage decrees ; and that in every case of the kind, if the decree was not obtained under s. 67, the mortgaged property cannot be sold.

We are unable to accede to this argument. As we read s. 99 it was never intended to apply to a decree already obtained declaring a lien over, and authorizing a sale of the mortgaged property. It was evidently intended to apply to other decrees not being mortgage decrees. But even if we were to concede that it was so, we are nevertheless of opinion that

(1) 6 A. 262.

s. 2 of the Act saves the right of the decree-holder in the present case to obtain a sale of the property hypothecated to him. That section, among other matters, runs as follows:—

"But nothing herein contained shall be deemed to affect (*e*) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability."

Now, in the present case, a legal relation was constituted, before the Act came into force, between the parties by the decree that was passed in December 1880. By reason of this relation **[438]** the decree-holder has a "right" to enforce his decree for the satisfaction of his claim; and he is entitled to the "relief" in respect to such right that he now prays for, *viz.*, to have the property sold in execution of the said decree.

The learned vakeel for the appellant quoted in support of his arguments the case of *Ganga Sahai* v. *Gishen Sahai* (1). All that we need say on the present occasion is, that the identical point raised in this case was not that which was raised in that case. There the question was one of procedure, here the question is one of substantive right.

We are, therefore, of opinion that the order passed by the lower Court was right, and we accordingly affirm it with costs.

T. A. P. *Appeal dismissed.*

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12 C. 438.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Ghose.

J. BRUCE *v.* C. CRONIN.* [7th January, 1886.]

Merchant Seamen's Act (*Act I of* 1859), *s.* 83—17 *&* 18 *Vic. c.* 104, *ss.* 243 (*cls.* 1 *and* 2), 288—*Merchant Shipping Act*, 1854—43 *&* 44 *Vic. c.* 16, *s.* 10—*Merchant Seamen* (*Payment of Wages and Rating*) *Act*, 1880—*Imprisonment for desertion.*

The amendment of cls. 1 and 2 of s. 243 of 17 & 18 Vic., c. 104, by 43 & 44 Vic., c. 16, s. 10, does not affect the liability of seamen in Calcutta to imprisonment for offences under s. 83, cls. 1 and 2 of Act I of 1859.

THIS was a reference to the High Court by the Chief Presidency Magistrate of Calcutta under s. 432 of the Code of Criminal Procedure.

It appeared that one Cornelius Cronin, a fireman on board the British steamship "City of Cambridge," was charged by the Chief Engineer of the vessel, under cl. 2 of s. 83 of Act I of 1859 with being absent without leave from the vessel; the accused pleaded guilty, and was sentenced to 24 hours' imprisonment with hard labour.

[439] The Chief Presidency Magistrate passed the following judgment convicting the accused, but having regard to the importance of the question decided, and to the fact that his predecessor had in July 1885 come to a different conclusion in a similar case (holding that the Court had no power to imprison for offences under cls. 1 and 2 of s. 83 of Act I of 1859) made his judgment contingent on the opinion of the High Court, as to whether the amendment of cls. 1 and 2 of s. 243 of 17 & 18 Vic.,

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*Criminal Reference No. 3 of 1886, made under s. 432 by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 21st of December 1885.

(1) 6 A. 262.

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c. 104, by 43 & 44 Vic., c. 16, affected the provisions of Act I of 1859, so as to do away with the liability of the seamen in Calcutta to imprisonment for the offences specified in cls. 1 and 2 of s. 83 of Act I of 1859. The accused was released, pending the decision of the High Court, on his own recognizances to appear for judgment when called upon.

"The question before the Court is whether under s. 83, cls. 1 and 2 of the Indian Merchant Shipping Act (Act I of 1859) seamen are liable to imprisonment for the offences therein specified, *viz.*, desertion, neglecting or refusing to join, or to proceed to sea, absence within twenty-four hours before sailing and absence without leave, or whether they are only liable to fine.

"My predecessor Mr. Reily, in a judgment delivered on the 8th July 1885, has held that the Court has no power to inflict imprisonment, and as I understand it, for the following reason, *viz.*, that the authority under which the Indian Legislature passed Act I of 1859 is to be found in s. 288, 17 & 18 Vic., c. 104, which is as follows :—'If the Governor-General of India in Council, or the respective Legislative authorities in any British possession abroad, by any Acts, ordinances, or other appropriate legal means apply or adopt any of the provisions in the third part of this Act contained, to any British ships registered as trading with, or being at any place within their respective jurisdiction, and to the owners, masters, mates and crews thereof, such provisions, when so applied and adopted as aforesaid, and as long as they remain in force, shall, in respect of the ships and persons to which the same are applied, be enforced, and penalties and punishments for the breach thereof shall be recovered and inflicted, throughout Her Majesty's dominions in the same manner as if such provisions had been hereby so adopted and applied, and such penalties and punishments had been hereby expressly imposed.'

"This section is recited in the preamble of Act I of 1859 of the Legislative Council in India.

"Section 83 of the said Act will be seen to be a transcript of s. 243 of 17 & 18 Vic., c. 104.

"Section 243, as it originally stood, empowered Criminal Courts to inflict **[440]** imprisonment for the offences specified in cls. 1 and 2, but this section has been amended by 43 & 44 Vic., c. 16, to the effect that Criminal Courts shall have no power to inflict imprisonment for offences under cls. 1 and 2 of s. 243.

"After giving the matter my best consideration, it appears to me that the Indian Act I of 1859 was passed under the general powers of legislation given to the Legislature of this country by the Indian Councils' Act, 24 & 25 Vic., c. 67, and that the object of s. 288 of the Statute, and the reason of its recital in the preamble of Act I of 1859 was that, according to s. 288, judgments and orders passed by the Criminal Courts of this country were to be enforced throughout Her Majesty's dominions in the same manner as if such provisions had been applied and adopted, and the penalties and punishments had been imposed by the Merchant Shipping Act of 1854, which would not otherwise have been the case.

"I am of opinion that the repeal, or otherwise, of 17 & 18 Vic., c. 104, can in no way further affect Act I of 1859 of the Indian Legislature; but that the latter must be considered to be in force in India until it is repealed by specific legislation.

"The effect I take it of the partial repeal of s. 243 of the Statute is to take away the power of enforcing orders passed under Act I of 1859,

outside the limits of British India, which was the only special effect of s. 288 of the Merchant Shipping Act of 1854.

"I would here refer to the use of the words 'within the United Kingdom' at the beginning of s. 10 of 43 & 44 Vic., c. 16, which is the section that expressly provides that a seaman or apprentice shall not be liable to imprisonment for the offences mentioned in cls. 1 and 2, s. 243 of 17 & 18, Vic., c. 104. That section commences as follows: 'The following provisions shall, from the commencement of the Act, have operation within the United Kingdom."

"If it were held that the amendment of Part III of the Merchant Shipping Act of 1854 acted *ipso facto* as an amendment of the Indian Act, it would seem to follow that if altogether new provisions were substituted for Part III of the Merchant Shipping Act of 1854, the Indian Act, whilst remaining unchanged upon the Indian Statute Book, might have to be read as meaning something entirely different from, and perhaps contradictory to, its express terms.

"It would appear that the British Legislature considered that different provisions might be necessary in different dependencies of the empire, and would seem to have provided for such a contingency by the passing of s. 288 of the Merchant Shipping Act of 1854.

"I can see no grounds for supposing that by s. 288, it was intended in any way to curtail the powers conferred by the Indian Councils' Act, 24 & 25 Vic., c. 67.

"The sentence of the Court is that the accused do undergo twenty-four hours' [441] imprisonment with hard labour, but inasmuch as the question is one of very great moment to the mercantile community, and one on which it appears to me most desirable that an authoritative ruling should be obtained, I direct that the following question be referred to the High Court, under s. 432 of the Code of Criminal Procedure, and that pending the decision of the High Court, the accused be enlarged on his own recognizance of Rs. 10 to come up for judgment when called upon.

"Whether the amendment cls. 1 and 2 of s. 243 of 17 & 18 Vic., c. 104, by Act 43 & 44 Vic., c. 16, affects the provisions of Act I of 1859 of the Indian Council, so as to do away with the liability to imprisonment in Calcutta for the offences specified in cls. 1 and 2 of s. 83, Act I of 1859?"

No one appeared for either party on the reference.

The following was the opinion of the Court (CUNNINGHAM and GHOSE, JJ.):—

OPINION.

We agree with the Magistrate in the view he has taken of this matter. The amendment of cls. 1 and 2 of s. 243 of the Merchant Shipping Act, 1854 (17 & 18 Vic., c. 104) by 43 & 44 Vic., c. 16, does not, in our opinion, affect the liability of seamen in Calcutta, under s. 83 of Act I of 1859, to imprisonment. Had any such change been intended, it would doubtless have been expressly enacted in Act V of 1883, passed subsequent to the above Act, 43 & 44 Vic., c. 16, which in ss. 35, 36 and 37 amends some portions of Act I of 1859.

T.A.P.

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APPELLATE CIVIL.

12 C. 441.

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APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice O'Kinealy.

RAJKUMAR BANERJI AND ANOTHER (*Judgment-debtors*) v. RAJLAKHI DABI (*Decree-holder*).* [11th December, 1885.]

Limitation Act (XV of 1877), *sch. II. Art.* 179, *cl.* (4)—*Execution of decree—Step-in-aid of execution—Confirmation of sale—Application for copy of decree.*

On the 19th of March 1880 a decree for money was passed, and on the 19th of February 1881, certain property belonging to the judgment-debtor was sold in execution thereof. On the 22nd of April 1881, the Court passed [442] an order confirming the sale. On the 10th of January 1882, the decree-holder applied to the Court for a copy of the decree, in order that he might make a fresh application for execution. On the 28th of March 1884 he applied for execution. The judgment-debtor appeared and pleaded that execution was barred by limitation. The Court of first instance held that execution was not barred on the ground that the passing of the order of the 22nd of April 1881 was sufficient, under the provisions of art. 179, cl. 4 of the Limitation Act, 1877, to keep the decree alive. The lower appellate Court also held that execution was not barred by limitation, but solely on the ground that the application of the 10th of January 1882 was sufficient to keep the decree alive. It did not appear that the order of the 19th of February 1881 was passed in consequence of any application by the decree-holder, and neither the application of the 10th of January 1882 nor any copy thereof was put in evidence on the present application.

Held, on appeal to the High Court, that the execution of the decree was barred by limitation.

[F., 23 B. 311 (315); R., 20 B. 179 (180); 31 C. 1011; 11 Bom. L. R. 729 (734) = 3 Ind. Cas. 771.]

IN this case the judgment appealed from is as follows:—

"This is an appeal from an order admitting an application, dated the 28th of March 1884, for the execution of a decree obtained on the 19th of March 1880. On the 19th of February 1881 certain property was sold in execution of the decree. On the 22nd of April 1881, the Court passed an order confirming the sale and striking the execution case off the file. On the 29th of April 1881 the decree-holder applied to take out a sale certificate. On the 10th of January 1882 he asked the Court to return a copy of the decree filed by him, in order that he might make a fresh application for execution. The lower Court, relying on the case of *Radha Prosad Singh* v. *Sundar Lall* (1), held that the order confirming the sale was a step-in-aid of execution sufficient to give a new starting point under art. 179, cl. 4 of the Limitation Act. The lower Court was wrong, because there was no application on the part of the decree-holder on the 22nd April 1881 when the sale was confirmed. Art. 179, cl. 4 has reference to applications only. The case of *Toree Mahomed* v. *Mahomed Mabood Bux* (2) clearly conflicts with the ruling in *Radha Prosad Singh* v. *Sundar Lall*; and the rulings throughout the Indian Law Reports consistently support the view that there must be an application, and that a mere act or deposit of money does not suffice. The application, dated the 29th of April [443] 1881, does not help the decree-holder, as it was made in his capacity of auction-purchaser. It remains to be seen whether the application, dated the 10th of January 1882, gives a new starting point under

* Appeal from Appellate Order, No. 260 of 1885, against the order of H. Gillon, Esq., Judge of Hooghly, dated the 30th of June 1885, affirming the order of Baboo Kristo Mohun Mukerji, Subordinate Judge of that district, dated the 17th of May 1884.

(1) 9 C. 644.

(2) 9 C. 730.

art. 179, cl. 4. Looking at the liberal construction put on art. 179, cl. 4, by the Calcutta High Court in many cases, I think the application dated the 11th of January 1882, must be considered as an application to take some step-in-aid of execution of the decree—*Kunhi Mannan* v. *Seshagiri Bhaktan* (1) and appeal from order No. 192 of 1884, dated 20th November 1884, decided by the Calcutta High Court (not reported). For these reasons I uphold the lower Court's order but on a different ground."

The judgment-debtors appealed to the High Court on the grounds—(1) that the lower appellate Court has erroneously held that the application made by the decree-holder on the 10th of January 1882, asking the Court to return a copy of the decree filed by her, in order that she might make a fresh application for execution, was sufficient within cl. 4, art. 179 of the Limitation Act to keep alive the decree in this case; (2) that the lower appellate Court ought to have held that the decree in this case was barred on the date the present application for execution was made, namely, 28th March 1884.

Baboo *Kristo Komul Bhuttacharjee,* for the appellants.

Baboo *Troilokhya Nath Mitter* and Baboo *Kali Charun Banerjee,* for the respondent.

The following judgments were delivered by the Court (CUNNINGHAM and O'KINEALY, JJ.).

JUDGMENTS.

CUNNINGHAM, J.—The question raised in this appeal is whether the application made on the 28th March 1884 to execute the decree made on the 19th March 1880 is barred by limitation.

Two grounds are stated as grounds on which limitation should be held not to be barred. The first is that on the 29th April 1881, the sale was confirmed. No copy of the order passed or of any application to pass it, if such there was, has been produced before us. As it lies on the judgment-creditor to show us that the period of limitation has not expired, it is **[444]** his duty, if he wishes to rely upon anything that took place, to supply the Court with proper evidence of the proceedings to enable us to be satisfied that there was any such application: as it is, we can only say that we have nothing to go upon which would justify our holding that any application was made at that time, and we do not consider that a mere order passed in execution, irrespective of any application, should be considered as an application within the meaning of art. 179 of the schedule of the Limitation Act.

The next ground on which it is urged that limitation is not barred is that on the 10th January 1882, the decree-holder applied for a copy of the decree, in order, as the District Judge has found, that he might make a fresh application for execution. Here again the judgment-creditor has thought fit not to place on the record a copy of this application. We are therefore in the dark as to what were its terms, and as to whether it showed on the face of it anything from which we could properly infer that it was for the purpose of execution. We have, however, the fact that no execution was applied for until March 1884. Therefore, if the purpose with which the application was made was to obtain execution, it was certainly a long time before that purpose was carried into effect. Taking the mere fact of an application for a copy of the decree, we are not prepared to find that it would be fairly construed as an application to the Court to take a step in furtherance of the execution of the

(1) 5 M. 141.

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decree within the scope of paragraph 4 of art. 179 of the schedule of the Limitation Act.

We think, therefore, that the judgment-creditor has failed on both grounds to show that there has been any such application between the making of the decree and the present application which would prevent the period of limitation from expiring.

We must, therefore, admit the appeal, reverse the decisions of both the lower Courts, and dismiss the application for execution with costs in all the Courts.

O'KINEALY, J.—I concur with the judgment which has just been delivered in holding that the application for execution is barred. The judgment-creditor says that under cl. 4 of art. 179 [445] of the schedule of the Limitation Act, he has a right to execute the decree. That clause runs as follows: "(Where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree. His contention is that he has made an application to the Court to take a step-in-aid of execution. There is no such application on the record. If we were to decide the case upon such an application, we would be deciding it upon a document which has never been put before us, which we have not seen and of which we do not know anything.

Moreover, I agree in considering that a mere order of Court which requires no application does not fall within that clause. That clause evidently means that there must be some application to the Court to take some step. And where a step has been taken an order has been passed without any application at all, it does not seem to fall within the purview of the law.

Then it is said that an application to get a copy of the decree returned which was in the record room of the Judge's Court, is an application to the Court to take a step-in-aid of execution.

It appears to me that an application for the return of a document in the record room is by itself an indifferent act. And there is nothing on this record to show us how or in what way it would aid execution. No copy of the decree is required by law to be filed in execution. I therefore concur in thinking that the application for execution should be dismissed.

P. O'K. *Appeal allowed.*

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12 C. 445.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

JUDAH (*Defendant*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Plaintiff*).* [5th January, 1886.]

Insolvent Act (11 & 12 *Vict.*, *c.* 21), *s.* 62—*Crown-debts—Judgment-debt in name of Secretary of State for India in Council.*

A judgment-debt due to the Secretary of State for India in Council, arising out of transactions at a public sale of opium held by the Secretary of State [446] for India in Council, is a debt in respect of Crown property, and therefore a

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* Original Appeal No. 14 of 1885, against the order of Mr. Justice Norris, dated the 16th of February 1885.

"debt due to our Sovereign Lady the Queen" within the meaning of S. 62 of the Insolvent Act.

In determining whether or no a debt falls under the denomination of a Crown-debt, the question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State. Principle in *Secretary of State for India in Council* v. *The Bombay Landing and Shipping Company* (1) followed.

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[R., 11 Ind. Cas. 58=5 S. L. R. 82; 40 C. 208 (312).]

ON the 1st May 1884, A. N. E. Judah purchased at a Government opium sale held at Calcutta a large quantity of opium, and under one of the conditions of sale, which directed that a promissory note should be taken as a deposit from the purchaser on each lot purchased, signed 29 promissory notes in favour of the Secretary of State for India in Council, the sum total of which amounted to Rs. 2,14,500, which notes were, under the same rules, made redeemable within five days. The notes were not redeemed, and the opium was put up again for sale, the second sale resulting in a loss. A suit was, therefore, brought by the Secretary of State for India in Council against A. N. E. Judah for the amount of these notes, which under the rules before mentioned, had become forfeited to Government, the amount of the notes being made recoverable irrespective of any amount recovered by the re-sale of the opium. On the 12th May 1885 the Secretary of State for India in Council obtained a decree for the amount sued for. On the 26th August 1884, A. N. E. Judah filed his petition in the Insolvent Court, and on that day he further filed his schedule, in which he inserted and admitted the claim of the Secretary of State for India in Council, and an order was made vesting the whole of his properties in the Official Assignee. On the 3rd September 1884 the insolvent obtained a protection order.

On the 14th January 1885 the Secretary of State for India in Council applied to have his name expunged from the schedule on the ground that the debt owing to him was a Crown-debt. After hearing Counsel on both sides, the Court directed the name of the Secretary of State for India to be expunged from the schedule. On the same day, subsequently to the making of the last-mentioned order, the insolvent obtained his personal discharge.

[447] On the 15th January 1885 the Secretary of State for India in Council applied for and obtained an *ex parte* order in execution of his decree for the arrest and imprisonment of the defendant.

On the 19th defendant obtained a rule calling upon the Secretary of State for India in Council to show cause why the order of the 15th January 1885 should not be set aside.

The *Standing Counsel* (Mr. *Bonnerjee*) showed cause.—I submit it is a Crown-debt. The case of *Nobin Chunder Dey* v. *Secretary of State for India*, &c. (2) deals with the position of the Secretary of State in such matters. Also the case of the *P. & O. Steam Navigation Co.* v. *Secretary of State for India* (3). By 3 & 4 Wm. IV, c. 85, the Company were prohibited from carrying on commercial business, with the exception of such as might be carried on for the purpose of Government, and by s. 4, the Company was allowed to carry on trade for the purposes of Government only. The opium sale is carried on for the purposes of Government; the proceeds of such sales form part of the revenues. Could a person put claims against him for land revenue in his schedule? Section 4 of Act I

(1) 5 B. H. C. O. C. 23. (2) 1 C. 11. (3) Bourke Pt. VII, 167.

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of 1878 lays down that no one but Government can sell opium, so the Secretary of State cannot be considered an ordinary vendor.

[NORRIS, J.—The 15th condition of sale which states, "that in the event of a dispute or difference touching any question arising out of the sale, or adjustment of the account thereof, the same shall and may be tried and decided in the High Court of Judicature at Fort William, in Bengal," is some evidence that the Government were private vendors, and were not in these sales exercising sovereign powers.] The character of the debt is not altered by the mode of the recovery of the debt. The Secretary of State under 21 & 22 Vic., c. 106, represents the Crown, in whom the territories of the East India Company were vested, and promises made to him and debts contracted in his favour must be taken to be for the benefit of the Crown. I submit the matter falls under s. 62 of the Insolvent Act.

The *Officiating Advocate-General* (Mr. *Phillips*) on the same side contended that the question before the Court was whether **[448]** the order of the 15th January could be set aside, and this matter had already been adjudicated on by the Insolvent Court on the 14th January. The Insolvent Court, after hearing the parties, had decided that the debt was a Crown-debt. The debt has been deliberately struck out by the Insolvent Court, and this Court has no control over the Insolvent Court, and therefore cannot restore the debt to the schedule.

Mr. *Pugh* (with him Mr. *Evans*), *contra*.—If this is a debt due to the Crown, there must be a co-relative remedy in the hands of the subject. The question in the case of *Nobin Chunder Dey* v. *Secretary of State for India*(1) was whether or not this Court had jurisdiction to interfere with contracts in respect of licenses. It was a question relating to the Revenue, and the Court held that it had no power to go into the question. As regards the order of the Insolvent Court, the order simply says that plaintiff's name shall be expunged and assigns no reason. The defendant having put the name of the Secretary of State in the schedule, he had done all that he was bound to do. If the plaintiff chooses to withdraw his name, it is not the fault of the defendant. There is nothing in the Insolvent Act which says that a debt and name shall remain in the schedule, all that is necessary is that it should be inserted. At the time of the passing of the Insolvent Act the East India Company were carrying on business as traders for the purposes of Government; and from the case of the *P. & O. Steam Navigation Co.* v. *Secretary of State for India* (2), it is clear that the Secretary of State is treated as a trader with regard to salt and opium. By 21 & 22 Vic., c. 106, the territories of the East India Company became vested in Her Majesty, and by s. 3 of that Statute, one of Her Majesty's principal Secretaries of State was to exercise all the powers exercised previously by the Company. The Secretary of State, therefore, could not stand in a higher position, after the passing of the Act, than the Company did before. By s. 65 it was expressly enacted that the Secretary of State should sue and be sued as a body corporate, and that all persons should have and take the same remedies against the Secretary of State in Council as they could have taken against the Company. The case of *Secretary of State for* **[449]** *India* v. *Hari Bhanji* (3), referred to 3 classes of acts—(*a*) acts of State; (*b*) acts done under Municipal Laws which the Government had passed; and (*c*) acts done as traders. The present contract fell under clause (*c*) and therefore the Secretary of State could not claim personal exemption from

(1) 1 C. 11. (2) Bourke Pt. VII, 167. (3) 5 M. 273.

any suit. Moreover the Government of India, and not the Crown, would get the benefit of the debt, and from the case of *Frith* v. *The Queen* (1), it would follow that if the Crown had a right to debts of this description they must go to the revenues of England and not India. The words of s. 62 of the Insolvent Act were "debts due to our Sovereign Lady the Queen." This debt was one due to the Secretary of State as representing the East India Company, and it could not be said that a debt due to the East India Company was a debt due to our Sovereign Lady the Queen. A debt in the name of the Crown for the benefit of the subject is a Crown debt—*In re Smith* (2), but a debt in the name of the subject for the benefit of the Crown is not a Crown-debt.

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Mr. Justice NORRIS, held that the debt was a Crown-debt and discharged the rule with costs.

The defendant appealed.

Mr. *Pugh*, for the appellant, contended that the Secretary of State was created by 21 & 22 Vic. c. 106, and that he had no powers saving under that Act; no prerogative of the Crown is vested in him except by the Act.

The Crown had no interest in such debts as the present up to the time of the passing of 16 & 17 Vic. c. 95. But whether, apart from specific enactment, this would be a Crown-debt or not, the effect of s. 65 of 21 & 22 Vic. c. 106, is to place it on a different footing. That section, in connection with former sections, shows that in matters of this description the Secretary of State does not stand in any better position than the East India Company would have stood in had the events happened whilst the Company was in power; he also contended that the present debt was not a Crown-debt, because, if incurred in England, it would not be the subject of extent. The following cases were also cited—*The Secretary of State for India in Council* v. *Hari Bhanji* (3), *Frith* **[450]** v. *The Queen* (1), *In re Smith* (2), *Appaya* v. *Collector of Vizagapatam* (4).

The Advocate-General (Mr. *Paul*) and the Standing Counsel (Mr. *Bonnerjee*) who appeared for the respondent were not called upon.

The following judgments were delivered :—

JUDGMENTS.

GARTH, C.J.—I think this is a very plain case; and I entirely agree with the Court below that the rule should be discharged.

The question is, whether the debt owing by the defendant, and which he desires to insert in his schedule, is a Crown-debt within the meaning of s. 62 of the Insolvent Act.

[Here the learned Judge set out the facts of the case.]

The only question therefore is, whether this is or is not a Crown-debt. In my opinion it is clearly a Crown-debt. It is admitted that the opium which was sold belonged to the Crown; and it is also admitted that this very debt, when recovered, would belong to the Crown; but it is contended that, in the meantime, the promissory notes sued upon which were given by the defendant to the Secretary of State were so given to him, not on behalf of the Crown, but as of a body corporate of a special character; and although he may be a trustee for the Government, he is not an officer of the Crown in such sort, as that the debt which is due to him from the defendant can properly be considered a Crown-debt.

(1) L.R. 7 Ex. 365. (2) L.R. 2 Ex. D. 47. (3) 5 M. 273.
(4) 4 M. 155.

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I confess I am unable to understand this nice distinction. It seems to me that, since the Statute 21 & 22 Vic., c. 106, the Secretary of State in Council represents the Government here to all intents and purposes. He is the officer of the Crown authorized to sue and be sued in respect of all Crown-debts and contracts. In that character these promissory notes were given to him by the defendant, and I consider that the debt is as much a Crown-debt before it is recovered from the defendants as afterwards.

This seems to me to be the true and short answer to the argument which has been addressed to us. There is nothing in this view which conflicts in any way with [451] the principle of the case of the *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State*(1), on which the appellant relies. That case only laid down the rule that where the Government of this country carries on a trade, and in the course of that trade employs a number of persons, they are as much liable for any negligence of which their servants may be guilty as any private person, and may be sued for such negligence in the name of the Secretary of State.

I cannot help thinking that in this case a good deal of time has been unnecessarily occupied in discussing a large amount of old English law with regard to extent and Crown-debts, which, I am happy to say, does not concern us here. Our procedure, as well as our law, upon that subject is of a much more simple character.

I think that the appeal should be dismissed with costs.

WILSON, J.—I am of the same opinion.

The question which we have to answer is, whether the debt in question is a "debt due to our Sovereign Lady the Queen," within the meaning of s. 62 of the Insolvent Act.

Under the Act for the better Government of India 21 & 22 Vict., c. 106, which is amended and its effect somewhat defined by 22 & 23 Vict., c. 41, there is no doubt that the territories formerly governed by the East India Company, and all those subsequently acquired, are vested in the Crown ; that all moveable property of the State belongs to the Crown; and that the revenues of India of all kinds, regular or casual, are vested in the Crown, although the control and management of them, in the manner prescribed by the Statutes, are entrusted to the Secretary of State.

Now the debt in the present case is a debt in respect of the price of Crown property sold, and the amount when received would be a part of the revenues of India. It appears to me, therefore, that the debt is in substance a debt due to the Crown.

But it is said that it is not a debt due to the Queen within the meaning of the section in question for two reasons. I shall deal with these in the reverse order to that in which they were argued.

[452] First, it is said that this is not a Crown-debt, because, if incurred in England, it would not be the subject of extent.

I think it unnecessary to inquire into the English law relating to extents. It appears to me that the principle laid down by the High Court in Bombay, in the case of the *Secretary of State for India* v. *The Bombay Landing and Shipping Company* (2) is the true principle applicable to such cases as the present; and it is abundantly supported by the authorities there referred to. That principle is that, in these cases, the question is,

(1) Bourke, Pt. VII, 167.

(2) 5 B.H.C.O.C. 23 (47).

not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State. 1885 JAN. 5.

Applying that principle to this case, I think it clear that this is a debt due to the Crown. APPEAL FROM ORIGINAL CIVIL.

Secondly, it was argued that whether, apart from the specific enactment, this would be a Crown-debt or not, the effect of s. 65 of the Act for the better Government of India is to place it on a different footing. It was contended that the effect of that section, read in connection with some earlier sections, is that in matters of this nature, neither the Secretary of State nor any higher authority represented by the Secretary of State shall, in any respect, stand in a better position than the East India Company would have stood in if the same events had occurred during the time of its government. 12 C. 445.

I do not think there is any such intention to be gathered from the Act. The section first empowers the Secretary of State to sue and be sued ; so far it deals only with the manner in which suits are to be brought, and has nothing to do with substantive rights. The latter part of the section says nothing as to what rights may be acquired either by the Secretary of State, or by the Crown through the Secretary of State, nor as to the nature or character of rights so acquired. It leaves that to be governed by the ordinary principles of law. But with regard to liabilities which may be enforced against the Secretary of State there are express words ; and the reason of that, as explained in the judgment in the case of the *Peninsular and Oriental Steam Navigation Company* v. *The Secretary of State in Council* (1) would seem to be that the East India Company **[453]** not being a sovereign body, might have been made liable by suit in cases in which such a remedy would not, without special enactment, be available either against the Crown or against any servant of the Crown as such ; and that it was intended to give the same remedies, in some cases at least, against the revenues of India by suit against the Secretary of State which were formerly admissible against the East India Company. But whether this be the true view or not, it was nothing to do with the nature of a Crown-debt ; and no bearing, therefore, upon the construction of s. 62 of the Insolvent Act.

T.A.P. *Appeal dismissed.*

Attorney for the appellant : Mr. *G. Gregory*.
Attorney for the respondent : The Govt. Solicitor (Mr. *U. L. Upton*).

(1) Bourke, Pt. VII, 167.

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JAN. 6.

APPELLATE CIVIL.

12 C. 453.

12 C. 453.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Agnew.

BUKSHI RAM PEGASH LAL (*one of the Defendants*) *v.* SHEO PERGASH TEWARI (*Plaintiff*).* [6th January, 1886.]

Limitation Act (*XV of* 1877), *sch. II, art.* 11—*Civil Procedure Code* (*Act XIV of* 1882), *ss.* 280, 283—*Mortgagee, suit by, against mortgagor and third party who has intervened and obtained an order under s.* 280, *Civil Procedure Code—Execution of decree.*

Article 11, sch. II of the Limitation Act (XV of 1877), refers only to suits contemplated by s. 283 of the Civil Procedure Code. Where, therefore, a mortgagee having obtained a decree on his mortgage, and caused the property to be attached was successfully opposed by a third party who intervened in his attempt to have the property sold, and an order was passed under s. 280 of the Code of Civil Procedure releasing the property from attachment, and when the mortgagee, more than a year after the date of that order, instituted a suit against such third party and his mortgagor, to have his lien over the mortgaged property declared, and to bring it to sale in execution of his decree alleging that the title set up by such third party was a fraudulent one, collusively created between the mortgagor and such third party with a view to deprive him of his rights and asking to have the order passed under s. 280 set aside :

[454] *Held*, that the suit was not barred by limitation under the provisions of art. 11, sch. II of the Limitation Act. The right that was in litigation in the proceeding under s. 280 was the right to attach and sell the property in dispute in *execution of the decree which the plaintiff had obtained against the mortgagor*, and so far as that right was concerned the present suit was barred, but so far as the other relief claimed in the present suit went that article did not apply and the suit was not barred.

[F., 15 C. 674 (681); R. 22 B. 875 (878).]

THE facts of this case as stated in the plaint were as follows :—On the 23rd Aughran 1278 Ram Dial Pandey, the father of the defendant No. 5, and defendant No. 6, executed a mortgage of the property in dispute in favour of the plaintiff. The plaintiff instituted a suit upon that mortgage and obtained a decree, directing the sale of the mortgaged property. Subsequent to that decree defendants Nos. 5 and 6, in collusion with defendants Nos. 1 to 4, caused the mortgaged property to be sold, and at such sale defendants Nos. 1 to 4 became the purchasers. The plaintiff in execution of his decree then attempted to have the property sold, but the defendants Nos. 1 to 4 intervened, and an order was passed on the 6th February 1882 in the execution proceedings releasing the property from the attachment put on it at the instances of the plaintiff.

The defendants Nos. 1 to 4 claimed to be entitled to the land by virtue of a purchase at a sale in execution of a mortgage decree upon a mortgage executed by the other defendants in their favour, and the plaintiff impeached that mortgage and all proceedings as fraudulent and collusive, and charged that they had been entered into merely to deprive him of his rights. In this suit, which was instituted on the 5th February 1883, he claimed to have those proceedings declared null and void, to have his lien in the property declared, and to have the order passed in the execution proceedings upon the intervention of the defendants Nos. 1 to 4 set aside.

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* Appeal from Appellate Order No. 214 of 1885, against the order of J. Tweedie, Esq., District Judge of Shahabad, dated the 4th of May 1885, reversing the decree of Baboo Gopal Chandra Bose, Munsif of Buxar, dated the 14th of June 1884.

Although the plaintiff alleged that the order complained of was passed on the 6th February 1882, it appeared that it was made on the 28th January. 1886 JAN. 6.

Defendant No. 1 contested the suit and *inter alia* pleaded that it was barred by limitation. He contended that the suit was one brought under the provisions of s. 283 of the Civil Procedure Code, to establish a right which had been the subject- [455] matter of an order under s. 280, and therefore was one governed by the provisions of art. 11, sch. II of the Limitation Act (XV of 1877), and consequently that the suit was barred not having been brought within one year of the date of the order. APPELLATE CIVIL. 12 C. 453.

The Munsif, relying upon the decision in *Raj Chunder Chatterjee* v. *Modhoosoodun Mookerjee* (1) adopted this view and dismissed the suit.

Upon appeal the District Judge reversed that decision and remanded the case for trial upon its merits, and the other issues raised by the defendant.

Against that decision the defendant now appealed to the High Court.

The view taken by the lower appellate Court appears sufficiently from the judgment of the High Court.

Baboo *Abinash Chunder Banerjee* and Baboo *Raghu Nundun Pershad*, for the appellant.

Munshi *Mahomed Yusuf*, for the respondent.

The judgment of the High Court (MITTER and AGNEW, JJ.) was as follows :—

JUDGMENT.

This is an appeal against the order of the District Judge of Shahabad remanding the suit to the Court of first instance which had dismissed it, on the ground that it was barred by limitation under art. 11 of sch. II of the Limitation Act. The Judge was of opinion that the suit was not so barred. The plaintiff alleged that defendants Nos. 5 and 6 executed a mortgage in his favour in the month of Aughran 1278, hypothecating the land in suit as collateral security for the money taken under the mortgage deed; that he obtained a decree against defendants Nos. 5 and 6, and in execution of it attached the property in dispute. It appears that before the property in dispute was so attached it had been sold in execution of a decree obtained by defendants Nos. 1 to 4 against defendants Nos. 5 and 6, and purchased by the decree-holders themselves, *viz.*, defendants Nos. 1 to 4.

Upon the plaintiff proceeding to sell the attached property [456] defendants Nos. 1 to 4 intervened, and under s. 280 of the Civil Procedure Code an order was passed by the execution Court releasing the property in dispute from attachment.

The present suit was brought by the plaintiff mainly against defendants Nos. 1 to 4, making defendants Nos. 5 and 6 also defendants, to establish his right under the mortgage, and to obtain an order for the satisfaction of that mortgage, by the sale of the hypothecated property, on the ground that his mortgage was prior in date to the purchaser of the defendants Nos. 1 to 4, and also upon other grounds mentioned in the plaint.

The present suit was admittedly brought more than one year after the date of the order which was passed in favour of the defendants Nos. 1 to 4, under s. 280 of the Code of Civil Procedure.

(1) 8 C. 395.

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Upon these facts the Court of first instance dismissed the suit, as barred by art. 11 of the schedule to the Limitation Act. That article says: "By a person against whom an order is passed under ss. 280, 281, 282, or 335 of the Code of Civil Procedure, to establish his right, or to the present possession of the property comprised in the order."

The District Judge has overruled the plea of limitation based upon this article, on the ground that the present suit is not one to establish the plaintiff's right to the property comprised in the order, because the District Judge thinks that the decree-holder has no right to the property which he can establish.

Although we agree in the result, *viz.*, that the present suit is not barred under art. 11, we are unable to take the same view which the District Judge has taken of the article in question. That article refers to suits which are contemplated under s. 283 of the Code of Civil Procedure, which says: "The party against whom an order, under ss. 280, 281, or 282, is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." Now, under this section, the decree-holder, who fails in a proceeding between himself and a claimant, under s. 280 of the Code of Civil Procedure, may institute a suit to establish his right to the property which he claimed in the proceeding before the execution **[457]** Court, *viz.*, the right to attach and sell the property which was claimed by the claimant in satisfaction of his decree. That is, in our opinion, the correct construction of art. 11 which refers only to suits contemplated by s. 283.

That being so, the question which calls for decision in this case is, whether the present is a suit which comes within the purview of s. 283. It seems to us that the suit contemplated by s. 283 is a suit which may be brought by the unsuccessful party in a proceeding under ss. 280, 281 or 282 to establish a right to the property in dispute, which right was the subject-matter of litigation in the execution proceedings.

Now, in this case, the right which was in dispute in the proceeding under s. 280 is not the right under which the present suit has been brought, and that is quite clear from this consideration, *viz.*, that even if the execution Court had found the right upon which the present suit is brought, established, it could not give effect to it under s. 280. On the other hand, even if that Court had been satisfied of the existence of the right upon which the present suit is brought, it would have been bound, under s. 280, to release the property, because it was established that the property in dispute which was sought to be attached was then in the possession of the defendants Nos. 1 to 4. The right that was in litigation in the proceeding under s. 280 was therefore a right to attach and sell the property in dispute in *execution of the decree which the plaintiff had obtained against defendants Nos.* 5 *and* 6. So far as that right is concerned, the present suit is barred, but as regards the other right upon which the plaintiff has brought this suit, *viz.*, that he held a mortgage prior in date to the purchase of the defendants Nos. 1 to 4, and that the purchase of the defendants Nos. 1 to 4 was not real, the present suit is not barred under art. 11 of the Limitation Act. We therefore agree with the District Judge, though upon different grounds, that the present suit is not barred by art. 11 of sch. II of the present Limitation Act.

We dismiss the appeal with costs.

H. T. H. *Appeal dismissed.*

12 C. 458.

1886 JAN. 14.

APPELLATE CIVIL.

12 C. 458.

[458] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Agnew.

KAMESHWAR PERSHAD (*Decree-holder*) *v.* RUN BAHADUR SINGH (*Judgment-debtor*).* [14th January, 1886.]

Civil Procedure Code, (Act XIV of 1882), *s.* 244, *cl.* (*c*)—*Execution of decree*—"*Representative*" *of judgment-debtor.*

The word "representative" as used in cl. (*c*), s. 244 of the Code of Civil Procedure, means any person who succeeds to the right of any of the parties to the suit after the decree is passed.

A Hindu widow mortgaged certain properties, and afterwards by an *ekrarnamah* made them over to *B*, the next heir. The *ekrarnamah* contained a condition that *B* was to be liable for the widow's debts. Subsequently the mortgagee brought a suit against the widow on the mortgage, and joined *B* as a party, on the ground that he was in possession of the mortgaged properties. That suit resulted in a money decree being passed on appeal by the High Court against the widow personally, the property in the hands of *B* being held not to be liable. The case was taken on appeal to the Privy Council, and pending the hearing of that appeal the widow died, *B* was brought on the record as her legal representative. The decree of the High Court was ultimately confirmed by the Privy Council. In execution of the decree it was sought to make *B* liable to satisfy the amount out of the properties which he had obtained under the *ekrarnamah*, the mortgagee not having been aware of the conditions of that document before the decree of the High Court.

Held, that so far as these properties were concerned, he was not the legal representative of the widow, as he inherited them as heir-at-law of her husband, and that his title to them under the *ekrarnamah* was not that of a "representative" within the meaning of cl. (*c*) of s. 244.

Held, further, that the question of *B's* liability under the *ekrarnamah* did not fall within the scope of the provisions of cl. (*c*) of s. 244, as being a question to be decided between the "parties" to the suit, as although *B* was a party to the suit, the only claim against him was that the property in his hands was liable, as having been previously hypothecated, and as the suit was dismissed so far as that claim was concerned, it was not a question relating to the execution of the decree.

[**Diss.** 17 C.P.L.R. 178 (186); 9 C.W.N. 824 (826) = 32 C. 1031; **F.**, 11 A. 74 (78) = 8 A.W.N. 275; **Rel. on** 6 C.W.N. 127 (128); **Expl.**, 16 C. 1 (8); **R.** 16 C. 603 (608); 23 A. 346 (352); 6 C.W.N. 10 (14) = 30 C. 134; 29 C. 696 (698); 8 C.W.N. 843; 9 C.W.N. 134 (138); **D.** 23 C. 454 (459).]

THIS appeal arose out of an application for execution of a decree passed in favour of Kameshwar Pershad, the appellant.

The suit in which the decree was passed was brought by Kameshwar Pershad against Ranee Asmedh Koer, upon a mortgage bond executed by her in his favour, and the present objector Run Bahadur Singh was joined as a party defendant, **[459]** upon the ground that he was in possession of the property sought to be affected, under an *ekrarnamah* executed by the Ranee on the 31st August 1872. After the date of the mortgage Kameshwar Pershad obtained a decree in the Court of first instance against both defendants, declaring amongst other things, that the property in the hands of Run Bahadur was liable to be sold to satisfy the mortgage-debt, and that the Ranee was also personally liable for the amount. Each defendant preferred a separate appeal against that decree to the High Court, and Run Bahadur appealed, not only on the ground that the property in

*Appeal from Order No. 236 of 1885, against the order of Baboo Kali Prasanna Mukherji, Subordinate Judge of Gya, dated the 23rd of May 1885.

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his hands was not liable, but also on the ground that there was no personal liability under the circumstances of the case on the part of the Ranee.

On the 2nd July 1878 the decree of the first Court was modified by the High Court, and the plaintiff was declared entitled to a money decree only against the Ranee personally, that portion of the decree declaring that the property in the hands of Run Bahadur was also liable to the plaintiff's claim being set aside.

Subsequent to the date of the High Court's decree the plaintiff discovered the true nature of the *ekrarnamah* of the 31st August 1872, and that it contained a condition that Run Bahadur was to be liable for and should pay the debts of the Ranee. The plaintiff upon that ground applied to the High Court for a review of its previous judgment, but his application was rejected.

He then appealed to the Privy Council, and pending the hearing of the appeal the Ranee died. Run Bahadur's name was therefore brought on the record as representative of the Ranee, but he did not appear at the hearing of the appeal, which took place on the 23rd November 1880, and which resulted in the decree of the High Court being confirmed [*see Kameshwar Pershad* v. *Run Bahadur Singh* (1).]

It was for execution of that decree that the present application was made, and the plaintiff claimed, upon the events which had happened, to be entitled to execute his decree by the sale of the properties which had come into the hands of Run Bahadur, under the *ekrarnamah*, as under that document Run Bahadur **[460]** had made himself personally liable for the Ranee's debts. Run Bahadur, on the other hand, contended that he had inherited the properties as the reversionary heir of the Ranee's husband, and that as the decree was a personal decree against the Ranee, it could not be executed against her husband's estate. He further contended that he was not liable under the provisions of s. 234 of the Civil Procedure Code as representative of the Ranee, as he alleged that she had left no *stridhan*, and that no portion of her estate had come into his hands, as in facts he had no estate of her own.

The lower Court held that it had no jurisdiction to determine the liability of Run Bahadur to satisfy the decree under the terms of the *ekrarnamah*, such a question not coming within the provisions of s. 244 of the Civil Procedure Code; and that by executing that document the Ranee had not constituted Run Bahadur her representative within the meaning of that term, as used in cl. (*c*) of that section, as upon the authority of the ruling in the case of *Rasbehary Mookhopadhya* v. *Maharani Surnomoyee* (2), the Court considered that a person whose interest comes into existence prior to the decree cannot be said to be a representative of the judgment-debtor.

That Court therefore held upon the main question raised in the case that Run Bahadur could not be held liable in these execution proceedings under the *ekrarnamah*, but it further held that as he had admitted having received personal property to the extent of Rs. 5,000 belonging to the Ranee after her death, which he alleged that he had disposed of for the Ranee, but the necessity for the disposal of which he had not proved, he was liable under s. 234 to that extent to satisfy the plaintiff's decree.

Against that order the plaintiff decree-holder appealed to the High Court, and Run Bahadur filed objections under the provisions of s. 561 of

(1) 6 C. 843.

(2) 7 C. 403.

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the Civil Procedure Code, to that portion of the order which declared him to be liable to the extent of Rs. 5,000.

Mr. *Woodroffe* and Mr. *Twidale*, for the appellant.

Mr. *C. Gregory*, for the respondent.

[461] It was contended by Mr. *Woodroffe* on behalf of the appellant that the question of Run Bahadur's liability under the *ekrarnamah* was a question which came within the terms of cl. (*c*) of s. 244 of the Code, and was one which the Court should have decided in these proceedings, because Run Bahadur was the representative of the Ranee, and as such a party to the proceedings pending the appeal to the Privy Council; and even if it was considered that it was not a question arising between the decree-holder and the representative of the judgment-debtor, it was a question arising between the parties to the suit. Run Bahadur was himself a party to the suit, and had, by appealing to the High Court against the decree of the Original Court, so far as it declared the personal liability of the Ranee, as well as by his subsequent conduct when added as party to the suit as representative of the Ranee after her death, precluded himself from contending that his liability under the *ekrarnamah* to satisfy the decree passed in the suit was not a question arising between the parties to the suit. For it was obvious that in acting as he had done, and in attempting to shield the Ranee from any personal liability, he had been all along attempting to prevent any decree being passed in the suit which he knew would have the result of fixing his liability under the *ekrarnamah*, although he, at the time, was well aware that the plaintiff did not know the conditions upon which he took the mortgaged properties under that document.

The judgment of the High Court (MITTER and AGNEW, JJ.) was as follows:—

JUDGMENT.

We are of opinion that this appeal, and the objections taken under s. 561 of the Code of Civil Procedure, must be dismissed, each party paying his own costs.

The question in the appeal turns upon the construction of s. 244, cl. (*c*) of the Civil Procedure Code, which runs thus: "Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree."

It is contended that the respondent Run Bahadur is a "representative" within the meaning of this clause, and that the question that is raised between the decree-holder and **[462]** Run Bahadur is a question relating to the execution of the decree.

It is further contended that, supposing he was not a representative, he was a party to the suit, and therefore comes within the purview of that clause. The facts of this case are briefly as follows:—The decree-holder Kameshwar Pershad brought a suit upon a mortgage bond which was executed in March 1872 by Ranee Asmedh Koer, hypothecating certain immoveable property. In the month of August 1872 an *ekrarnamah* was executed between Ranee Asmedh Koer and the respondent before us, Run Bahadur, who was the next reversionary heir of Asmedh Koer, by which the succession to the estate was accelerated, and the properties inherited by Asmedh Koer were handed over to Run Bahadur who, at the same time, by the terms of the *ekrarnamah*, undertook to pay off the debts due by her. Subsequently to the execution of this document, the

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suit in which the decree now sought to be executed was passed was brought, and in that suit the plaintiff Kameshwar Pershad obtained a decree in the Court of first instance. By that decree the property hypothecated in the hands of Run Bahadur was declared liable for the satisfaction of the debt in the mortgage-bond. There was a personal decree against Asmedh Koer. Two separate appeals were preferred by the two defendants respectively, and the two appeals were disposed of by this Court by one and the same judgment and decree. This Court came to the conclusion, for reasons stated in the judgment, that the mortgage was not binding upon Asmedh Koer as well as upon Run Bahadur, but it was of opinion that under the bond Asmedh Koer was personally liable. Accordingly the decree of the lower Court was varied, and it was confirmed so far as it was a personal decree against Asmedh Koer. In all other respects it was set aside. Against that decree the plaintiff Kameshwar Pershad preferred an appeal to the Judicial Committee, but before this appeal was preferred Ranee Asmedh Koer died, and Run Bahadur was substituted in her place. The appeal before the Judicial Committee was heard *ex parte*, and the decree of this Court was confirmed. That decree is now sought to be executed against Run Bahadur, and the decree-holder prays for the realization of the money due by the sale and attachment of certain properties **[463]** which came into the possession of Run Bahadur at the time the *ekrarnamah* of August 1872 was executed.

We are of opinion that upon these facts the decree cannot be executed by the attachment and sale of these properties which had been owned and held by the husband of Asmedh Koer. So far as these properties are concerned, he was not the legal representative of Asmedh Koer under the law of inheritance. He inherited these properties as the heir-at-law of Ranee Asmedh Koer's husband after the death of Asmedh Koer. Furthermore, the respondent's title as regards these properties under the *ekrarnamah* is not that of a representative within the meaning of cl. (*c*) of s. 244. The word "representative" there means any person who succeeds to the right of any of the parties to the suit after the decree is passed. If such rights are transferred by a party to the suit before decree, and if the transferee is made a party to the suit before decree, then he comes within the words "parties to the suit." The word "representative" as used in cl. (*c*) only means a person who succeeds to the right of a party to the suit after decree, and therefore the respondent is not a "representative" within the meaning of cl. (*c*), s. 244. If he is considered as a representative after the death of Asmedh Koer as having succeeded to her peculiar properties, then the decree-holder must bring the case within the provisions of s. 234, which says:—"Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of."

In the present case the decree-holder was able to prove that to the extent of Rs. 5,000 only the respondent Run Bahadur is liable under this section.

In order that the decree-holder may succeed in making a representative under this section liable, he must prove that some property of the deceased has come to the hands of the representative after the death of the party whose representative he is.

In this case the properties in dispute came into the hands of the respondent before the death of Asmedh Koer under the *ekrarnamah* of 1872.

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So long as Asmedh Koer was alive, the respondent was holding these properties under the conditions of the *ekrarnamah*.

[464] After the death of Asmedh Koer, he became the owner of the properties as heir-at-law of Asmedh Koer's husband.

Then as regards the contention that the present case comes within cl. (*c*) of s. 244, because the respondent Run Bahadur was a party to the suit, it seems to us that it is not well founded, because, although Run Bahadur was a party to the suit, no decree was passed against him. He was successful. The claim against him was that the property in his hands was liable as having been previously hypothecated. That was the only claim brought against him in that suit, and so far as that claim was concerned, the plaintiff's suit was dismissed, and therefore, although he was a party to the suit, still the question that has arisen is not a question relating to the execution of *the decree* which was passed in the suit in favour of the plaintiff.

Upon these grounds we are of opinion that the lower Court is right in the view which it has taken of the meaning of cl. (*c*) of s. 244.

With reference to the ground which was urged under s. 561 against the order of the lower Court, it is sufficient to say that there is a clear admission on the part of Run Bahadur that he inherited properties to the extent of Rs. 5,000.

H. T. H. *Appeal dismissed.*

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12 C. 464.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

ASHANULLA KHAN BAHADUR (*Plaintiff*) v. RAJENDRA CHANDRA RAI, FOR SELF AND AS EXECUTOR TO THE ESTATE OF THE LATE DEBENDRA CHANDRA RAI (*Defendant*).*
[27th August, 1885.]

Beng. Act VIII of 1869, *s.* 64—*Landlord and Tenant—Sale of portion of under-tenure—Suit for arrears of rent.*

There is nothing in s. 64 Beng. Act VIII of 1869, which necessarily leads to the conclusion that under that section a share of an under-tenure cannot be sold, so as to render the sale binding upon the judgment-debtor ; and there is no substantial difference between the sale of a portion of an under-tenure under that section and under the Civil Procedure Code.

[465] Where, therefore, a plaintiff, who was the owner of a share in a zemindari, had obtained a decree against *X*, who held a taluk in such zemindari, for arrears of rent due in respect of such share, and in execution of such decree brought a share of such taluk to sale, corresponding with his share in the zemindari and himself became the purchaser ; and where such plaintiff subsequently instituted a suit against *X*, who was also the owner of a *howla* and *nim-howla* under the said taluk for arrears of rent due in respect of the share of the taluk so purchased by him ; and where it appeared that the sale at which the plaintiff became the purchaser was afterwards confirmed, and that he had obtained a sale certificate :

Held, that such suit was not liable to be dismissed, merely on the ground that the plaintiff had brought a share of an under-tenure to sale, in execution

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* Appeals from Appellate Decree, No. 1764 and other analogous appeals of 1884, against the decree of Baboo Beni Madhab Mitter, First Subordinate Judge of Backergunge, dated the 28th of June 1884, affirming the decrees of Baboo Apurba Krishna Sen, Munsif of Patuakhali, dated the 19th of December 1883.

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of a decree for arrears of rent under s. 64 of Beng. Act VIII of 1869 and had thereby acquired nothing by such purchase, there being nothing in that section to support such a conclusion. *Gobind Chunder Roy Chowdhry* v. *Ram Chunder Chowdhry* (1) and *Reily* v. *Hur Chunder Ghose* (2) discussed and explained.

THE suits out of which these appeals arose were suits for arrears of rent, and the facts in all being substantially the same they were tried together.

The plaintiff was the owner of a 7 annas $10\frac{1}{2}$ gundas $1\frac{1}{2}$ krant share of a zemindari called Tuppah Sultanabad. Under the 16-anna share of that zemindari there was a taluk named Gungadhur Siddhanto. The plaintiff alleged that one Thunda Bibi had become owner of $1\frac{1}{4}$ anna share of that taluk by a *hibanama* from one Karimuddi; that another 4 annas share of the taluk belonged to Modun Narain Bhuttacharji and Tara Moni Debi, and that Thunda Bibi and Haran Chandra Gungopadhya had acquired this 4-anna share by purchase and inheritance respectively; that the plaintiff having obtained decrees for arrears of rent in respect of the $1\frac{1}{4}$ anna and 4 annas share of the said taluk respectively, brought those shares to sale and himself purchased the $5\frac{1}{4}$ annas share of the taluk, which was situated within the 7 annas $10\frac{1}{2}$ gundas $1\frac{1}{2}$ krant share of the zemindari Tuppah Sultanabad belonging to him, or in other words that he had purchased the 7 annas $10\frac{1}{2}$ gundas $1\frac{1}{2}$ krant share of the $5\frac{1}{4}$-annas of Thunda Bibi and Haran Chandra Gungopadhya treating it as 16 annas; that the defendants held under-tenures under the said taluk, and as the rents **[466]** due to the plaintiff's share in respect of those under-tenures were not paid, these suits were instituted for recovering those arrears of rent.

The defendants in all the suits contended that the suits could not be maintained, inasmuch as the rents in respect of the plaintiff's alleged share were never collected separately, and the plaintiff's co-sharers in the taluk were not made parties, and that the plaintiff had obtained no right to the taluk mentioned in the plaints, inasmuch as his purchase was invalid; they also raised several other defences to the suits which were immaterial for the purpose of this report, and which were not gone into by the lower Courts.

The Munsif held that the plaintiff's purchase of the share in the taluk was invalid, and that the suits could not be maintained, as the plaintiff's co-sharers had not been made parties, and he accordingly dismissed the suits.

The Subordinate Judge confirmed the decrees of the lower Court upon grounds which sufficiently appear in the judgment of the High Court.

The plaintiff now appealed against those decrees.

The Advocate-General (The Hon. *G. C. Paul*), Baboo *Rasbehari Ghose*, Baboo *Srinath Banerjee*, Baboo *Basunt Coomar Bose* and Baboo *Kuloda Kinker Roy*, for the appellant.

Baboo *Durga Mohan Das* and Baboo *Bhobun Mohan Das*, for the respondents.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

These appeals will be governed by one judgment. It is alleged, in the plaint that the plaintiff is the owner of a zemindari to the extent of seven annas and odd gundas : that within that zemindari there is an ousut

(1) 22 W. R. 421.

(2) 9 C. 722.

taluk called Gungadhur Siddhanto; that the defendant Thunda Bibi and another person held one anna five gundas and four annas, respectively, of this ousut taluk; that the plaintiff brought two suits for rent due on account of his share in the zemindari from the holders of the two aforesaid shares, respectively; that he obtained decrees, and in execution [467] of those decrees he brought to sale the share of the ousut taluk corresponding with his share in the zemindari, and himself became the purchaser. The plaint further alleges that, subordinate to this ousut taluk Gungadhur Siddhanto, is a *howla*, and there is also a *nim-howla*, subordinate to the *howla*, both belonging to Thunda Bibi. It is further alleged in the plaint that the whole rent payable on account of the *nim-howla* was Rs. 112, and the plaintiff's share out of it is Rs. 17-6; but this share of the rent, the plaintiff has been collecting separately, and that the defendant Thunda Bibi having defaulted to pay the aforesaid rent in the years 1287, 1288 and 1289, the present suit was brought to recover the same.

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Various objections were taken in the written statement, but it is not necessary to refer to them in detail now.

The Subordinate Judge has dismissed the appeals preferred against the Munsif's judgment dismissing the plaintiff's suits, upon the ground that, as the plaintiff brought a share of the ousut taluk to sale, in execution of his decrees for arrears of rent, under s. 64 of Beng. Act VIII of 1869 and as under that section a share of a tenure could not be brought to sale, the plaintiff's purchase is invalid. The Subordinate Judge therefore dismissed the plaintiff's suit on the ground that by his purchase he has acquired no title to any share of the ousut taluk, and in support of his decision has referred to the two cases of *Gobind Chunder Roy Chowdhry* v. *Ram Chunder Chowdhry* (1), and *Reily* v. *Hur Chunder Ghose* (2). He has further relied upon the language of s. 64 of the Rent Act which runs as follows: "If a decree is given in favour of a sharer in a joint undivided estate, dependent taluk, or other similar tenure, for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate, taluk, or tenure, no order for the sale of such under-tenure in execution of such decree shall be made unless and until all moveable property (if any) which such judgment-debtor may possess within the jurisdiction of the Court in which the suit was instituted, shall have been seized and sold in execution of such decree, and the sale of such property, if any, shall have proved insufficient to satisfy the [468] judgment. In such case such under-tenure, if of the nature described in s. 59, may be seized and sold in execution of such decree, according to the ordinary procedure of the Court and not in the manner provided in the said section, and every such sale shall have such and the same effect as the sale of any immoveable property sold in execution of a decree not being for arrears of rent payable in respect thereof."

In this case the plaintiff, after the sale was confirmed under the provisions of the Code of Civil Procedure, obtained a sale-certificate. According to that sale-certificate, he has a valid title as regards the share sold against the judgment-debtor whose property was sold. Although s. 64 speaks of the sale of the whole under-tenure, it does not appear to us to follow from it that the sale of a portion of an under-tenure would not be binding between the purchaser and the judgment-debtor, whose property is sold under that section. There is no question that if this sale

(1) 22 W.R. 421. (2) 9 C. 722.

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had taken place under the provisions of the Code of Civil Procedure, and if no reference had been made to s. 64, the sale would have been valid. But we fail to see any substantial distinction between the sale of a portion of an under-tenure under the Code of Civil Procedure and under s. 64 of the Rent Act. In both cases the same formalities have to be gone through. It appears to us that there is nothing in the language of s. 64 which necessarily leads to the conclusion that under that section a share of an under-tenure could not be sold so as to render the sale binding upon the judgment-debtor. The cases cited do not support the view of the Subordinate Judge. In the case of *Gobind Chunder Roy Chowdhry* v. *Ram Chunder Chowdhry* (1), the question at issue between the parties was whether the purchaser of a certain share of an under-tenure acquired such a right under his purchase as would entitle him to hold that share free from the payment of rent to the superior holder. The plaintiff in that case was the purchaser of a fractional share, and it is stated in the judgment that the defendant having obtained a decree against him (that is, the plaintiff) for rent, the latter brought that suit in order to have it declared that he was not liable to pay any rent. Couch, C.J , in delivering the judgment of the Court says: "If **[469]** a person chooses to purchase part of an under-tenure he must take his position as being jointly liable for the rent with the other under-tenants." So what was decided in that case was not that the purchase was invalid as between the purchaser and the judgment-debtor, but that by his purchase the plaintiff was not entitled to hold the share purchased, rent-free.

In the case of *Reily* v. *Hur Chunder Ghose* (2), it was decided that the purchaser of a share of a tenure does not acquire the property free from encumbrances. The words used are: "It has been established by a number of decisions in this Court that a purchaser under s. 108, Act X of 1859, which corresponds to s. 64, Bengal Act VIII of 1869, acquires the judgment-debtor's rights and interests only."

This case, far from being an authority in support of the view of the law taken by the Subordinate Judge, seems to us to lay down that a purchaser of a portion of a tenure acquires the judgment-debtor's rights and interests only. We are unable to agree with the Subordinate Judge that under the purchase mentioned in the plaint, the plaintiff has acquired no title in the ousut taluk. That being the sole ground of the decision of the lower Courts, we think that these cases must go back to the Munsif in order that all the other points arising in the cases may be disposed of.

We think it right to notice an objection that was taken on behalf of the respondent. It was urged that in this case the rent was payable not only to Thunda Bibi, whose rights and interests the plaintiff has purchased in the ousut taluk, but also to other persons not parties to the suit, that is to say that the rent of the *howla* and *nim-howla* was payable to Thunda Bibi and her co-sharers in the ousut taluk. We find that an objection was taken in the written statement to this effect. With reference to the facts stated above the allegations in the plaint are not clear. In certain analogous cases the finding of the Subordinate Judge upon the evidence is that there was no separate payment of rent in respect of that share of Thunda Bibi which was sold, and in respect of the share of the same lady which was not sold. If that finding is correct, it would **[470]** be in conflict with the statement made by the defendants in these cases. In their written statement

(1) 22 W.R. 421.

(2) 9 C. 722.

they say that their share of rent was payable not only to Thunda Bibi, but also to other persons, her co-sharers in the ousut taluk. This point will have to be gone into on remand, if it really arises between the parties. If the Court finds that there is no other co-sharer to whom the rent of the *howla* and *nim-howla* was payable, but that the entire rent was payable to Thunda Bibi, then the plaintiff's suit would not be liable to any objection. But it would be necessary to apportion the rent of the subordinate tenure between the purchaser and Thunda Bibi and after apportionment of the rent, the plaintiff would be entitled to his proportionate share. But if the Munsif finds that the rent of the *howla* and *nim-howla* was payable not only to Thunda Bibi, but also to other persons, then the cases would be open to the objection of defect of parties.

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Costs will abide the result.

H. T. H. *Appeal allowed and case remanded.*

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12 C. 470.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice O'Kinealy.

RAJANIKANTH NAG RAI CHOWDHURI (*Plaintiff*) v. HARI MOHAN GUHA AND OTHERS (*Defendants*).* [22nd December, 1885.]

Transfer of Property Act (*IV of* 1882) *s* 135—*Right of suit—Suit to set aside a document—Actionable claim.*

The co-sharers of a Hindu family one of whom was a minor, owned certain immoveable property in Munshigunge near Dacca. In 1873 a perpetual lease of his property, executed by all the co-sharers except the minor, was granted to certain persons hereinafter called the lessees. On the minor's behalf the lease was executed by his elder brother as guardian of the minor. In May 1882 the minor, who had previously attained his majority, sued the lessees and his co-sharers for a declaration of his right to and for possession of his share in the said property, alleging that the perpetual lease was not binding on him. On the day after the institution of the suit the plaintiff sold all his interest therein to *A* for Rs. 600.

Held, that *A's* purchase was an actionable claim within the meaning of s. 135 of the Transfer of Property Act (IV of 1882).

[R., 16 A. 315 (317) (F.B.) ; 3 O. C. 215 (228).]

[471] IN this case it appeared that the Sitanath Kundu (the original plaintiff) and othere were joint owners of certain immoveable property situated at Munshigunge in Dacca, Sitanath's share being one anna ten gundas. On the 27th of October 1873 a perpetual lease of the abovementioned property was granted to certain persons named Guhas. The lease purported to have been granted by Sitanath and his co-sharers, but it was admitted in the present case that Sitanath was then a minor, and that the lease was executed on his behalf by his elder brother Doorga Churn Kundu, who professed to act as his guardian on that occasion. It was stated in the plaint that, at the time of the granting of the lease, Sitanath was living under the protection and guardianship of the mother Umbica Soondery Dossee.

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* Appeal from Appellate Decree, No. 2369 of 1884, against the decree of Baboo Mati Lal Sirkar, Second Subordinate Judge of Dacca, dated 11th of September 1884, affirming the decree of Baboo Chandra Mohan Mookerji, Munsif of Munshigunge, dated the 24th of September 1883.

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Para. 5 of the plaint as far as material was as follows :—

"After attaining the age of majority, the plaintiff Sitanath has come to know that the principal defendants," the Guhas, "have in concert and collusion with his brother Doorga Churn Kundu......fraudulently got it mentioned in the *pottah*, obtained by them on the 27th of October 1873, that the aforesaid Doorga Churn Kundu was the guardian of the plaintiff, and have caused some mention to be made about the existence of some false necessities for the granting of that *pottah*. But as the plaintiff's brother, the aforesaid Doorga Churn Kundu, was neither guardian of the plaintiff nor a person legally competent to grant any *pottah* on behalf of the plaintiff, and as in reality there was no legal necessity for granting any such *pottah* to the defendants, and as by the aforesaid act of the defendants with regard to the aforesaid lands the plaintiff has suffered a great deal of loss, the plaintiff can by no means be bound by the same." The plaintiff prayed for a declaration of his right to the one anna ten gundas share, *khas* possession, and *mesne* profits.

This suit was instituted by Sitanath Kundu on the 14th of May 1883, and on the next day he sold to Rajanikanth Nag Rai Chowdhuri, certain landed property together with all his rights and interests in the present suit for Rs. 600. On the 10th of July 1883, Rajanikanth was substituted as plaintiff in this suit for Sitanath Kundu, and on the same day one of the defendants, Hari Mohan Guha, made an application to the Court in which [472] he offered to pay to Rajanikanth the price he had paid for Sitanath's claim. The application was based on the provisions of s. 135 of the Transfer of Property Act (IV of 1882).

On the 29th of July 1883 the principal defendants, the Guhas, filed written statements. The defence was—(1) that Doorga Churn was the guardian of Sitanath, and the person who looked after and managed the trading business carried on by his family and the landed properties; (2) that Sitanath since attaining his majority had received rents from the defendants; (3) limitation. The defendants also relied on the offer made by Hari Mohan Guha on the 10th of July 1883.

At the hearing of the suit in the Court of first instance, the plaintiff Rajanikanth contended (1) that s. 135 of the Transfer of Property Act did not apply to the present suit; and (2) that all the defendants must join in an application under s. 135. These contentions were overruled, and the suit was ordered to be dismissed on the defendant Hari Mohan Guha paying into Court the sum of Rs. 548-4-6. This decision was upheld on appeal.

The plaintiff Rajanikanth Nag Rai Chowdhuri appealed to the High Court on the ground that s. 135 of the Transfer of Property Act was not applicable to the circumstances of the case; and on other grounds not material for the purposes of this report.

Baboo *Aukhil Chunder Sen*, for the appellant.

Baboo *Rash Behari Ghose* and Baboo *Girish Chunder Chowdhry*, for the respondents.

JUDGMENT.

The judgment of the Court (CUNNINGHAM and O'KINEALY, JJ.) was delivered by

CUNNINGHAM, J.—We think that under the circumstances of this case the Court below was right in holding that what the plaintiff purchased was an actionable claim. It appears to have been merely a

right to set aside a document on the ground that the person by whom it was executed exceeded his powers. Without going any further, therefore, into the question of the meaning of those words under the Transfer of Property Act, we consider at any rate that they cover such a right as the one now in question. The appeal must, therefore, be dismissed with costs.

P. O. K. *Appeal dismissed.*

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12 C. 473 (F.B.).

[473] FULL BENCH REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Field.

OPENDRO NATH GHOSE (*Accused*) *v.* DUKHINI BEWA (*Complainant*).* [7th January, 1886.]

Criminal Procedure Code, Act X of 1882, s. 435—*Further enquiry—Inferior Criminal Court—Magistrate of the District, Powers of.*

A Magistrate of a District is competent, under s. 435 of the Criminal Procedure Code, to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own District.

[F., L. B. R. (1872—1892) 387 ; R., 25 P. R. 1908=9 Cr. L. J. 104.]

THIS was a reference to the High Court under the following circumstances :—

One Opendro Nath Ghose was found at night in the house of the complainant, and was sent up for trial by the police under s. 451 of the Penal Code. The Joint Magistrate who tried the case, after examining the complainant and one other witness, discharged the accused, on the ground that there was no evidence of any criminal attempt. The complainant applied to the District Magistrate for a further enquiry into the case, and the District Magistrate directed a further enquiry by a Deputy Magistrate. Pending this further enquiry, the accused applied to the Sessions Judge to have the order directing the further enquiry set aside, on, amongst other grounds, the ground that the Joint Magistrate was not subordinate to the District Magistrate for the purpose of Chapter XXXII of the Criminal Procedure Code. The Sessions Judge on this point referred the case under s. 438 of the Criminal Procedure Code to the High Court.

Mr. Justice Prinsep and Mr. Justice Grant, before whom the reference was heard, having regard to the different opinions expressed by the High Courts on this point (for which see the cases referred to in the opinion given on the Reference), referred to a Full Bench the question, whether a Magistrate of a District, acting under s. 435 of the Code of Criminal Procedure, can call for and [474] examine the proceedings of a Magistrate of the first class, exercising jurisdiction in the same district as an inferior Court, by reason of such Magistrate being Subordinate to him under s. 12.

The *Deputy Legal Remembrancer* (*Mr. Kilby*), for the Crown.—The plain ordinary meaning of the words " inferior Criminal Court " in s. 435

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* Reference to a Full Bench in Criminal Motion No. 214 of 1885, against the order of the District Magistrate of Howrah, W. H. Grimley, Esq., dated the 27th March 1885.

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is perfectly clear. That being so, it is not allowable by comparing the words by which the plain intention of the Legislature is now expressed with words in a repealed Act, to arrive at a meaning contrary to that clearly expressed in the Act now in force.

Inferior includes subordinate ; a subordinate Court must be inferior to the Court to which it is subordinate, as it can neither be equal (*i.e.*, co-ordinate) nor superior to that Court.

According to the construction put upon "inferior Court" in *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1), that a Court is only inferior to another when it is subject to its appellate jurisdiction, the Court of a Magistrate of the third class in s. 6 of the Criminal Procedure Code is not inferior to the Court of Sessions, as appeals do not lie from it to the Judge, but to the District Magistrate, but the Court of a District Magistrate is inferior.

By the use of the more comprehensive word "inferior" in s. 435 of the present Code in place of the word "subordinate" in s. 295 of the previous Code, the necessity for inserting the last paragraph of the latter section in the new Act was done away with, and this was probably why the one word was changed for the other. See ss. 17—195. But whatever might have been the reason, it cannot be inferred, solely from the substitution of the one word for the other, that the Legislature intended to limit the authority of District Magistrates to Magistrates of the second and third class, and the authority of Sessions Judge to Magistrates of the first class. Any such rule being of the greatest administrative importance would not have been left to inference, but would have been clearly expressed.

No one appeared on the other side.

The opinion of the Full Bench was as follows :—

OPINION.

[475] GARTH, C.J., MITTER, WILSON and TOTTENHAM, JJ.—The question submitted to us for determination is whether a Magistrate of the first class is a Criminal Court inferior to the Magistrate of the district, within the meaning of s. 435 of the Code.

The learned Judges who have made this reference to a Full Bench were induced to do so, because of the importance of the question, and because the existing rulings of this Court in *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1), and in *Queen Empress* v. *Nowab Jan* (2) followed as they were by the High Court of Allahabad in the case of *Jhinguri* v. *Bachu* (3), by a single Judge, were found to be in conflict with later rulings on the same point by the High Courts of Madras and Bombay as reported in the cases of *In the matter of the petition of Padmanabha* (4), and *Queen Empress* v. *Pirya Gopal* (5). The ruling by the High Court of Madras was that of a Full Bench.

And it appears that in a more recent case at Allahabad—*Queen Empress* v. *Laskari* (6)—a Full Bench of the High Court have practically dissented from the ruling of this Court by holding that the Magistrate of a District is competent to call for and deal with the record of a Magistrate of the first class under ss. 435 and 437 of the Code.

We think that the question should be answered in the affirmative.

The supposed difficulty lies in assigning a meaning to the word "inferior" in s. 435. The learned Judges who decided the case of *Nobin*

(1) 10 C. 268. (2) 10 C. 551. (3) 7 A. 134.
(4) 8 M. 18. (5) 9 B. 100. (6) 7 A. 853.

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Kristo Mookerjee v. *Russick Lall Laha* (1) thought it necessary to attach a limited or technical meaning to the word, and held that the words "inferior Criminal Court" must be construed to mean inferior so far as regards the particular matter in respect of which the superior Court is asked to exercise its revisional jurisdiction. They were accordingly of opinion that in cases tried by a Magistrate of the first class, whose jurisdiction to try is equal to that of the Magistrate of the district to whom no appeal would lie, the former officer is not inferior to the latter, although he is subordinate to him; because they considered the term "inferior" to refer only to **[476]** judicial authority in respect of the particular case of which revision is sought.

It appears to us, however, unnecessary to devise any special or technical meaning for the word "inferior" in s. 435, unless we find that its ordinary meaning is not applicable. And we see no reason for holding that it is not. If we take the ordinary meaning of the word, there can be no question but that all subordinates are inferior to the authority to which they are subordinate; although inferiors are not necessarily subordinates. So within the territorial jurisdiction of a High Court, all other Courts are inferior to it: in a Sessions Division the Sessions Court is superior to all other local Criminal Courts, and all such other Courts are inferior to it; and in a District all other Magistrates are by s. 17 of the Code subordinate to the Magistrate of the district, and consequently inferior to him: and inferior as much for the purpose of s. 435 as in any other respect.

The High Court can under that section call for the record of any proceeding before any Criminal Court within the local limits of its jurisdiction; a Court of Session may do so as regards every other Criminal Court in the Sessions Division; and the Magistrate of the district can do the same as regards every other Magistrate's Court within his district. We entirely agree with the learned Judges who decided the case of *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1) in the opinion, that the word "inferior" in s. 435 was advisedly substituted for the word "subordinate" used in the corresponding s. 295 of the Code of 1872. But we think that the true reason for this substitution must be that which is suggested by Mr. Justice Straight in the Full Bench case of *Queen-Empress* v. *Laskari* (2). It seems to us, as to the High Court of Allahabad, that the reason for this change in the word used was to meet the rulings that a District Magistrate is not subordinate to the Sessions Judge, and to provide that, nevertheless, the revisional authority of the latter over the former should remain unquestionable. We cannot suppose that there was any intention on the part of the Legislature to suggest that Courts *subordinate* to the Magistrate of the district are not also *inferior* to him.

[477] We therefore, in reply to the question referred to the Full Bench, state our opinion that a Magistrate of the District is competent under s. 435 to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own District.

FIELD, J.—When the case of *Nobin Kristo Mookerjee* v. *Russick Lall Laha* (1) was before Mr. Justice McDonell and myself, the question now referred to a Full Bench was a new one, and had not been discussed or considered by the other High Courts, (so far as the reports show), or by other Judges of this Court. I gave in the judgment in that case reasons which then appeared to me to support the view there taken. Since the

(1) 10 C. 268. (2) 7 A. 853.

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appearance of that judgment, the question has been fully considered and discussed by the Madras and Bombay High Courts, who have taken a different view from that acted upon in the case of *Nobin Kristo Mookerjee* v. *Russick Lall Laha*. My colleagues adopt the view taken by the Madras and Bombay High Courts. Under these circumstances although I cannot say that my mind is wholly free from doubt, I think I ought to defer to the large majority who are in favor of a construction different from that which I originally accepted.

I therefore concur in holding that a Magistrate of a District can, under s. 435 of the Code of Criminal Procedure, call for and examine the proceedings of a Magistrate of the first class.

T. A. P.

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12 C. 477.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

DANMULL (*Plaintiff*) *v.* BRITISH INDIA STEAM NAVIGATION COMPANY (*Defendant*).* [12th January, 1886.]

Limitation Act, 1877, *sch. II, arts.* 30, 115—*Bill of Lading— Contract, Breach of, for non-delivery—Onus of proof of loss of goods.*

Where a plaintiff brings a suit for breach of contract for non-delivery of goods under a bill of lading, it is not open to the defendants, after having [478] denied receipt of the goods, to set up, or for the Court, after finding that the goods had been shipped, but not delivered, to assume, without evidence, that the goods were lost in order to bring the case within art. 30, sch. II of the Limitation Act of 1877.

Per GARTH, C. J.—*Semble*, where a plaintiff sues for breach of contract and proves his case, the three years' limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful act of theirs, to which the shorter limitation would apply. *Mohansing Chawan* v. *Conder* (1) and *British India Steam Navigation Co.* v. *Hajee Mahomed Esack* (2) approved.

[Diss., 108 P. R. 1906=2 P.L.R. 1907=33 P.W.R. 1907 (F.B.) ; D., 14 M.L.J. 396 (400).]

THIS was a reference from the Calcutta Court of Small Causes. On the 27th October 1884, the plaintiff sued the defendant Company to recover Rs. 1,041-5, as damages, by reason of the failure of the defendant Company to deliver to him at Rangoon a bale of piece-goods, shipped under a bill-of-lading dated the 3rd December 1881. The defendant Company denied that they had received the bale, and endeavoured to prove that what was in reality shipped was a bale of gunnies. They further contended that the suit was barred by art. 30, sch. II of the Limitation Act of 1877.

The learned Chief Judge of the Small Cause Court found that the bale of piece-goods was shipped by the plaintiff at Calcutta, and that the bale had not been delivered by the defendant Company at Rangoon; and as regards this latter point added, "It has been held that the bale of piece-goods, the subject of the dispute, has not been delivered: and if it has gone astray between Calcutta and Rangoon, it must have been

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* Small Cause Court Reference in Case No. 6 of 1885, made by H. Millet, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 22nd of May 1885.

(1) 7 B. 478. (2) 3 M. 107.

lost, for the Company cannot account for it in any way. The suit being brought more than two years from the time the loss occurred is barred by limitation under art. 30, sch. II of the Limitation Act." He therefore gave judgment for the plaintiff, which, at the request of the defendant Company, was made contingent on the opinion of the High Court, as to whether under the above circumstances, the suit was or was not barred by limitation.

1886 JAN. 12. — SMALL CAUSE COURT REFERENCE. — 12 C. 477.

No one appeared for either party on the reference.

The opinion of the Court was as follows :—

OPINION.

GARTH, C.J.—This was a suit brought by the plaintiff against the defendant Company for damages for not delivering to him at Rangoon, under the terms of a bill-of-lading, dated the 3rd [479] December 1881, a bale of piece-goods which was shipped from Calcutta.

The plaintiff's cause of suit, as alleged in the plaint, was *for the non-delivery of this bale of goods at Rangoon.*

The answer of the defendants was, that they had never received the bale of piece goods at all ; and they tried, moreover, to go behind the terms of the bill of lading, in order to prove that what was shipped as a bale of piece goods was in fact a bale of gunnies.

The plaintiff proved to the satisfaction of the Court that he had actually shipped a bale of piece goods ; and the defendants entirely failed to prove their case with regard to the contents of the bale, or that the goods had not been, as they alleged, shipped at all.

But the learned Judge, although he found the facts entirely in favour of the plaintiff, so far as the shipping of the goods and the non-delivery of them at Rangoon was concerned, considered that the suit was barred by limitation, as coming within art. 30 of the Limitation Act.

That article provides that suits against carriers for compensation for losing or injuring goods, shall be brought within two years of the loss or injury; and the learned Judge considered, that as the plaintiff's goods were not delivered at Rangoon, it was his duty to find that they were lost; and as the suit was not brought within two years of the loss, he held that the plaintiff was barred by limitation, although assuming the suit to be founded on contract, it would have been in time.

But the plaintiff never alleged that the goods were lost. On the contrary, his case was that the goods had not been delivered to him by the defendants as they ought to have been. He sued the defendants *upon their contract for a breach of the terms of the bill of lading.*

Nor, indeed was it the defendant's case that the goods were lost ; because they alleged that the goods had never been shipped : and there appears to have been no evidence on either side to lead the learned Judge to the conclusion that the goods were lost.

But the way in which he puts it in his judgment is this. He says : "It has been held that this bale of piece goods, the subject of the dispute, has not been delivered, and if it has gone astray [480] between Calcutta and Rangoon, it must have been lost, for the Company cannot account for it in any way."

I consider that in point of law the learned Judge was not justified in coming to any such conclusion. If the defendants desired to prove that the goods were lost, it was for them to have alleged and proved it. But that was not their case ; on the contrary, their case was, as I have explained, quite inconsistent with that contention.

1886 JAN. 12. — SMALL CAUSE COURT REFERENCE. — 12 C. 477.

In a Bombay case, to which we have been referred, *Mohansing Chawan* v. *Conder* (1), where the plaintiff sued to recover the price of bags not delivered, and the defendants contended that the suit was barred under art. 30 of the Limitation Act, the bags not having been delivered, and therefore lost, within two years before suit, it was held by the Court that the mere non-delivery of the bags was no proof of their loss, the onus of proving which as an affirmative fact lay on the defendants.

In this I entirely agree, and indeed I should be disposed to go further and to hold with the Madras Court in the case of the *British India Steam Navigation Co.* v. *Hajee Mahomed Esack* (2) that where the plaintiff sues for a breach of contract, and proves his case, the three years' limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful act of theirs to which the shorter limitation would apply.

In the present case the plaintiff sues for the non-delivery of the goods ; he does not sue for their loss ; he knows not whether the goods have been lost or not. His case is, that the defendants contracted with him to deliver the goods at Rangoon, and that they have failed to complete their contract; and he claims his right to bring a suit for the breach of contract within three years of the time when the goods ought to have been delivered.

It may be that the goods were lost ; it may be that the defendants may have been guilty of some other misconduct, with reference to them, of which the plaintiff was not aware ; but I do not see why the defendants have a right to take advantage of their own wrong, in order to change the nature of the plaintiff's [481] suit, for the purpose of bringing themselves within the protection of the two years limitation.

The plaintiff's suit is no less a suit on contract, because the defendants may have been guilty of a tort, of which the plaintiff was not aware.

I am therefore of opinion that the question referred to us should be answered in the negative ; and that the plaintiff should have his costs of this reference.

WILSON, J.—I am entirely of the same opinion. I only desire to add a few words.

I wholly concur with the Bombay Court in holding that, if the loss of the goods could be set up as the learned Judge of the Small Cause Court has held in this case that it may be, in order to introduce the shorter period of limitation, then it would be for the defendants to raise that case in a proper way and to prove it by evidence.

I also concur with the Madras Court in holding that in a case of this kind such a course is not open to the defendants. The case is somewha alalogous to one which might easily occur. Suppose a lessee, under a registered lease executed in Calcutta to sue his landlord for breach of covenant for quiet enjoyment, could the landlord set up in reply, "true I have broken my contract, but what I did amounted also to a trespass, and inasmuch as the period of limitation for a trespass is a short one, your suit on the contract is barred." The answer would be, "I do not care whether there was a trespass or not, you have broken your contract and I am suing you as for the breach, not for trespass."

Here the suit is for breach of a contract to deliver goods. The Judge says the goods were lost. The plaintiff may reply, "I do not care whether the goods are lost or not ; I am not suing on any such ground,

(1) 7 B. 478. (2) 3 M. 107.

but because the defendants have broken their contract to deliver the goods; and I am entitled to sue within the time allowed for suits upon a breach of contract." **1886** JAN. 12. SMALL CAUSE COURT REFERENCE. 12 C. 477.

Attorney for the plaintiff: Mr. *Pittar*.

Attorneys for the defendants: Messrs. *Barrow & Orr*.

T.A.P.

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12 C. 482 (P.C.) = 4 Sar. P.C.J. 674.

[482] PRIVY COUNCIL.

PRESENT:

Sir B. Peacock, Sir R. P. Collier, Sir R. Couch, and Sir A. Hobhouse.

[*On Appeal from the High Court at Calcutta.*]

MADAN MOHAN LAL AND OTHERS (*Plaintiffs*) *v.* LALA SHEOSANKER SAHAI (*Defendant*). [1st July, 1885.]

Civil Procedure Code, Act X of 1877, *s.* 43—*Splitting claims.*

A decree for damages in a suit instituted on 2nd June 1879 (27th Joist 1286 F.) on a breach of contract for not having given possession of land according to the terms of a *zur-i-peshgi* potta, awarded the profits of the land for 1283 F, which would have been received by the plaintiff had the contract been performed.

The decree-holder then brought the present suit (14th June 1880 or 21st Joist 1287 F.), for damages on the breach of the same contract, claiming the profits accrued during 1284, 1285 and 1286 F. (1876-77 to 1878-79).

Held, that the High Court had rightly decided that in regard to Act X of 1877, s.43, the plaintiff could not recover so much of the profits as had already accrued at the date of the institution of the prior suit, inasmuch as the claim in respect of such profits might have been included therein, *viz.*, the profits for the two years 1284 and 1285 F., which had expired when that suit was brought.

[F. 11 M. 151 (153); Appl. 2 C.L.J. 490 (491); R. 19 C. 615 (617); U.B.R. (1904), Civil Procedure 1 (2); 3 L.B.R. 56 (58); 9 O.C. 224 (226); 8 Ind. Cas. 445; D. 19 B. 532 (538); 5 C.L.J. 192 (200) = 34 C. 223.]

APPEAL from a decree (14th April 1882) of the High Court, partly confirming and partly reversing a decree (3rd September 1880) of the Subordinate Judge of Tirhoot.

The main question here was as to the application of s. 43 of the Code of Civil Procedure, Act X of 1877, that section having been held applicable by the High Court (1).

The suit was brought by the father of the appellants, Hridi Narain, who died pending this appeal, for Rs. 20,998, for damages on account of the withholding possession of land by the defendants who, making a potta for a term to secure a *zur-i-peshgi* advance, had agree to deliver possession and had failed so to do.

By the potta (30th Sawan 1282, corresponding to August 17th, 1875) the defendant made a lease of mouzah Badsam, with its appurtenances, for a term of eleven years, from the beginning of 1283 F. to the close of 1293 F., at an annual *jumma* of [483] Rs. 3,714 having taken the sum of Rs. 30,000 as *zur-i-peshgi*, charged with interest at one per cent. per mensem. The lessee was to take possession of the leased land from 1283 F., and after paying the Government revenue and other charges, to pay himself annually the sum of Rs. 3,600 (estimated to be

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(1) *Sheo Sunker Sahoy* v. *Hridoy Narain*, 9 C. 143.

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what would remain over), being the interest on the *zur-i-peshgi*, retaining whatever balance there might be. Among other agreements the lessor agreed that, if he failed to perform his part, the lessee might recover the amount with interest from his property.

The plaintiff did not obtain possession of the property until August 1876 : and then only under a decree in a suit which he brought for it.

On the 2nd June 1879 (22nd Jeyt 1286) the plaintiff sued Lala Sheosanker Sahai for damages, according to the terms of the *zur-i-peshgi* potta, such damages being estimated by the profits for the year 1283 F., for which he obtained a decree on 16th July 1879. Again, on the 18th June 1880, the plaintiff sued the present respondent for damages sustained owing to his having been kept out of possession during the years 1284, 1285 and 1286 F.; this being the suit out of which this appeal arose.

Lala Sheosanker Sahai, among other defences, objected that part of the claim was barred under ss. 42 and 43 of Act X of 1877.

The Subordinate Judge held that the omission to include a claim for damages for the years 1284 and 1285 in the farmer suit did not preclude the plaintiff from now making the claim. He adopted the method of calculation of the previous decision of 16th July 1879, and decreed accordingly.

The defendant appealed on the ground that the suit should be held to be barred under ss. 42 and 43 of Act X of 1877. There was a cross-appeal on the ground that certain other terms of the lease, entitling the plaintiff to damages, should have been made the basis of a decree.

The High Court (MITTER and MACLEAN, JJ.) held the defence to be good so far as the claim to the profits for 1284 and 1285 F. was concerned, but confirmed the decree for the profits of 1286 F.

The Cross-appeal was dismissed. The High Court held that **[484]** the parties were bound by the former decision ; but that s. 43 barred the suit, so far as it related to damages, which, having been already sustained at the time when the prior suit was brought, might have been included therein. The judgment of the Court is reported in I.L.R., 9 Calc., 145.

From this decree the plaintiff, Nridi Narain Sahu, obtaining special leave appealed.

On his death, the present appellants as heirs of their father obtained substitution of their names for his on the record.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, appeared for the appellants.

Mr. *J. Graham, Q.C.*, and Mr. *H. Cowell*, for the respondent.

For the appellants it was argued that the claim for damages as measured by the profits of the years 1284 and 1285 F., was not, as regards so much of the damages as had been incurred in that period, barred by the provisions of the Code.

Their Lordships, however, without calling on Counsel for the respondents, intimated that the judgment of the High Court was correct as regarded the matters in question.

C. B. *Appeal dismissed with costs.*

Solicitor for appellants : Mr. *T. L. Wilson.*

Solicitors for the respondent : Messrs. *Barrow and Rogers.*

12 C. 484 (P.C.)=12 I.A. 188=9 Ind. Jur. 474=4 Sar. P.C.J. 666.

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PRIVY COUNCIL.

PRESENT:

Lord Monkswell, Lord Hobhouse, Sir B. Peacock and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

RAM CHUNDER SINGH (*Plaintiff*) *v.* MADHO KUMARI AND OTHERS (BY THE COURT OF WARDS) (*Defendants*).
[19th, 20th and 23rd June and 11th July, 1885.]

Res judicata—Civil Procedure Code, Act X of 1877, *s.* 13—*Matters directly and substantially in issue in a suit—Limitation—Adverse possession.*

Where a decree, awarding to one of the parties money deposited in a Treasury by a third party, as the compensation for land taken by the latter for railway purposes, was based upon the right to the land, the question of title having been directly and substantially in issue between the parties: *Held*, that the contest of title was conclusive between them under s. 13 of Act X of 1877.

[485] In a suit brought by a ghatwal to resume, as determinable at will, an under-tenure granted by one of his ancestors, of land, part of the ghatwali mehal, it was alleged for the defence that the under-tenure was permanent.

A prior judgment upon conflicting claims made by the ghatwal and the under-tenure holders to receive the above-mentioned compensation money, which had been paid in respect of lands in part comprised in the under-tenure, determined that the ghatwal was entitled to the money, being founded on the under-tenure-holders having been in possession of it by the mere sufferance of the ghatwal, who could put an end to it at any time: *Held*, that the question whether the latter had a permanent tenure, having been directly and substantially in issue in the former suit, could not be contested in another.

Limitation having been set up in bar of the suit, *held* that, after the creation of the under-tenure, as long as there was no dispute or conflicting claim, the possession of it was not adverse to the ghatwal; and proceedings either between the ghatwal or between under-tenure-holders on the one side and creditors on the other, could not be taken to show an assertion of right by either of the parties now in litigation, as against one another.

There being nothing else to render the possession adverse, limitation only commenced at the date of the above-mentioned claim to the compensation money which was made less than twelve years before the present suit was brought; and accordingly the suit was not barred.

[F., 14 C. 323 (345); 105 P.L.R. 1901=65 P.R. 1901; 5 C.L.J. 62 (63); **Rel. on,** 17 C.W.N. 137 (139)=40 C. 173; 19 Ind. Cas. 558 (559)=15 Bom. L R. 266=37 B. 224; **R.,** 20 M. 269 (273); **D.,** 11 C.W.N. 525 (527)=34 C. 466; 18 C. 520 (526); 27 B. 515 (544); 60 P.R. 1908.]

APPEAL from a decree (27th July 1882) of the High Court (1), reversing a decree (26th November 1880) of the Subordinate Judge of Deogurh.

The questions now raised were whether the claim was barred by limitation, as it had been held to be by the High Court and also whether the appellant's right had been conclusively determined between the parties by a prior judgment, within s. 13 of Act X of 1877. The first question was decided in the negative, the judgment of the High Court (1) being reversed; and the second question in the affirmative.

The suit out of which this appeal arose was brought by the ghatwal of a mehal, named Pathrole, to resume a grant of a mouzah, named Taraf Lalghur, within the limits of the mehal; the grant having been made by one of the ghatwal's predecessors in estate in favour of the father of the last male possessor of Taraf Lalghur. The ghatwali estate was a mehal

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(1) *Madho Koeri* v. *Thekait Ramchunder Singh*, 9 C. 411.

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of Surat Deoghur in the zemindari of the Raja of Nagore, and having been originally [486] comprised in the decennial and permanent settlement of Birbhum zillah, though now in the Sonthal Pergunnahs, came under Regulation XXIX of 1814 (1). Taraf Lalghur, the disputed mouzah (as to which no sanad was forthcoming), was granted about A. D. 1800 by Thekait Digbijai Singh, the great-great-grandfather of the present ghatwal, to his second son, Thakur Kanhaya Lal Singh, by way of a mokurari kharposh lease, or fixed or leased for maintenance, at the rent of Rs. 103 per annum. This grantee was succeeded by his son Bunwari Lal Singh, who died in 1865, leaving the widows who were respondents on this appeal, now represented by the Court of Wards.

The present ghatwal (whose father, Thekait Kharagdari Singh, son of Thekait Bharut Chunder Singh, and grandson of the said Digbijhai, died in 1865) obtained the management of the ghatwali in 1873; the estate having been during his minority also under the management of the Court of Wards. The following are the principal proceedings relating to Taraf Lalghur, referred to in their Lordships' judgment.

First, the decision of 1853 in which Taraf Lalghur was, on the petition of the above-named Thekait Bharut Chunder, declared to be incapable of being attached for debts due by the ghatwal. Reported as *Sartuuk Chunder Chunder Dey* v. *Bhagat Bharut Chunder Singh* (2).

Secondly, the decision of the Commissioner of the Sonthal Pergunnahs (Mr. Yule), dated 23rd October 1857, to the effect that Lalghur being within the ghatwali mehal of Pathrole could not be sold in execution of a decree against the above-named Kanhaya Lal Singh, inasmuch as it was not lawful for a ghatwal to alienate permanently lands in his mehal.

Thirdly, a suit to establish the ghatwal's right to receive Rs. 15,125, the compensation money deposited by the East Indian Railway Company in the Deogurh Treasury for 1,765 bighas of land (Act X of 1870, s. 39), within the limits of the [487] ghatwali mehal, part of such land, *viz.*, 832 bighas, being not only within Pathrol but also within Lalghur, of which the then holder, Bunwari Lal, claimed a proportionate part of the compensation money; another claimant being the zemindar as to the whole. Apportionment was decreed in 1875 by the Subordinate Judge of Deogurh, but on appeal this decision was reversed by the High Court [See *Ram Chunder Singh* v. *Mahomed Johur Juma Khan*, (3) in March 1875.

The present suit was brought on the 25th June 1879, for khas possession of Taraf Lalghur, with a declaration that the mokurari kharposh lease granted by Digbijai to Kanhaya Lal was not binding on the present ghatwal, also for mesne profits from 1282 to 1285 (A. D. 1876 to 1879). The defendants, besides alleging limitation, set up that the grant of Taraf Lalghur to Kanhaya Lal, through whom they claimed, was a "shikmi ghatwal" tenure, or dependant estate of the same nature as the ghatwali, the grantee being bound to perform services in subordination to the ghatwali, and that it had, since that grant in 1800, been held by the defendants and their predecessors at the same rent; thus indicating that the grant was permanent.

Issues having been fixed as to limitation, and as to whether the decision of 1875 did not conclude the defendants under s. 13 of Act X of

(1) Entitled "A Regulation for the settlement of certain mehals in the district of Birbhum usually denominated the ghatwali mehals." It determined certain rights of the ghatwals, the zemindars and the Government, respectively, as to these mehals.

(2) S.D.A. (1853) 900. (3) 23 W.R. 376.

1877, the Subordinate Judge of Deogurh decided that, whether the defendants were mokuraridars or not, limitation did not bar this suit; time having only commenced to run against the plaintiff from the date when he first had notice that the defendants, or those through whom they claimed, insisted that the under-tenure was permanent. This was not before 1875, when the litigation as to the compensation money took place. He referred to *Mukurbhanoo Deo* v. *Kostoora Koonwaree* (1), which case, however, related to grants prior to the decennial settlement, the present grant having been made after the permanent settlement ; also to *Grant* v. *Bangsi Deo* (2) deciding that a ghatwal is not competent to grant in perpetuity, and that his successors need not recognize such an act ; and to Regulation XXIX of 1814 ; and the Subordinate Judge held that the grant of **[488]** Taraf Lalghur, whatever it had been was not binding on the present ghatwal. He, therefore, decreed in the plaintiff's favour.

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On the defendants' appeal, this decision was reversed by the High Court (Tottenham and Bose, JJ.) on the ground of limitation. They held that the possession of the defendants had become adverse to the plaintiff on the death of his father in 1865, until fourteen years after which date the present suit was not brought, and was therefore barred. The judgment is reported in I.L.R., 9 Cal., 413.

On this appeal,—

Mr. *C. W. Arathoon*, for the appellant, argued that the suit was not barred by limitation. He referred to *Shaik Moddeen Hossein* v. *Lloyd* (3) in which limitation was held to run from the time when a mokurari lease had been set up against the claimant, and to *Tekaetni Goura Coomaree* v. *Saroo Coomaree* (4), showing that limitation does not begin to run until notice of the setting up of such mokurari. Here, on the contrary, there was no date, before 1875, from which limitation could be reckoned ; no reason existing why the High Court should have fixed upon the date of the death of the plaintiff's father as the commencement of the twelve years' bar. In fact until the proceedings relating to the compensation money in 1875, the possession of the under-tenure was not treated by either party as other than permissive. Not being barred by limitation, the plaintiff could insist that a judgment given on the point in 1875 prevented the defence being set up that the under-tenure was perpetual.

In *Ram Chunder Singh* v. *Mahomed Johur Juma* (5) (the suit relating to the compensation money), it had been decided that the tenant through whom the defendants now claimed was in possession by the mere sufferance of the ghatwal. This was a bar to the defence under s. 13 of Act X of 1877. Also, on this point, if the question could be re-opened it would be found that the so-called mokurari kharposh tenure was no permanent tenure, the ghatwal not having been able to alienate the ghatwali lands in perpetuity, and on this point the judgment of the Subordinate Judge was correct.

[489] He referred to *Grant* v. *Bangshi Deo* (2) ; *Rungololl Deo* v. *The Deputy Commissioner of Birbhum* (6) ; *Binode Ram Sein* v. *The Deputy Commissioner of the Sonthal Pergunnahs* (7) ; *Ram Chunder Singh* v. *Mahomed Johur Juma* (5).

Mr. *J. Graham*, Q.C., and Mr. *J. T. Woodroffe*, for the respondents, argued that the suit was barred by limitation as decided by the High

(1) 5 W. R. 215. (2) 6 B. L. R. 652=15 W.R. 38. (3) 15 W.R. 232.
(4) 2 Suth. P. C. J. 806. (5) 23 W. R. 376. (6) 1 Marsh 117.
(7) 7 W.R. 178.

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Court. Reference was made to *Babaji* v. *Nana* (1) and *Pitamber Babu* v. *Nilmoni Singh Deo* (2).

If the suit was not barred, then the tenure was not resumable as it was claimed that it was. It had been granted for the maintenance of a junior branch of the family as a kharposh tenure and was a division of the ghatwali interest. It was an under-tenure in the sense that performance of ghatwali services was required in subordination to the ghatwal of the parent estate.

The nature of the tenure was not *res judicata* between the parties, either in consequence of the judgment of 1875 or any other proceeding. The respondents had not been duly represented when that judgment was given, and were not bound by it—Bengal Act IV of 1870.

They referred to *Nilmoni Singh* v. *Bakranath Singh* (3); *Rao Bahadur Singh* v. *Mussumat Jowahir Kuar* (4); *Hurlal Singh* v. *Jorawun Sing* (5).

Mr. *C. W. Arathoon* replied :

On a subsequent day, July 11th, their Lordships, judgment was delivered by—

JUDGMENT.

LORD MONKSWELL.—Thekait Ram Chunder Singh, ghatwal of a large estate named Pathrole, brings this action to eject from Lalghur, a subordinate tenure within its ambit, the defendants, who are widows of the last holder of it, Bunwari Singh, and are under the protection of the Court of Wards. He claims the right to resume that tenure at will, and further asserts that his right to this resumption has been conclusively decided in a [490] previous suit between the same parties. The defendants claim to hold a ghatwali tenure, from which they could not be dispossessed on the payment of a fixed rent ; they deny that the question has been decided as alleged, and set up the plea of limitation. The Subordinate Judge found for the defendants on the plea of *res judicata* and for the plaintiff on the plea of limitation, and gave the plaintiff a decree on the ground that the tenure was resumable at will.

The High Court reversed this judgment, finding for the defendants on the plea of limitation only. From that judgment the present appeal is preferred.

The following facts appertain to the history of the tenure :—

One Digbijai Singh was the ghatwal of Pathrole about the beginning of this century.

The property held by the defendants called Taraf Lalghur, was granted by him to one of his younger sons, Kanhaya Singh, for maintenance in or before 1804 ; for receipts of rent are put in, one in 1805 for rent due in 1804.

In 1800 or 1801 a settlement for ten years seems to have been made with Digbijai, another settlement at the expiration of that for three years, and another in 1813-14 for ten years, which became permanent by the operation of Regulation XXIX of 1814. We hear little or nothing more about it till 1853, when a proceeding took place before the Judge of Birbhum, which arose in this way. Some creditors who had obtained decrees sought to execute them against the owners of ghatwalis, among them Bharut Chunder Singh, grandfather of the plaintiff, ghatwal of Pathrole, and Kanhaya Sing, ghatwal (as he described himself) of taluk Lalghur. The ghatwals contested the right of the judgment-creditors to

(1) 1 B. 535. (2) 3 C. 793. (3) 9 C. 187=9 I. A. 104.
(4) 10 C. 887=11 I. A. 75. (5) 6 Sel. Rep. 169=7 I. D. (O.S.) 820.

seize their estates in execution, whereupon an order was made for the release of the estates from attachment, which was confirmed on appeal to the Sudder Dewani Adalut in May 1853. The Court gave judgment in these terms :—

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"The Court are of opinion that, under the law, the ghatwali tenures of Birbhum being not the private property of the ghatwals, but lands assigned by the State in remuneration for specific police services, are not alienable, nor attachable for personal dedts."

[491] In a similar proceeding in 1857 a decision to the same effect was arrived at, and a notice was sent to Bharut Singh that the grant to Kanhaya had not given Kanhaya any right in mouzah Lalghur, but as far as we know Bharut took no action on this, nor does any assertion or counter-assertion of rights appear to have taken place between the holders of Pathrole and the owners of Lalghur, till the time which will be hereafter referred to. It further appears that the owners of Lalghur have been treated as bound to perform, and, indeed, have performed, the police duties incident to their tenure ; this is recognized by a perwana from Bharut to Bunwari in 1855, and by a further perwana from the Assistant Commissioner of the Sonthal Pergunnahs in 1873.

The first question in the case to be determined is whether the contest of title between the parties is *res judicata* under Act X of 1877, s. 13, which is in these terms :—

No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties or between parties under whom they or any of them claim, litigating on the same title."

The plaintiff's father died in 1865, leaving him a minor. During his minority, which ended in 1873, the rent of Lalghur was paid by Bunwari to the Court of Wards on his behalf, and no question of title or conflicting right arose. On his attaining majority some time in 1873 he brought a suit against Bunwari, claiming against him the whole of the compensation money which had been paid into Court by the East Indian Railway Company in respect of land in Lalghur, which had been taken by the Company, Bunwari claiming a share in that money.

Pending the suit Bunwari died ; his widows were substituted for him, and the Subordinate Judge decided in their favour, giving them a considerable part of the compensation money.

On appeal to the High Court this judgment was reversed.

The contention of the respective parties and the ground of the judgment, are so clearly stated by Mr. Justice Romesh Chunder Mitter, that their Lordships think it well to give the following extracts from his judgment :—

[492] "This suit was instituted on behalf of Ram Chunder Singh, minor, who has now attained his majority, for obtaining Rs. 15,125-11-6 deposited in the Government Treasury of Deoghur, being the compensation money for 1,76*b.* 9*c.* 14*h.* of land appertaining to the ghatwali taluk Pathrole, taken for the construction of a railway. The allegation of the plaintiff is that he is entitled to the whole of this compensation money, and the defendants having unjustly claimed the same, it has been detained in the Treasury, leaving the contending parties to have their respective rights settled by a competent Civil Court.

"The defendant Bunwari Lall alleged in his written statement that he holds a sub-tenure in the plaintiff's ghatwali mehal, charged with a

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fixed annual rent of Rs. 104 ; that a portion of the lands taken falls within his sub-tenure, the compensation money in respect of which was therefore due exclusively to him." . . . .

Then, after disposing of certain claims by other parties, the learned Judge continued :—

"Then we come to the claim put forward by Bunwari Lal. It is evident that he held a subordinate tenure within the plaintiff's ghatwali mehal, and the said tenure is still in the possession of his widows. It has also been established upon the evidence that his tenure was created by an ancestor of the plaintiff to provide for the maintenance of a junior branch of the ghatwal's family. It has been contended on behalf of the plaintiff that it is not sufficient to show that Bunwari Lal during his lifetime was in possession, and his legal representatives are still in possession of this subordinate tenure, but that it must be established that Bunwari Lal was, and the widows are still, in rightful possession of it, and that it is of a permanent nature, so that the superior ghatwal cannot at his will determine it. I think that this contention is valid. These defendants, it appears to me, are not entitled to any share in the compensation money, if it can be shown that they are allowed to remain in possession of the subordinate tenure by mere sufferance of the superior holder, who can at any moment put an end to their possession. From the nature of the tenure held by the plaintiff, it follows that the arrangement made by his ancestor to provide for the maintenance of a junior branch of **[493]** the family is not binding upon him. He is fully competent to resume possession of these lands (*vide* 6 B. L. R., p. 652).

"Bunwari Lal, therefore, not having during his lifetime any valid right to any portion of the lands taken, his representatives are therefore not entitled to receive any share in the compensation money, the whole of which, therefore, should be paid to the plaintiff.

"But the plaintiff is a ghatwal. His title is not that of an absolute owner. He is only entitled to enjoy the profits of the ghatwali mehal during his life, without power of alienation. The compensation money in deposit is only a money equivalent to a portion of that mehal."

From this judgment there was no appeal. Their Lordships are of opinion that the very question in this cause, *viz.*, whether the defendants held a permanent tenure, or whether the plaintiff was entitled to resume it at pleasure, was directly and substantially in issue between the parties, and has been finally decided between them.

Their Lordships are relieved, therefore, from deciding what the rights of the respective parties really were, a question which, if it had been open, might have been attended with difficulty.

The question of limitation remains. The provision in art. 144 of the second schedule of Act XV of 1877, which gives twelve years as the period of limitation from the time "when the possession of the defendant becomes adverse to the plaintiff," appears the only provision applicable to the case.

Their Lordships understand the judgment of the High Court to be, in effect, based on these considerations.

The tenure set up by the defendants being of a permanent character, was adverse for a long period of time to the claim of the plaintiff and his ancestors, which was to resume the tenure at will; that it was not the less adverse on account of the payment of rent, which was an incident of the tenure; that the statute began to run against the plaintiff on the death of his father in 1865, when his title accrued, although

he was not recognized by the Government as ghatwali till his majority; that as he did not bring this suit till five or six years after he became [494] of age, he was barred by the statute. Their Lordships are unable to assent to this view.

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It can scarcely be contended that immediately on the creation of the sub-tenure the possession of it became adverse when there was no dispute or conflicting claim. If not so, when did the possession become adverse? It has been contended that it became adverse in 1853, when notice was given by the Court to Bharut Chunder that the grant to Bunwari conferred no title against him, and that he could eject Bunwari at pleasure. But the proceeding was wholly between creditors and ghatwals holding tenures or under-tenures. There were no proceedings hostile or otherwise between the ghatwals and the sub-tenure-holders, each of whom was content to go on as before without any definition or assertion of right by either party. The same state of things continued after the death of Kharagdhari Singh, the plaintiff's father, when the rent was paid to the Court of Wards on behalf of the plaintiff during his minority.

In their Lordships' opinion no adverse possession, within the meaning of the statute is proved to have existed until the institution of the suit in 1873, when the claims of both parties were undoubtedly adverse, and the statute began to run only from that time. If so, the plaintiff is not barred by limitation.

On these grounds their Lordships are of opinion that the judgment of the High Court must be reversed, and judgment given for the plaintiff, and they will humbly advise Her Majesty to this effect. The respondent must pay the costs of this appeal.

C. B. *Appeal allowed.*

Solicitor for the appellant: Mr. *T. L. Wilson.*
Solicitor for the Court of Wards, respondent: Mr. *H. Treasure.*

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12 C. 495.

[495] CRIMINAL REVISION.

Before Mr. Justice Mitter and Mr. Justice Beverley.

IN THE MATTER OF CHANDRA KANT BHATTACHARJEE AND OTHERS.
CHANDRA KANT BHATTACHARJEE *v.* THE QUEEN-EMPRESS.*
[11th December, 1885.]

Sentence—Cumulative sentences—Separate Convictions for more than one offence where acts combined form one offence—Penal Code (Act XLV of 1860), *ss.* 143, 147, 324, 353 (*Act VIII of* 1882), *s.* 4—*Criminal Procedure Code, Act X of* 1882, *s.* 235.

Four persons were charged with being members of an unlawful assembly consisting of themselves and others the common object of which assembly was resisting the execution of a legal process, namely, the arrest of a judgment debtor by a Civil Court peon, who went with a warrant for his arrest accompanied by other persons, *A* and *B*, for the purpose of identifying him, and with using force or violence in prosecution of the common object, such force or violence consisting of an assault on the Civil Court peon and another by means of a dangerous weapon on *A*. The Deputy Magistrate convicted all the accused of offences

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* Criminal Revision No. 421 of 1885, against the order of H. Beveridge, Esq., Sessions Judge of Fureedpore, dated September 14th, 1885, affirming the order of Baboo Rajoninath Chatterjee, Deputy Magistrate of Madaripore, dated August 31st, 1885.

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under ss. 147 and 353 of the Penal Code, and sentenced them to six months' rigorous imprisonment uuder the former section and two months' rigorous imprisonment under the latter. He further convicted one of the accused of an offence under s. 324, in respect of the assault on *A* and sentenced him to one month's rigorous imprisonment in respect of that offence, and directed that the sentences were to take effect one on the expiry of the other.

Held, that the offence of rioting was completed by the assault on *A*, and that the assult on the peon was a further offence under the first sub-section of s. 235 of the Code of Criminal Procedure.

Held, further, that even if *A* had not been assaulted the conviction and sentences passed for rioting and the assault on the peon were legal, inasmuch as the acts of the accused taken separately constituted offences under ss. 143 and 353 of the Penal Code, and, combined, an offence under s. 147; and under s. 235, sub-section 3 of the Code of Criminal Procedure, the accused might be charged with and tried at one trial for the offence under s. 147, and those under ss. 143 and 353, and therefore also separately convicted and sentenced for each such offence, provided the punishment did not exceed the limit imposed by s. 71 of the Penal Code, as amended s. 4 of Act VIII of 1882, which limit had not been exceeded in the present case.

[R., 9 A. 645 (650, 654); 19 C. 105 (110).]

[496] THE facts of the case were as follows: One Ramdoyal Dey, a Civil Court peon, accompanied by Abbas Mirdha, Lall Mahmood and others, went to the house of Kashi Chandra Bhattacharjee, a judgment-debtor, for the purpose of arresting him under a warrant which he held. It was alleged that, after Kashi Chandra was arrested, the accused, Chandra Kant Bhattacharjee, Soshi Bhattacharjee, Kali Prosonno Mookerjee and Mohini Bashi Mondol and others, who were armed with *latties* and a *dao*, came and rescued Kashi Chandra from the custody of the peon, and that in effecting his release they assaulted the peon, and that upon Abbas Mirdha and Lall Mahmood, who had accompanied the peon to identify the judgment-debtor, attempting to prevent the accused releasing Kashi Chandra, Abbas Mirdha was assaulted and wounded and Lall Mahmood was also struck.

The defence set up on behalf of the accused was that Chandra Kant and not Kashi Chandra was arrested, and that upon his getting away from the peon and entering his house the peon and a number of others followed him and assaulted him and dragged him out in spite of his resisting the illegal arrest, and that it was not till after the peon and the others with him had discovered their mistake that he was released.

The Deputy Magistrate disbelieved the evidence for the defence and found that the accused formed members of an unlawful assembly, with the common object of resisting the execution of a legal process, namely, the arrest of Kashi Chandra, and that force or violence was used by the unlawful assembly in prosecution of the common object. He also found that the accused resisted the peon in the execution of his duty to arrest the judgment-debtor. Upon these findings he convicted all the accused under ss. 147 and 353 of the Penal Code, and sentenced them to six months' rigorous imprisonment under s. 147 and two months under s. 353. He also convicted Soshi Bhattacharjee of an offence under s. 324 of the Penal Code, in respect of the hurt caused to Abbas, and passed a sentence of one month's rigorous imprisonment upon him in respect of that charge.

The Deputy Magistrate further directed that the sentences were to take effect one on the expiry of the other.

[497] The accused then appealed to the Sessions Judge against the conviction and sentences. But the Judge confirmed the findings of the lower Court, and considering the sentences passed not too severe

dismissed the appeals. The accused then applied to the High Court under its revisional powers to send for the record, upon the ground that the conviction and sentences under s. 353 as well as under s. 147 of the Penal Code could not be sustained.

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The case now came on to be argued.

Baboo *Umbica Churn Bose*, for the petitioners.

No one appeared for the opposite party.

The judgment of the High Court (MITTER and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

In this case the record was sent for in order to ascertain whether the conviction and sentence under s. 353, as well as that under s. 147 of the Indian Penal Code, can be sustained.

It is contended before us that, inasmuch as by its definition in s. 146 of the Indian Penal Code the offence of rioting involves the use of force or violence, the accused cannot be separately convicted and sentenced for the use of the same force under s. 353.

The facts, as found by both the lower Courts, are that one Ramdoyal Dey, a Civil Court peon, accompanied by Abbas Mirdha and Lal Mahmood, went to arrest one Kashi Chandra Bhattacharjee; that the process was resisted by the accused, and that both the peon and Abbas Mirdha were assaulted in the struggle that ensued.

The four accused were convicted under ss. 147 and 353 of the Indian Penal Code, and sentenced to a separate punishment under each section. Soshi Bhusan Bhattacharjee has also been convicted and sentenced under s. 324 of the Indian Penal Code, for the assault committed on Abbas.

It having been found by the lower Courts that force was used both to the peon and also to Abbas, it seems clear that the force used to either by any member of the unlawful assembly would suffice to constitute the offence of rioting. It follows that the **[498]** offence of rioting was completed by the assault on Abbas, and that the assault on the peon was a further offence under the first sub-section of s. 235 of the Code of Criminal Procedure.

But the matter has been argued before us on the assumption that it was the force used towards the peon that constituted or completed the offence of rioting, and that the accused cannot fairly be convicted and sentenced under another section for the use of the same force.

We think that this view of the law is wrong, and that even if Abbas had not been assaulted, the conviction and sentences passed for the assault on the peon were legal and must be upheld. Sub-section 3 of the section in question (235 of the Code of Criminal Procedure) runs as follows: "If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined, a different offence, the person accused of them may be charged with and tried at one trial for the offence constituted by such acts when combined, or for any offence constituted by any one or more of such acts."

In the present case we have acts separately constituting offences under ss. 143 and 353 of the Indian Penal Code, and when combined constituting an offence under s. 147 of the Indian Penal Code. Under the sub-section quoted, therefore, the accused might be charged with and tried at one trial for the offence under s. 147, for that under s. 143, or for that under s. 353. It follows that they might also be separately convicted and sentenced for each offence.

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Section 235, however, goes on to say that "nothing in this section shall affect the Indian Penal Code, s. 71;" and turning to that section as amended by Act VIII of 1882, we find it laid down that in cases (such as that before us) falling under sub-section (3) of s. 235 of the Code of Criminal Procedure, "the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

Now the aggregate punishment actually awarded under ss. 147 and 353 of the Indian Penal Code is eight months' imprisonment only, whereas the Deputy Magistrate might have awarded two years' imprisonment under s. 147 alone.

There is, therefore, nothing illegal in the sentences passed.

H. T. H. *Conviction and sentences upheld.*

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12 C. 499.

[499] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Field.

TAPONIDI HORDANUND BHARATI AND ANOTHER (*Two of the Defendants*) *v.* MATHURA LALL BHAGAT (*Plaintiff*).*
[22nd December, 1885.]

Civil Procedure Code, 1882, *ss.* 294, 295—*Rateable distribution of assets—Allowance of set-off of purchase money against amount of decree—Suit for share of sale proceeds—Limitation—Principle of distribution.*

In execution of a decree against *M* the plaintiff attached and advertized for sale certain property in mouzah *A*. At that time there were pending proceedings in execution of two other decrees obtained against *M* by the first and second defendants respectively. These two decrees were obtained on a bond executed by *M*, by which an eight annas share of mouzah *A* was hypothecated as collateral security; and in execution of those decrees the defendants brought to sale, and themselves purchased, not an eight annas share only but the whole of mouzah *A*, and were allowed by the Court to set off the purchase money against the amounts due to them under their decrees. At the same time the plaintiff's execution case was struck off on the 30th June 1880. In a suit brought by the plaintiff under s. 295 of the Civil Procedure Code for his share of the sale proceeds of mouzah *A*, in which the plaintiff alleged fraud on the part of the defendants in selling the whole mouzah under their decrees, of which he only became aware in July 1882 from which time he dated his cause of action, the defendants denied the fraud and contended that the suit should have been brought within a year of the order of the 30th June 1880; that a set-off having been allowed to the defendants, the plaintiff was not entitled to any rateable distribution; and that if any rateable distribution were allowed, they were entitled to have an allowance made in respect of a mortgage which the plaintiff held in a two annas share of mouzah *A*, which they had paid off subsequently to the transaction now in question. *Held*, that the existence of the order of the 30th June 1880 was not inconsistent with the plaintiff's right, and the suit was therefore not barred as not having been brought within one year of that order. *Held*, also, that the fact of the set-off being allowed in exercise of the power given in s. 294 of the Code, instead of actual payment into Court, did not alter the substantial nature of the transaction, so as to render the purchase money less applicable to the satisfaction of the debts of other attaching creditors.

Held, further, that the defendants were not entitled to deduct the sum paid by them to clear off the plaintiff's mortgage, from the amount of the

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* Appeal from Appellate Decree, No. 1569 of 1885, against the decree of J. B. Worgan, Esq., Judge of Cuttack, dated the 19th of March 1885, modifying the decree of Baboo Radha Krishna Sen, Subordinate Judge of that district, dated the 21st of May.

[500] purchase-money, before the Court could determine the amount rateably distributable among the parties concerned. *Quaere.*—Whether they were even entitled to reckon the amount so paid as one of the claims in respect of which, with others, a rateable distribution should be made.

[F., 11 M. 356 (358); R., 16 B. 91 (102); 15 B. 438 (441); 2 C.W.N. 429 (432); 3 O.C. 84 (86); U.B.R. (1904) 4th Qr., Limitation, sch. II, 13.]

THE facts of this case were stated as follows in the judgment of the Subordinate Judge :—

"The plaintiff and Mussamut Golap Kumar Bacha Dei had obtained a decree for Rs. 2,470 against one Mohanund Bun Gossain, the guru of the defendant No. 3, and in execution of this decree they attached and cause to be advertized for sale mouzah Arol, the rent-free property of the said Gossain. Afterwards Golap Kumar and Bacha Dei sold their interest in the decree to the plaintiff, who thus became the *sole* decree-holder in execution case No. 111 of 1879. There were, however, two other execution cases, Nos. 151 and 152 of 1879, pending at the time against Mohanund Bun Gossain, the decree-holder in one of them being defendant No. 1, and in the other the defendant No. 2, who had purchased his decree from one Hur Sahoy Lal. Mohanund had borrowed some money from the defendant No. 1 and Hur Sahoy Lal, and executed a bond in their favour on the 11th December 1869, by which he had hypothecated an eight-anna share of mouzah Arol, as collateral security for the realization of the money lent. The defendant No. 1 and Hur Sahoy Lal, however, brought two separate suits, and each obtained a decree, declaring his mortgage lien over the eight annas share of mouzah Arol. The defendants Nos. 1 and 2 also brought the whole of mouzah Arol to sale, fraudulently representing that the same was mortgaged by the bond, dated the 11th December 1869, and they were allowed by the Court to set off the purchase money against the amounts due to them. On the same day, 30th June 1880, the plaintiff's execution case was struck off the file.

"The plaintiff, being thus deprived of his share in the sale proceeds of eight annas of the property which were not mortgaged with the defendant No. 1 and Hur Sahoy Lal, has instituted this suit under s. 295 of the Cviil Procedure Code, and he avers that he became aware of the defendant's fraud in the month of July 1882, whence he dates his cause of action. He claims Rs. 1,752 in satisfaction of his decree out of the sale-proceeds appropriated by the defendants.

"The defendants Nos. 1 and 2 reply that the Court having held that the plaintiff was not entitled to any rateable distribution of the sale-proceeds of mouzah Arol, struck off his execution case on the 30th June 1880, and the suit not having been brought within one year of that date, is barred by limitation; that of the sale proceeds only Rs. 135-14-1 were paid into Court, the remainder being allowed to be set off against the amounts due to the defendants Nos. 1 and 2, and the Court could not therefore make a rateable distribution; that the plaintiff's allegation, as to his being ignorant of the [501] whole of mouzah Arol having been mortgaged with defendant No. 1 and Hur Sahoy Lal, and the defendants committing a fraud against him, is wholly false; that two annas of mouzah Arol was mortgaged with the plaintiff by Mohanund Bun Gossain, and the plaintiff having obtained a decree, declaring his mortgage lien over the said two annas, applied for the execution of his decree (in execution case No. 115 of 1882); that at the time of the sale of mouzah Arol, the defendant No. 2 had another execution case (No. 136 of 1880) pending in Court against the debtor

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Mohanund Bun Gossain for the realisation of Rs. 3,631-1-7, but had received Rs. 5-7-1 out of the sale-proceeds on account of the money due to him; and that, therefore, even if the Court ordered at the time any rateable distribution of the sale-proceeds, all these decrees would have been taken into consideration."

The issues settled were: (1) whether the suit was barred by limitation; (2) whether the plaintiff was entitled to maintain the suit; (3) whether the plaintiff could recover any portion of the sale proceeds of mouzah Arol from the defendants? If so, to what extent?

The Subordinate Judge held that the suit was barred by limitation, and dismissed it without deciding on the other issues.

The Judge reversed that decree and decided the issue as to limitation in favour of the plaintiff.

On the second issue, with respect to which the cases of *Vishvanath Moheshvar* v. *Virchand Panachand* (1); and *Viraragava Ayyangar* v. *Varada Ayyangar* (2) were referred to, the Judge held that the fact of the set-off being allowed to the defendants, and the purchase-money thereby prevented from coming actually into the hands of the Court, did not interfere with the right of the plaintiff to maintain the suit.

On the 3rd issue the judgment of the lower appellate Court was as follows:—

"There were, it is said, *five* decrees in execution against the debtor Mohanund Bun Gossain, at the time of the sale in the defendants' execution cases, inclusive of their two decrees in original suits Nos. 14 and 15 of 1874, in which the plaintiff was decree-holder, and in original suit No. 36 of 1879, in which defendant No. 2 was so; and it was said that, if there had been rateable distribution at the time of the sale of May 1880, it would have had to be between the decree-holders in these five decrees, and not only as prayed for by the plaintiff.

"To this it was replied that there were no other *decrees for money* under execution at the time. The defendant's decree, in original Suit No. 36 of **[502]** 1879, was not a money decree, being a decree on a mortgage bond in which defendant No. 2 was the mortgagee, and as such not entitled to share in the surplus.

"As regards this matter of mortgage in the execution on the above suit, being execution case No. 136 of 1880, it was said that the mortgage caused no bar to the defendant, as the property was not sold subject to the mortgage. Reference was made to *Fukeer Buksh* v. *Chutturdharee Chowdhry* (3) and *Joy Chunder Ghose* v. *Ram Narain Poddar* (4) to show that the fact of there being an undisclosed mortgage would make no difference. I find that in the sale proclamation in the case nothing was said of the second mortgage of January 1876 on which defendant No. 2 sued, and as far as the public went, the mortgage was undisclosed, and the bidding may be taken to have been what it would have been for an unencumbered property. Any way I do not see how I could, in the face of the rulings cited, say that the property was *sold subject to the mortgage*, and, if so, the defendant would not have been barred from rateable distribution, his first execution in suit No. 36 of 1879 having been started before the sale of May 1880 in No. 86 of 1880.

"It is worthy of note that the plaintiff himself in asking for rateable distribution does so on the strength of a decree, which is solely a decree for money. He had a mortgage of two annas on the Arol mouzah when

(1) 6 B. 16. (2) 5 M. 123. (3) 14 W. R. 209. (4) 21 W. R. 43.

he took out execution of this decree, but *he* also said nothing then of this. No sale proclamation has as yet issued. In his case also it cannot be said that the property, when it was sold, was sold subject to his mortgage.

"It was urged that the decree in No. 36 of 1879 was barred when the plaintiff sued, and there can be no rateable distribution as regards it now. To this, however, it was said that, if there is to be rateable distribution at all, it must be such as would have been made at the time of the sale of May 1880, had the Court at the time acted in accordance with the law. This principle seems to me a proper one to adopt.

"It was further urged that as the defendants paid off the plaintiff's two annas' mortgage in execution suit No. 115 of 1882 of original suit No. 15 of 1874, if the plaintiff is now to get rateable distribution, the money so paid by them, being some Rs. 1,981, must be deducted from what he would otherwise get, as had he got this at first, *they* would not have had to pay him it. To this it was urged that this money cannot come into the hotchpot, having been paid long after the rateable distribution would have been made.

"Having regard to the character of the five decrees which the defendants say should form the subject of rateable distribution if ordered at all, and to the dates of their execution applications, and to what was made public in such sale-proclamations as are seen to have been issued, I am of opinion that the contention of the respondents-defendants' pleader on the point is **[503]** correct, and that the half of the Rs. 12,040 representing the proceeds of the unmortgaged eight annas of Arol at the sale in execution cases Nos. 151 and 152 of 1879, ought to have then been rateably divided between the decree-holders in the five cases. As regards the payment of Rs. 1,981 which defendants made in plaintiff's two annas' mortgage execution, I do not think they are entitled to get any allowance for this now, as I am ascertaining what would have been the rateable distribution *then*, and it was their own fault if they, owing to their own wrongful act excluding plaintiff from rateable distribution, had to pay him the money they did on *another* account. The five decrees must be taken at what they stood at on the date of sale, *viz*., the 15th of May 1880, being the decrees in original suits Nos. 12 (part), 14, 15 and 16 (part) of 1874, and No. 36 of 1879 of the Subordinate Judge's Court, and the Rs. 6,020 must be divided amongst the holders of these decrees in proportion to their decrees as found to be. Whatever amount is found by this calculation to be what plaintiff would have received had there *then* been a rateable distribution on this principal, that sum he is entitled to get from the defendants, who, as we have seen, took the whole money. He will also get interest on such sum at 6 per cent., from the date of sale to date of this judgment, and costs in both Courts."

Defendants Nos. 1 and 2 appealed from this decision to the High Court.

Mr. *R. E. Twidale*, and Mr. *H. E. Mendes*, for the appellants.

Baboo *Mohesh Chandra Chowdhry*, and Baboo *Karuna Sindhu Mukerji*, for the respondent.

The Judgment of the Court (WILSON and FIELD, JJ.) was as follows :—

JUDGMENT.

The facts of this case sufficiently appear in the judgment of the Court below.

1885 DEC. 22. — APPELLATE CIVIL. — 12 C. 499.

Three points have been discussed before us. The first is the question of limitation. It has been argued that the suit is barred, because it was not brought within a year from the date of the order of the 30th June 1880. On that point we entirely agree with the lower appellate Court. This is not a suit to set aside any order at all. It is a suit brought to enforce a right which the law gives to the plaintiff, and which right arose by virtue, among other things, of that order; but the existence of that order in full force is in no sense inconsistent with the right of the plaintiff. It is a suit governed by some one or other of [504] the articles in the schedule to the Limitation Act. It is not necessary for us to discuss under which article it falls, because under whatever article it falls the suit is in time.

The second point taken before us is this, that, because in this case the defendants as to the larger part of the purchase-money were allowed to set it off against their judgment-debt instead of actually paying it into Court in coin, therefore the purchase money never became assets of the estate of the judgment-debtor applicable to the satisfaction of the debts of those creditors who had obtained decrees and orders for execution. We are of opinion that the power given in s. 294 of the Code of Civil Procedure is not intended to alter the substantial nature of the transaction. In a proper case, in order to prevent trouble and inconvenience, that law allows the Court to sanction a set-off instead of a payment in followed by payment out. But the purchaser who has obtained this indulgence cannot, in our opinion, take advantage of it so as to alter the substance of the transaction and alter the rights of other creditors.

Then it is argued that assuming this to be the state of the law, the principle of distribution adopted by the Court below has been too favourable to the plaintiff. It is said, granting that as to the eight annas of the property sold, the defendants, who were both the selling creditors, and the purchasers, were only entitled to share rateably with other creditors, and granting that the plaintiff under his money decree was entitled to a rateable share, there was another judgment-debt as to which execution proceedings had been taken, and in respect of which allowance should be made, that is to say, the debt arising out of a decree obtained by the plaintiff in respect of his mortgage of a two anna share of the property in question, which mortgage and decree the defendants in this suit, subsequently to the transactions now in question, paid off. In other words, they claim to be allowed to deduct the money which they paid in satisfaction of that claim of the plaintiff from the amount of the purchase money in question before the Court can say what was the amount distributable rateably among the parties concerned. This contention seems to us wholly untenable. The claim of the present plaintiff with regard to that matter was a mortgage claim in [505] respect of two annas of the property, and he was, so far as appears, the sole mortgagee. Therefore, the present defendants, when they purchased that property upon which the plaintiff held a mortgage, and purchased it under proceedings to which the plaintiff was no party, purchased subject to the mortgage. *Prima facie*, therefore, when the defendants paid off that mortgage, they paid it off for their own benefit in order to clear their property of an encumbrance. What the District Judge appears to have done was this, not to allow them to deduct the whole of that amount before ascertaining what was distributable, but to allow them to reckon this judgment-debt as one of the claims in respect of which, with others, a rateable distribution was to be made. Whether he was right in doing that, and whether he may not,

perhaps, have dealt with the matter on a footing too favourable to the present defendants, it is not necessary for us to consider, because there is no cross-appeal before us. It is clear, we think, that the principle on which the matter has been dealt with has not given undue advantage to the plaintiff.

1885 DEC. 22. — APPELLATE CIVIL. — 12 C. 499.

The result is that the appeal will be dismissed with costs.

J. V. W. *Appeal dismissed.*

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12 C. 505 = 10 Ind. Jur. 419.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Agnew.

LALA JUGDEO SAHAI (*Plaintiff*) v. BRIJ BEHARI LAL AND OTHERS (*Defendants*).* [14th January, 1886.]

Transfer of Property Act (IV of 1882) s. 131—Transfer of Debts—Notice of transfer—Assignment of Mortgage—Mortgagor, Liability of, to Assignee of Mortgagee when no notice of Assignment given.

The provisions of the Transfer of Property Act apply to the assignment of a mortgage made after that Act came into force, although the mortgage may have been made before the commencement of that Act.

An assignment is perfectly valid though the notice referred to in s. 131 of the Transfer of Property Act has not been given, though the title of the assignee as against third parties is not complete until such notice has been given; the object of such notice being the protection of the assignee.

[506] Section 131 of the Transfer of Property Act makes no alteration in the law as it obtained in England previous to the passing of that Act and as laid down in the cases cited in the note to *Ryall* v. *Rowles* (1), the first portion of the section merely fixing the time when the section comes into operation, and the latter providing for the protection of the debtor if he deals with the debt before that time.

Where therefore an assignee of a mortgagee brought a suit on the mortgage against the mortgagor and the mortgagee, and no notice of the assignment had been given to the mortgagor under s. 131 of the Transfer of Property Act.

Held, that the Court was wrong in dismissing the suit merely on the ground that no notice was served, as after the suit was instituted the mortgagor became aware of the assignment, and the transfer accordingly came into operation on the date when he thus became aware of it.

[F., 10 A. 20 (26) ; 10 M. 289 (290) ; 21 B. 60 (63) ; R., 21 C. 568 (573) (F.B.) ; 16 A. 315 (317) (F.B.) ; 18 A. 265 (267) (F.B.) ; 7 C.P.L.R. 82 (83) ; 2 C.P.L.R. 1 (3).]

IN this case the plaintiff, as assignee of a mortgage bond, executed by defendants Nos. 1 to 4 in favour of defendant No. 6, sued on the bond to recover the amount due thereunder and to enforce the mortgage lien.

He alleged that defendants Nos. 1 to 5 were members of a joint family; that defendant No. 5 who was in the employment of defendant No. 6, as putwari, had been guilty of criminal misappropriation of certain monies collected on behalf of defendant No. 6, and that a warrant for his arrest had been issued from the Criminal Court ; that thereupon an

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* Appeal from Appellate Decree, No. 746 of 1885, against the decree of Baboo Grish Chundra Chatterji, Officiating Subordinate Judge of Tirhoot, dated the 27th of January 1885, affirming the decree of Baboo Gopal Chundra Banerji Munsif, of Hajipore, dated the 29th May 1884.

(1) 2 W. and T.L.C. pp. 777—779, 4th ed.

1886 JAN. 14. — APPELLATE CIVIL. — 12 C. 505 = 10 Ind. Jur. 419.

arrangement had been come to between the defendants, whereby defendants Nos. 1 to 4 paid to defendant No. 6 a portion of the sum misappropriated by defendant No. 5, and executed the mortgage bond, the subject-matter of the suit, to secure the repayment of a further portion, the defendant No. 6 giving up the balance. The plaintiff further alleged that, although the bond was executed by defendants Nos. 1 to 4 only, it mortgaged the joint family property, and the consideration money was applied for the benefit of defendant No. 5. He also stated that the bond was assigned to him by defendant No. 6 by a registered deed of sale on the 21st October 1883, after the money secured by it had become due, and he accordingly instituted this suit to recover the amount due and to enforce the mortgage lien.

The mortgage bond contained a recital to the effect that **[507]** defendants Nos. 1 to 5 were members of a joint family living in commensality.

Defendants Nos. 1 to 4 contested the suit, and in their written statement denied that they were joint, alleging that defendants Nos. 1 and 5 were separate. They also pleaded that there was no consideration for the mortgage bond; that their signatures to the bond had been obtained by undue influence; and that, as no notice had been given them of the assignment to the plaintiff, the suit could not be maintained under the provisions of s. 131 of the Transfer of Property Act.

Defendant No. 5 also filed a written statement, in which he took the same objections as defendants Nos. 1 to 4, and in addition contended that he could not be held liable as he was not a party to the mortgage.

Defendant No. 6 filed a written statement in which he admitted the assignment to the plaintiff, and supported his case as to the reasons for the mortgage being given. He also alleged that the assignment to the plaintiff was made with the knowledge of his co-defendants, and contended that he should not have been made a party to the suit at all.

The Munsif held that the defendants Nos. 1 to 4 were estopped from pleading separation, inasmuch as they had led the original mortgagee to accept the bond upon the statement that they were members of a joint-family, that the bond was executed voluntarily and for good consideration, and that the plaintiff had proved that branch of his case. He, however, dismissed the suit upon the ground that it could not be maintained, as no notice of the assignment had been given to defendants Nos. 1 to 5 under s. 131 of the Transfer of Property Act.

The plaintiff thereupon appealed, but his appeal was dismissed, the lower appellate Court taking the same view of the law and holding that notice was necessary.

The plaintiff now preferred this second appeal to the High Court.

Baboo *Abinash Chandra Bannerji*, for the appellant.

Baboo *Karuna Sindhu Mukherji*, for the respondents.

[508] The judgment of the High Court (MITTER and AGNEW, JJ.) was as follows:—

JUDGMENT.

The plaintiff in this case sued as the assignee of a bond executed by the first party defendants in favour of the second party defendants. The defence was that there was no legal consideration for the bond, and that the suit was not maintainable as no notice of the assignment had been given to the first party defendants under s. 131 of the Transfer of Property Act (IV of 1882). The Munsif found that there was good

consideration for the bond; but he dismissed the suit upon the ground that it was not maintainable, as no notice of the transfer had been given. The Subordinate Judge was also of opinion that notice was necessary and dismissed the appeal. Two points have been argued before us. One that, as the bond was executed before the Transfer of Property Act came into force, the Act is not applicable. The assignment, however, was after the Act came into force, and we think, therefore, that the provisions of the Act are applicable to this case. The other point was as to whether notice of the assignment was necessary in order to enable the assignee to maintain the suit. It was contended that, as between the assignee and the debtor, notice is not necessary, and that even if it is, then the suit was sufficient notice. Section 131 of the Transfer of Property Act is as follows :—

"No transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer; and every dealing by such debtor or person, not being a party to or otherwise aware of, and not having received express notice of, a transfer, with the debt or property shall be valid as against such transfer." The Subordinate Judge says: "Primarily the obligor remains liable to the obligee alone upon such a contract. The notice provided for by the section is meant to extend this liability further and make the obligor privy to the transfer to a third party. The force of the word 'any' in the first part of the section cannot be lost sight of, and the meaning of the word 'operation' is sufficiently clear. The illustration refers to the second part of the section **[509]** and it is not exhaustive. The second part of the section is, I think, explanatory, and it does not in any way limit the meaning and effect of the first part of the section. Section 133 provides that on receiving such notice the debtor shall give effect to the transfer. He is not bound to recognize the transfer unless he is a party or privy to it before the receipt of the notice provided for in s. 132. It is sufficiently clear, therefore, that the notice enjoined by s. 132 is essential to bind the debtor and to compel him to recognize or give effect to the transfer. Without such a notice the transfer has no operation." No doubt, at first sight, it does appear as if under s. 131 a transfer is of no effect at all unless notice of it has been given to the debtor. But this is a view so entirely opposed to the law as it existed before the Act came into force that we do not think that we should adopt it unless we are absolutely bound to do so, and unless the words of the section will not bear an interpretation which will make them consonant with the previous law.

The Act is an Act "to define and amend certain parts of the law relating to the transfer of property by act of parties." And the law so to be dealt with is based upon the English law. Now it is well settled according to English law that it is not necessary to the validity of an assignment of a debt as between the assignor and assignee that notice should be given to the debtor [see the cases referred to in the notes to *Ryall* v. *Rowles* (1)]. The assignment, therefore, is perfectly valid though no notice is given. But the title of the assignee as against third persons is not complete until he has given notice, and the reason is this: As between the debtor and assignor the liability on the part of the debtor is still subsisting, and the debtor may pay the assignor, or the assignor may

(1) 2 W. and T.L.C., pp. 777—779, 4th ed.

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afterwards assign to a third party who gives notice and so acquires priority. Notice, therefore, ought to be given by the assignee to protect himself and for this purpose only. It is immaterial to the debtor whether he pays his money to the original creditor or to some third person claiming through the creditor so long as he gets a discharge for his debt. If he pays the assignor, having no notice of an assignment, he is protected. The assignment does not in any way affect the [510] liability of the debtor to discharge his debt, but the assignee should take care to let the debtor know that it is he and not the original creditor who is entitled to be paid. It is, therefore, only for the protection of the assignee that notice ought to be given. That being the state of the English law on the subject, can the section be so read as to agree with it?

We think that the first branch of the section fixes the time when the assignment comes into operation, and the other branch provides for the protection of the debtor if he deals with the debt before that time. The words of the first branch, *viz.*, "no transfer of any debt or any beneficial interest in moveable property shall have any operation against the debtor or against the person in whom the property is vested, *until* express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer," indicate the time when the transfer comes into operation.

In the first place if the debtor is no party to the transfer or not aware of it, the transfer comes into operation when the notice mentioned in it is given. If he is himself a party to the transfer, the transfer comes into operation immediately. If he be not a party to the transfer, but becomes aware of it subsequently, the transfer comes into operation at the time when he becomes aware of the transfer. That is the meaning of the first branch of the section. Putting that construction upon it, it seems to us that after the suit was instituted, the debtor became aware of the transfer, and the transfer consequently came into operation on the date when he thus became aware of it.

We are, therefore, of opinion that the lower Courts were not right in holding that, although the assignment was proved, and although it was established that the plea put forward in the defence was not correct, still the plaintiff is not entitled to a decree.

We, therefore, reverse the decision of the lower Courts and decree the plaintiff's suit and with costs.

H. T. H. *Appeal allowed.*

12 C. 511 (F. B.).

1886
JAN. 7.

FULL BENCH.

12 C. 511 (F. B.).

[511] FULL BENCH REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice Tottenham and Mr. Justice Field.

SRIBULLAV BHATTACHARJEE (*Judgment-debtor*) v. BABURAM CHATTOPADHYA AND ANOTHER (*Decree-holders*).*
[7th January, 1886.]

Appeal—Summary Procedure under Act XX of 1866—*Appeal from order in execution of decree under Act XX of* 1866—*Act XX of* 1866, *ss.* 53, 54, 55.

An appeal from an order or decree passed in proceedings had in execution of a decree made under s. 53 of Act XX of 1866 is not barred by anything in s. 55 of that Act.

ON the 17th January 1870 one Gopinath Tarkopunchanan borrowed Rs. 199 at 32 per cent. per annum, from Baburam and Rakhal Das Chattopadhya, upon a bond specially registered under s. 53 of Act XX of 1866. On the 13th July 1871 they obtained a decree for Rs. 293-13-9 upon the bond under the provisions of the Act. Various applications for execution were made, but nothing was recovered. In July 1883 the decree-holders again applied for execution in the Court of the Munsif of Tamluk, and certain properties belonging to Sribullav Bhattacharjee, a son of Gopinath Tarkopunchanan (Gopinath being then dead) were attached. The judgment-debtor objected that execution was barred by limitation; this objection was overruled and execution order to issue for the amount decreed with interest at 12 per cent. per annum. On the 17th November 1883 the judgment-debtor appealed to the District Judge of Midnapore, and the decree-holders filed cross-objections to the order of the Munsif as to interest, claiming interest at the rate mentioned in the bond. On the 11th July 1884 the District Judge dismissed the appeal and allowed the decree-holders' objections.

The judgment-debtor appealed to the High Court, but on the 23rd January 1885 his appeal was dismissed, upon the ground that the suit out of which the appeal arose being one of a nature cognizable by a Small Cause Court, no appeal would lie.

[512] On the 13th March 1885 the judgment-debtor applied to the High Court, and obtained a rule calling upon the decree-holders to show cause why the order of the District Judge should not be set aside as made without jurisdiction, upon the ground that the decree being a summary one under the provisions of Act XX of 1866 no appeal to him would lie.

After hearing this rule the Court (Tottenham and Agnew, JJ.) referred to a Full Bench the question whether an appeal from an order or decree passed in proceedings had in execution of a decree made under s. 53 of Act XX of 1866 is barred by anything in s. 55 of that Act, and expressed in this reference the following opinion:—

Upon this point there is a difference of opinion between this Court and the Courts at Bombay and Allahabad. The first case in this Court is entitled *Petition of Rash Behari Babu* (1). It was decided by Mr. Justice Jackson sitting alone, and does not appear to have been fully argued. The next case is *Hurnath Chatterjee* v. *Futtick Chunder Sumadar* (2),

* Full Bench Reference on an order in Misc. App. No. 32 of 1883, passed by the District Judge of Midnapore, dated 11th July 1884.

(1) 7 W.R. 130. (2) 18 W.R. 512.

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decided by Mr. Justice Jackson and Mr. Justice Markby, and the case in 7 W. R. 130, was followed. The subsequent cases are *Radha Kristo Dutt* v. *Gunga Narain Chatterjee* (1) ; *Huro Soonduree Debia* v. *Punchoo Ram Mundul* (2) ; and *Byrub Chunder* v. *Golab Coomari* (3). In each of these cases the point was treated as being concluded by authority. And in *Ramanand* v. *The Bank of Bengal* (4), a Division Bench of the Allahabad High Court followed the case in this Court. But in *Wilayatunnissa* v. *Najibunnissa* (5), a Full Bench of the High Court overruled the last-mentioned case, and, dissenting from this Court, held that an appeal would lie from an order passed in the execution of a decree obtained under s. 53 of Act XX of 1866—and in *Bhikambhat* v. *Fernandez* (6), a Full Bench of the Bombay High Court came to the same conclusion. There is, we think, considerable force in the arguments used in both these cases ; that though the Legislature may reasonably be supposed to have intended to **[513]** take away the right of appeal from a person who has agreed to submit to a summary decree for money, yet that it would be unjust not to allow the parties to the agreement to have the same right of appeal in execution proceedings as ordinary decree holders or judgment-debtors are entitled to. There is no special procedure provided for execution proceedings, but the decree-holder is left to execute his decree in the manner provided by the Code of Civil Procedure. And there does not appear to be any reason why the parties should not have the same opportunity of applying to the superior Court to correct any error that may take place in the execution proceedings as is given to litigants in ordinary cases. There being this difference of opinion between this Court and the High Courts of Allahabad and Bombay, and as we incline to the opinion that the latter Courts are right, we refer to the Full Bench the question whether an appeal from an order or decree passed in proceedings had in execution of a decree made under s. 53 of Act XX of 1886 is barred by anything in s. 55 of that Act.

Baboo *Umakali Mookerjee*, for the judgment-debtor.

Baboo *Jogesh Chunder Dey*, for the decree-holders.

The opinion of the Full Bench was as follows :—

OPINION.

We think that the question referred to us should be answered in the negative.

It would seem from the earlier cases upon the subject decided by this Court—*Rash Beharee Babu* (7) and *Hurnath Chatterjee* v. *Futtick Chunder Sumadar* (8), which have been since followed as binding authorities, that the attention of the learned Judges was not sufficiently directed to the distinction between decrees made under ss. 53, 54 and 55 of Act XX of 1866, and orders made under the Civil Procedure Code in the process of executing those decrees.

The prohibition against appeals in s. 55 is expressly confined to such decrees or orders as are made under the above sections of the Act ; the prohibition does not extend to orders made under the Code in the course of execution proceedings, although the **[514]** object of those orders may be to enforce decrees, which have been made under s. 53 ; and there is quite as much reason why an appeal should lie from such orders

(1) 23 W.R. 328. (2) 24 W.R. 225. (3) 3 C. 517. (4) 1 A. 377.
(5) 1 A. 583. (6) 5 B. 673. (7) 7 W.R. 130. (8) 18 W.R. 512.

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if they are generally appealable, as from any other orders which may be made in execution proceedings.

The reason why an appeal should lie in the one case and not in the other is well explained by Mr. Justice Melville in the Full Bench case of the Bombay High Court—*Bhikambhat* v. *Fernandez* (1).

"It is clearly just," he says "that a party who has covenanted to submit to a summary decree, should not be allowed to appeal against such a decree. But in the execution of that decree both parties are exposed to all the ordinary risks and possible injury arising from an erroneous order; and there would appear to be no just cause why the sufferer should be deprived of any of the ordinary remedies, which the Code of Civil Procedure provides for a decree-holder or a judgment-debtor."

The learned pleader who appeared before us for the judgment-debtor was obliged to admit, that if in his view of the case one party was to be deprived of the benefit of an appeal in the execution proceedings, the other party would be also deprived of the same benefit.

We therefore entirely agree with the learned Judges who referred this question, and we think that the judgment-debtor should pay the costs of the reference.

[In accordance with this ruling the Division Bench on the 26th January 1886 discharged the rule making no order as to costs.]

T. A. P.

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12 C. 515.

[515] APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice Macpherson.

IN THE MATTER OF THE PETITION OF BROJENDRA KUMAR RAI CHOWDHURI AND OTHERS.

BROJENDRA KUMAR RAI CHOWDHURI AND OTHERS (*Defendants*) *v.* RUP LALL DOSS AND ANOTHER (*Plaintiffs*).* [1st February, 1886.]

Civil Procedure Code, 1882, *s.* 492—*Civil Procedure Code*, 1859, *s.* 92—*Injunction to stay sale pending suit to establish title—Superintendence of High Court under s.* 622, *Civil Procedure Code*, 1882.

A claim by *R* to certain property which had been attached by *B* in the course of execution proceedings in the Court of the First Subordinate Judge of Dacca having been rejected, *R* instituted a suit in the Court of the Second Subordinate Judge to establish his title to the property. In that suit he applied to the Court in which his suit was brought for an injunction under s. 492 of the Civil Procedure Code to stay the sale of the property attached by *B* in the execution proceedings; but that application was rejected, and *R* thereupon applied for and obtained from the Court of the First Subordinate Judge, an order staying the sale of the attached property until the hearing of the suit brought by him to establish his right to it. *Held*, in an application under s. 622 of the Code, to set the latter order aside, that s. 492 of the Code of 1882 has, and was intended to have, a wider application than s. 92 of Act VIII of 1859 had, and provides a remedy where property is "*in danger of* being wrongfully sold;" if the circumstances justified it, an order could have been obtained under that section from the Court of the second Subordinate Judge to stay the sale. There being this alteration in the law, and such a remedy provided, and no express provision in the Code for

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* Civil Rule No. 194 of 1886, against the order of Baboo Grish Chundra Chowdhuri, First Subordinate Judge of Dacca, dated the 17th of August 1885.

(1) 5 B. 676.

1886 FEB. 1. stay of execution by a Court executing a decree on the application of a third party, the order of the First Subordinate Judge was made without jurisdiction, and should be set aside.

APPELLATE CIVIL. [F., 23 C. 351 (356); R., 2 L.B.R. 89 (90); 133 P.L.R. 1903.]

12 C. 515. THIS was the hearing of a rule granted by the High Court on the petition of the defendants, calling on the plaintiffs to show cause why an order of the First Subordinate Judge of Dacca in certain execution proceedings in his Court should not be set aside. The facts stated in the petition were as follows:—

That in execution case No. 68 of 1885, in the Court of the First Subordinate Judge of Dacca, the petitioners had, in execution of [516] a decree against one Madhub Chunder Ghose, attached with a view to sale certain property of the judgment-debtor; that thereupon Rup Lall Doss and Rughoonath Doss, the plaintiffs in the present suit, preferred a claim to the attached property under s. 278 of the Civil Procedure Code, and the claim being disallowed they instituted a suit in the Court of the Second Subordinate Judge of Dacca to establish their right to the property; and applied to the Court in which their suit was brought for an injunction under s. 492 of the Code to restrain the sale of the property attached in the execution proceedings in case No. 68 of 1885. This application was rejected on 17th August 1885, and Rup Lall Doss and Rughoonath Doss thereupon applied to and obtained from the First Subordinate Judge an order that the sale of the attached property should be stayed until the decision of the suit brought by them in the Court of the Second Subordinate Judge.

Mr. *Bonnerjee* on behalf of the petitioners thereupon applied to the High Court (Mitter and Macpherson, JJ.) under s. 622 of the Civil Procedure Code to set aside that order, and that Court on the 8th September 1885 granted a rule *nisi* calling upon Rup Lall Doss and Rughoonath Doss to show cause why the order should not be set aside, as having been made without jurisdiction.

The Advocate-General (Mr. *Paul*) (with him Baboo *Lol Mohun Das*) now showed cause, and contended that the First Subordinate Judge had jurisdiction to make the order staying the sale in the execution proceedings, referring to *Roy Luchmipat Singh* v. *The Secretary of State* (1); and *Durga Churn Chatterjee* v. *Ashootosh Dutt* (2).

Mr. *Woodroffe* (with him Baboo *Kali Churn Banerjee*, for the petitioners) referred to *Ishan Chunder Roy* v. *Ashanoollah Khan* (3); and *Gossain Money Puree* v. *Guru Pershad Singh* (4).

ORDER.

The decision of the Court (FIELD and MACPHERSON, JJ.) was delivered by

[517] FIELD, J.—In this case the petitioner, Brojendra Kumar Rai Chowdhuri, obtained a decree in the Court of the First Subordinate Judge of Dacca. In execution of this decree he sought to sell certain property. Thereupon certain persons, Rup Lall Doss and Rughoonath Doss, preferred a claim to that property. This claim was unsuccessful, and was rejected in the course of the execution proceedings. On this Rup Lall Doss and Rughoonath Doss instituted a regular suit to assert their right

(1) 20 W.R. 11=11 B.L.R. Ap. 27.
(2) 24 W.R. 70.
(3) 10 C. 817.
(4) 11 C. 146.

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to the property attached by Brojendra Kumar Rai Chowdhuri in execution of his decree. In that suit they applied for a temporary injunction to restrain Brojendra Kumar Rai Chowdhuri from selling the property until the decision of the suit so brought by them to assert their title thereto. This suit is pending in the Court of the Second Subordinate Judge. The application for an injunction was refused. Thereupon Rup Lall Doss and Rughoonath Doss went back to the Court of the first Subordinate Judge and applied to him to stay the sale of the property until the decision of the title suit pending in the Court of the Second Sudordinate Judge. The First Subordinate Judge, in compliance with their application, made an order so staying the execution of the decree.

We are now asked to say that the First Subordinate Judge had no jurisdiction to make this order. It is contended by the learned Advocate-General on the authority of two cases *Roy Luchmiput Singh* v. *The Secretary of State* (1) and *Durga Churn Chatterjee* v. *Ashootosh Dutt* (2), that the First Subordinate Judge had jurisdiction, and that the order staying the execution sale was properly made. It appears to us that the Legislature has deliberately altered the law as laid down in the two cases just referred to. Under s. 92 of the old Code, Act VIII of 1859, the words were "that any property which is in dispute in the suit is in danger of being wasted, damaged, or alienated, by any party to the suit;" and in the case of *Roy Luchmiput Singh* v. *The Secretary of State* (1), it was held that property, which was about to be sold in execution, could not be said to be in danger of being wasted, damaged, or alienated within the purview of these words. In the present Code, s. 492, other words have been introduced, namely, "or wrongfully **[518]** sold in execution of a decree," and these words must be read with the previous part of the section, that is, "that any property in dispute in a suit is in danger of being wrongfully sold in execution of a decree." The law does not say that a property is or is about to be wrongfully sold, but that it is *in danger of* being wrongfully sold. We think that these words are wide enough to include a case, such as that which is now before us, and that in a case of this kind there is a sufficient remedy provided under the present Code by an application to the Court in which the title to the property is being litigated, for an *ad interim* injunction to restrain the defendant in that suit from proceeding to a sale of the property until the title has been definitely determined.

The point does not appear to have been as yet decided by this Court under the new Code. But we may refer to the case of *Gossain Money Puree* v. *Guru Pershad Singh* (3). In that case one Gossain Money Puree obtained a decree against Chacka Singh upon a mortgage bond, and the mortgage property was directed to be sold. This decree was confirmed by the High Court. Chacka Singh was the father of a Mitakshara family. After Gossain Money Puree had obtained his decree the sons of Chacka Singh brought a suit to have their title to certain shares in the property declared. Gossain Money Puree then proceeded to execute his mortgage decree, whereupon the sons applied for and obtained an *ad interim* injunction restraining him from selling the property until the title suit was decided. The title suit was subsequently decided adversely to the sons. They preferred an appeal to the High Court, and they obtained from the Subordinate Judge a further injunction restraining Gossain Money Puree from executing his decree until the appeal

(1) 20 W.R. 11 = 11 B.L.R. Ap. 27. (2) 24 W.R. 70. (3) 11 C. 148.

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was decided. The High Court were of opinion that the Subordinate Judge had no jurisdiction to grant this further injunction, but in speaking of the first injunction to stay the sale pending the decision of the suit in the Court of the Subordinate Judge, Garth, C.J., said :—" He, that is, the Subordinate Judge, had a right whilst the questions in this suit were awaiting trial, to restrain the defendants by an *ad interim* injunction from enforcing [519] his decree in the former suit." As we have already said the question now before us was not decided, but the case is important as an instance in which a Subordinate Court issued an *ad interim* injunction since the passing of the new Code under circumstances similar to those in the present case ; and such course was approved by the High Court, although the exact question did not come before that Court for decision.

It appears to us then that under the language of s. 492 of the present Code, Rup Lall Doss and Rughoonath Doss could have obtained from the Second Subordinate Judge an *ad interim* injunction to stay the sale of the property. Whether under the circumstances such an injunction ought or ought not to have been granted, is a question not now before us, and upon which we therefore express no opinion.

We are then of opinion that, if the circumstances justified it, an order staying the sale might have been obtained under the provisions of s. 492 from the Second Subordinate Judge ; and that this section has been amended so as to afford a remedy which was not available under the section of the old Code. This being so, and the Court executing the decree not being vested with power to stay execution under these circumstances by any of the other provisions of the present Code, we do not think that the First Subordinate Judge had jurisdiction to make, upon the application of a third party, an order staying the execution of the decree. There are, in the present Code, express provisions for stay of execution (see for example ss. 239 and 243, and, as to stay of execution of a decree under appeal, ss. 545 and 546). There is no provision which enables a Court to stay execution upon the application of a third party ; and having regard to the fact that the Legislature has provided for stay of execution in certain cases and has not provided for the particular case now before us, bearing further in mind that in our view the preventive jurisdiction which is sought to be called into operation can be otherwise exercised under a specific section of the Code, we think that the First Subordinate Judge had not jurisdiction to make the order which we are now asked to set aside.

The rule must, therefore, be made absolute with costs.

J. V. W. *Rule Absolute.*

12 C. 520.

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FEB. 18.

CRIMINAL REVISION.

12 C. 520.

[520] CRIMINAL REVISION.

Before Mr. Justice McDonell and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF HAIDAR ALI.*
[18th February, 1886.]

Security for good behaviour—Criminal Procedure Code (Act X of 1882), ss. 110, 112.

The mere fact that a person from whom security is required has been previously convicted of offences against property is not sufficient to justify proceedings under s. 110 of the Code of Criminal Procedure, unless there be additional evidence that the person complained against has done some act or resumed avocations indicating on his part an intention to return to his former course of life.

[R., 16 C.L.J. 467 = 17 C.W.N. 238 (268) = 18 Ind. Cas. 149 (171) = 14 Cr.L.J. 5 (27).]

ONE Haidar Ali, on the evidence of certain constables who stated that he, Haidar, was a thief and an old offender, and had neither residence nor employment, that he had only been released two months from jail, after having undergone a sentence of five years' rigorous imprisonment for housebreaking, and that he had likewise undergone a sentence of two years' rigorous imprisonment for theft in 1878, was called upon by a Bench of Presidency Magistrates to show cause, under s. 110 of Act X of 1882, why he should not execute a bond with two sureties for his good behaviour in the sum of Rs. 100 each for a period of one year; and on failure to find security was sentenced to simple imprisonment for one year, or until such time as he should be able to furnish the security.

The prisoner applied under the revisional sections to have this order set aside.

No one appeared at the hearing.

The judgment of the Court (MCDONELL and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

We think that the proceedings of the Bench in this case ought to be set aside on two grounds. In the first place the order made, under s. 112 of the Code of Criminal Procedure, does not comply with the provisions of that section. [521] This is a mere technical irregularity; but on general grounds we think that the mere fact that the person from whom the security was demanded had been previously convicted of offences against property is not in itself sufficient to justify proceedings under s. 110 of the Code, unless there is additional evidence, (which in this case there is not), that the person complained against has done some act, or resumed avocations that indicate on his part an intention to return to his former course of life, and to pursue a career of preying on the community. In this case the person from whom security was required had only recently been released from jail, and we think it was rather the duty of the police to assist him in finding honest employment than to apply to have him incarcerated for a further period merely on the ground of his previous convictions.

We set aside the order of the Bench and direct that Haidar Ali be released.

T. A. P. *Order set aside.*

* Criminal Revision No. 61 of 1886, against the order of the Bench of Presidency Magistrates, consisting, of Messrs. O. C. Dutt, M. S. Dutt and S. Dutt, dated the 14th of January 1886.

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REVISION.

12 C. 521.

12 C. 521.

CRIMINAL REVISION.

Before Mr. Justice Tottenham and Mr. Justice Agnew.

CHUNDER KOOMAR PODDAR *v.* CHUNDRA KANTA GHOSE AND ANOTHER.* [19th November, 1885.]

Criminal Procedure Code, 1882, *s.* 145—*Inquiry as to possession*—"*Actual Possession.*"

Under s. 145 of the Criminal Procedure Code, a Magistrate has to look to the "actual possession," that is, the possession, however obtained, of the party in possession at the time of the inquiry. *Ambler* v. *Pushong* (1) followed.

THIS case merely followed the interpretation put on s. 145 of the Criminal Procedure Code, in the case of *Ambler* v. *Pushong* (1).

Baboo *Rashbehari Ghose*, for the petitioner.

Baboo *Durga Mohun Dass*, for the opposite party.

J. V. W.

12 C. 522.

[522] CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Agnew.

DARSUN LALL *v.* JUMUK LALL.† [23rd November, 1885.].

Criminal Procedure Code, 1882, *s.* 437--*Power of Sessions Judge to order further inquiry*,

A Sessions Judge is not competent under s. 437, Criminal Procedure Code, to direct the re-opening of the proceedings, merely because in his opinion the Subordinate Magistrate has not rightly appreciated the credit due to the witnesses. "Further inquiry," under that section means the taking of additional evidence, not the re-hearing of the same evidence.

[Diss., 9 A. 52=6 A.W.N. 281 (F. B.).]

THIS case merely followed the interpretation put on s. 437 of the Criminal Procedure Code in the cases of *Chundi Churn Bhuttacharjea* v. *Hem Khunder Bannerjee* (2); *Jeebunkristo Roy* v. *Shib Chunder Dass* (3); and *Queen-Empress* v. *Amir Khan* (4).

Baboo *Koruna Sindhu Mookerjee*, for the petitioner.

Baboo *Kashi Kanto Sen*, for the opposite party.

J. V. W.

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* Criminal Revision No. 344 of 1885, against the order of F. H. Barrow, Esq., Officiating Magistrate of Fureedpore, dated 12th June 1885.

† Criminal Motion No. 372 of 1885, against the order of J. M. Kirkwood, Esq., Sessions Judge of Patna, dated 30th July 1885.

(1) 11 C. 365. (2) 10 C. 207. (3) 10 C. 1027. (4) 8 M. 336.

12 C. 522.

1886 JAN. 29.

SMALL CAUSE COURT REFERENCE.

12 C. 522.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

J. HIPPOLITE *v.* C. STUART AND ANOTHER.*

[29th January, 1886.]

Married Woman's Property Act (III of 1874), *ss.* 8, 9—*Restraint on anticipation—Transfer of Property* (*Act IV of* 1882), *s.* 10.

Section 8 of Act III of 1874 extends to the separate property of a married woman subject to a restraint upon anticipation.

Section 10 of the Transfer of Property Act merely excepts from the general rule laid down in that section, the particular case of a married woman and does not give to a restraint upon anticipation any greater force than it had before the passing of the Act, but merely preserves to it the effect it had previously, leaving the Married Woman's Property Act of 1874 and the decisions upon it untouched.

[F., 11 B. 348 (351); Diss., 18 M. 19 (20) 30 M. 378 (380) = 17 M.L.J. 363 = 2 M L T. 322.]

[523] THIS was a suit brought on the 21st July 1885 against C. Stuart and his wife in the Calcutta Court of Small Causes to recover a sum of Rs. 260 due as principal and interest on a promissory note dated the 26th of February 1885.

It appeared that the plaintiff had, in January and February 1885 advanced to Mrs. Stuart, through a Mrs. Cox, one hundred and sixty-two rupees, eight annas, on interest at the rate of two annas per rupee per month, and that on the 26th February 1885 Mrs. Stuart had executed a promissory note for Rs 200 with interest at the rate of two annas per rupee per month in favour of the plaintiff. At the date of suit none of the principal having been repaid, the sum of Rs. 260 was owing to the plaintiff.

On the evidence given at the trial the learned Judge found—

(1) That these advances had been made to Mrs. Stuart without the knowledge or authority, express or implied, of her husband, and were made for the purpose of carrying on a millinery business on her own account of which the husband was unaware.

(2) That Mr. and Mrs. Stuart were married on the 25th November 1871.

(3) That Mr. Stuart was in receipt of a monthly income of Rs. 580, and Mrs. Stuart to the interest on a sum of Rs. 50,000 under her father's will.

(4) That the contract was made with reference to Mrs. Stuart's separate property, and on the faith that her obligation would be satisfied thereout.

(5) That as regarded this sum of Rs. 50,000 it had been left to her by her father (who had died in 1881) under a clause in his will which was as follows: "I direct that my trustees shall stand possessed of my trust property in trust for all my children in equal shares if my said trust property shall not exceed in value rupees two lacs, but in case my trust property shall exceed that value, then as to Rs. 50,000 in trust for my daughter Eliza Sarah; the wife of Charles Stuart, Esq., an assistant in the Bank of Bengal ....and I direct and declare that my said trustees shall stand possessed

* Small Cause Court Reference No. 7 of 1885, made by A. O. Ackworth Esq., Officiating Judge of Calcutta, Court of Small Causes, dated the 2nd October 1885.

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of the shares of my daughter upon trust, from time to time, to pay the annual [524] income accruing therefrom into the proper hands of my said daughter entitled to receive the same for and during her life, so that the same may be for her sole and separate use and benefit without power of anticipation or disposing of the income or capital thereof, otherwise than by will. The income thereof to be enjoyed by her as an inalienable personal possession free wheresoever she shall be covert from the control and enjoyment of her husband, and for which income her receipt alone shall be a sufficient charge to my trustees."

On these facts the learned Judge dismissed the suit against Mr. Stuart and as regarded the liability of Mrs. Stuart to meet the demand out of her separate property, gave the following judgment:—

"The law which governs the postnuptial contracts of married women is contained in s. 8 of the Indian Married Woman's Property Act of 1874. (Here followed s. 8 *in extenso.*) I think the present contract was made with reference to the second defendant's separate property, and on the faith that her obligation arising out of such contract would be satisfied thereout. No difficulty, therefore, arises upon the construction of those words. But can a person so contracting recover as against a married woman's separate property where that is subject to a restraint upon anticipation. Sir Richard Couch in *Peters* v. *Manuk* (1) expressed an opinion that he could. The point, however, does not appear to have been taken in argument by the defendant's Counsel in that case, and Mr. Stokoe submitted in the present case that this was not the proper construction of the section. 'I see no reason,' says Pontifex, J., in *Peters* v. *Manuk* (1), 'why this protection of restraint upon anticipation is less needed since the recent legislation (*viz.*, s. 4 of the Succession Act), or why it should not be continued. Females still require, and Courts of Equity ought, in my opinion, to still afford them, the protection which was originally afforded them. Certainly it is one thing to say that a creditor with whom an unmarried woman contracts ought not to suffer by reason of a subsequent marriage, and quite another thing to abolish the restraint altogether. For this is really what it amounts to. [525] In England, notwithstanding the sweeping changes introduced in the law by the Married Woman's Property Act, 1882, this restriction has been expressly preserved—see s. 19. I think, therefore, the presumption is in favour of the defendants, but this cannot override what Pontifex, J., calls 'a deliberative legislative intention.' Is there evidence of such here?

"The preamble to Act III of 1874 re cites that the Indian Succession Act, 1865, does not expressly provide for the enforcement of claims by or against women to whose marriages it applies. But these words do not throw much light on the construction of s. 8. If anything, they are in favour of the defendants as hardly preparing one for any sweeping change in the law in the respect I have mentioned. Mr. Stokoe argued that s. 8 must be read as a procedure section, enabling a creditor to sue a married woman without joining the husband. But the section seems in that case at once insufficiently precise and unnecessarily cumbrous, and it is difficult to say what effect can then be given to the concluding words of s. 7. 'And a married woman shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried.' And the side note to s. 8, if it is allowable to refer

(1) 13 B.L.R. 383.

to it, is against such a view. On the other hand the heading to this part of the Act, 'legal proceedings by and against married woman,' rather favours it. Upon the whole, I think the solution of the meaning of s. 8 must be found in s. 9. That section enacts that 'a husband married after the 31st day of December 1865 shall not, by reason only of such marriage, be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried.' Now these words closely resemble the language of s. 12 of the English Married Woman's Property Act, 1870, and so closely that the resemblance cannot, in my opinion, be treated as a coincidence. Section 12 provides that 'a husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to [526] satisfy, such debts as if she had continued unmarried.' Now s. 12 has been held to extend to separate property subject to a restraint on anticipation. This was in the case of *Sanger* v. *Sanger* (1), decided by Lord Romilly in 1871, and that authority has never been questioned, and ss. 12 and 9 being so similar, I regard *Sanger* v. *Sanger* as an authority also on the construction of s. 9, and I am of opinion, therefore, that s. 9 relates to property subject to a restraint upon anticipation. But it seems to me that the words 'to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree' in s. 8 correspond to the words 'to satisfy such debts as if she had continued unmarried' in s. 9, and I consider that the two sections were intended to be parallel sections. I think, therefore, that they must be construed in the same way. Mr. Stokoe laid great stress on the fact that in the English Act the property was expressly made liable, whereas in s. 8 of the Indian Act the only words referring to the property affected were the words 'and to the extent of her separate property,' and that this was rather a restrictive than an enlarging phrase. But this argument, if it is a sound one, would extend to s. 9 also, and upon the whole I am of opinion that s. 8 was intended to include property subject to a restraint on anticipation, and that the plaintiff is entitled to proceed against Mr. Stuart's separate estate. Mr. Stokoe asked me if my judgment was unfavourable to him on this part of the case to refer the point to the High Court. I entertain some doubt on the question, and the point being a very important one it itself, and the amount really at stake so large (for I understand that this is in the nature of a test case), I have thought it right to make my judgment contingent upon the opinion of the High Court. The question I desire to refer is, whether s. 8 of Act III of 1874 extends to separate property of a married woman subject to or restrained upon anticipation?"

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Mr. *Pugh* appeared on the reference for Mrs. Stuart, and referred to s. 4 of Act X of 1865 and s. 8 of Act III of 1874, citing *Stanley* v. *Stanley* (2) to show that restraint upon anticipation [527] could not be evaded; also *Buckton* v. *Hay* (3) as to the doctrine of restraint on anticipation, and also referred to and distinguished *Sanger* v. *Sanger* (1), and cited *Peters* v. *Manuk* (4) to show that it is a limited interest that the

(1) L.R. 11 Eq. 470. (2) L.R. 7 Ch. D. 589. (3) L.R. 11 Ch. D. 645. (4) 13 B.L.R. 383.

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wife takes in property under a restraint upon anticipation. [WILSON, J.—You are relying on a point which Couch, J., expressly says was not before the Court.] Whatever doubt there may be thrown on the woman's interest in *Peters* v. *Manuk* (1) is cleared up by s. 10 of the Transfer of Property Act, which expressly provides that property may be transferred to a woman so that she shall not have power to charge the same or any interest therein during marriage. This section was not brought to the notice of the Judge in the Court below. The following cases show the charging of property is prohibited where there is a clause against anticipation—*Roberts* v. *Watkins* (2); *Stanley* v. *Stanley* (3); *Chapman* v. *Biggs* (4).

The case of *Pike* v. *Fitzgibbon* (5) shows that the debt can only be enforced against so much of the interest as is due on separate estate at the time the debt was contracted. It cannot be presumed that the Legislature intended in the Married Woman's Property Act to make any alteration in the law further than therein is explicitly declared in express terms or unmistakeable implication. See Maxwell on Statutes, pp. 95-96.

The question of the liability of Mrs. Stuart's separate estate was, I submit, rightly raised at the hearing and not in execution. [WILSON, J. —Yes, it is a condition precedent to the suit proceeding that the married woman has separate property.]

The Married Woman's Property Act is an act amending s. 4 of the Succession Act; and *Miller* v. *The Administrator-General* (6), lays down that s. 4 of the Succession Act did not apply where either of the parties had an English domicile. Mrs. Stuart's domicile is English, and therefore the Act of 1874 does not apply to her.

No one appeared for the plaintiff.

[528] The following opinions were delivered by the Court (GARTH, C.J., and WILSON, J.):—

OPINIONS.

GARTH, C.J.—The question which is submitted to us by this reference is whether s. 8 of Act III of 1874 extends to separate property of a married woman, which is subject to a restraint upon anticipation.

It seems to me that the view which has been taken of this point by the learned Judge of the Small Cause Court is perfectly correct; and that the reasoning by which he arrives at his conclusion is quite satisfactory.

Mrs. Stuart, the lady against whom this suit is brought, had a sum of Rs. 50,000 settled upon her by her father and placed in the hands of trustees for her benefit. The interest was to be paid to her from time to time by the trustees, and she was only to have a power of disposing of the property by will.

Mrs Stuart, it appears, carried on a sort of millinery business on her own account, and for the purposes of that business borrowed money of the plaintiff. It is found that he lent the money upon the credit of her separate estate; and the question is whether having regard to s. 8 of the Married Woman's Property Act (III of 1874), the defendant's separate property is liable for the debt.

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(1) 13 B.L.R. 383. (2) 46 L.J.Q.B. 552. (3) L.R 7 Ch.D. 589.
(4) L.R. 11 Q.B.D. 27. (5) L.R. 17 Ch.D. 454. (6) 1 C. 412.

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Mr. *Pugh* contended that, if this were the effect of s. 8, it would take away the power now allowed by law of settling money upon a married woman with a restraint upon anticipation; and he referred us to s. 10 of the "Transfer of Property Act" to show that this was not the intention of the Legislature. But it is clear that the Married Woman's Property Act was not intended to alter the rule in that respect. The only question is, whether ss. 8 and 9 of that Act were not intended to introduce a modification of the rule in certain cases.

Now we have direct authority in the English Courts, as to the proper meaning of s. 12 of the English "Married Woman's Property Act, 1879," which is very similar in its terms to s. 9 of the Indian Act; and I think we may take s. 9 as a guide, in construing s. 8, with which we are now dealing. The authority to which I allude is the case of *Sanger* v. *Sanger* (1), which, so far as I am aware, has never been questioned.

[529] In that case Mr. Sanger gave his wife by will an annuity of £300 for her separate use, without power of anticipation, and after his death a fund was set apart, out of his property, to answer this annuity.

After the passing of the English Married Woman's Property Act, 1870, a creditor brought an action against Mrs. Sanger to recover a debt which had been incurred by her after the death of the testator; and on the 19th of January 1871 judgment was entered up by the plaintiff in that suit for £346.

On the same 19th January, but earlier in the day, Mrs. Sanger intermarried with William Hutchinson; and the question then arose, how far s. 12 of the Married Woman's Property Act, 1870, protected the settled property, during the marriage with William Hutchinson, from the judgment debt thus incurred by Mrs. Hutchinson.

Now by s. 12 her separate property was made liable for debts incurred by her before her marriage *in the same way as it would have been if she had continued unmarried*, which provision is substantially the same as that contained in s. 9 of the Indian Married Woman's Property Act of 1874.

An application was then made to Mr. Justice Lush to charge Mrs. Hutchinson's separate property (the fund which had been set apart to answer the annuity) with the payment of the judgment-debt of £346; and Mr. Justice Lush made an order accordingly.

An application was then made to the Master of the Rolls to protect the fund against the charging order upon the ground that, as it was settled to Mrs. Hutchinson's separate use without power of anticipation, it could not be taken from her.

But the Master of the Rolls was clearly of opinion that the charging order was right; and that, although Mrs. Hutchinson was married, her property was answerable for the payment of any debts which she had incurred before marriage, precisely as if she had continued unmarried.

Now then let us see what is the effect of s. 8 of the Indian Act. It says that, if a married woman possesses separate property, and if any person enters into a contract with her on the faith that her obligations arising, out of such contract will be **[530]** satisfied out of such property, then such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered

(1) L.R. 11 Eq. 470.

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in such suit *had she been unmarried at the date of the contract and continued unmarried at the date of the execution of the decree.*

Now it seems to me impossible (for the purposes of our present question) to distinguish the terms of that section from those of s. 9.

Section 9 says that, to the extent of her separate property, a married woman is liable to satisfy all debts contracted before her marriage, as if she had continued unmarried. Section 8 says that she is liable to satisfy out of her separate property any debt which she has incurred upon the faith of the creditor being paid out of that property.

The creditor under such circumstances, is to be entitled to recover against her *what he might have recovered, had she been unmarried at the date of the contract.*

Now it is conceded that, if she had been unmarried, and the property had been settled upon her as it is now, it might have been taken in execution in payment of the debt; and the section says that, having incurred the debt after her marriage, the creditor is to be entitled to recover what he might have recovered if she had remained unmarried.

It seems to me, therefore, that the only reasonable construction of s. 8 is that which has been put upon it by the Court below.

I do not feel any difficulty with regard to the question of domicile which was raised by Mr. *Pugh*, because it seems to me that the Act of 1874 applied (and I do not see any reason why it should not apply) to persons having an English, as well as to those having an Indian domicile. In fact I consider that this point was virtually decided here some years ago in the case of *Allumuddy* v. *Braham* (1).

I think, therefore, that we should answer the question referred to us in the affirmative. We make no order as to costs.

WILSON, J.—I am entirely of the same opinion. With regard to the question of domicile I have nothing to add. With regard to the main question which has been argued before us, it appears [531] to me that the words of s. 8, by themselves, are clear and definite. It appears to me clear that the separate property of a married woman means *all* her separate property; and it appears to me clear also that, if a married woman possesses separate property and any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, then, in order to ascertain how far her property is liable under the section, we must look at the last words of it, which say that it is liable to the same extent as if she had been unmarried at the date of the contract and continued unmarried at the execution of the decree; so that in each case we must treat the matter as if, instead of being a married woman, she had become a widow before each of those dates.

That seems the plain and natural construction of the section, but we have also ample authority to the same effect.

In the first place I can see no distinction, for this purpose, between the words of s. 8 and of s. 9, nor between the words of s. 9 of this Act and the words of s. 12 of the English Act 32 and 33 Vic., c. 93, and the words of s. 12 of the English Act were considered by Lord Romilly and apparently also by Mr. Justice Lush in the case which has been referred to by the Court below.

Then we have authority on the same subject in this Court in the case of *Peters* v. *Manuk*. That was a suit in which it was sought to charge

(1) 4 C. 140.

the property of a married woman settled to her separate use without power of anticipation. It was held by Mr. Justice Pontifex in that case that the property could not be charged under the Succession Act. The learned Judge expressed his opinion that it was as essential then, *i. e.*, at the time he was speaking of, as it ever was, that a married woman should have the protection of the clause restraining alienation. Apparently, the learned Judge had not had his attention drawn, and there was no reason why it should have been, to the Act we are now considering until towards the close of his judgment; and he merely pointed out that it did not apply.

The Court of appeal dealt with the case again. They agreed with Mr. Justice Pontifex that the Succession Act had not the effect of overriding the clause restraining alienation; but they [532] went on deliberately to consider the effect of the section which is now before us, and the Chief Justice expresses a perfectly clear and distinct opinion that the effect of it was that which the learned Judge of the Small Cause Court has held it to be.

At first sight it may seem as if that were not an actual decision, but I am disposed to think that it is an actual decision and for this reason.

If s. 8 has not the effect which we attribute to it, what effect has it? All the separate property of a married woman not subject to restraint against anticipation could, without the aid of s. 8, be made liable to satisfy contracts entered into by her with respect to that property. What then is the effect of s. 8?

It was contended that it is at most a section affecting the mode of procedure without making her property specifically liable. But what did the Court of appeal in the case to which I have referred say on this subject? They held that the Act was not retrospective. Couch, C.J., said that "If it could be considered to be a law of procedure only, it might be held to have a retrospective effect." But it is not a law of procedure. It is a law by which an effect is given to a contract with a married woman which it had not before.

That is an express decision that this is not a section of procedure, but that it gives a substantive right.

Then we were asked to hold that whatever may have been the law before the Transfer of Property Act it is different now, and we were referred to s. 10 of that Act as bearing out that contention.

Now s. 10 says that, where property is given absolutely, but subject to a condition or limitation in restraint on alienation, the gift shall be good, and the condition or limitation void, and it is only by way of exception to that general rule that the case of a married woman is introduced. It is said that the property may be transferred to or for the benefit of a woman, so that she shall not have power during her marriage to transfer or charge the same on her beneficial interest therein. This merely excepts from the general rule of the section this particular case. It does not give to a restraint on alienation any greater force than it had before, but merely preserves to it the effect it had [533] previously. It therefore leaves the Married Woman's Property Act of 1874 and the decisions upon it untouched.

Attorney for the defendant: Mr. *Hechle.*

T. A. P.

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APPEL-
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CIVIL.

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12 C. 533.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice Macpherson.

MATHURA NATH KUNDU, ON HIS DEATH HIS SONS DEBENDRA NATH KUNDU AND OTHERS (*Plaintiffs*) *v.* O. STEEL AND OTHERS (*Defendants*).* [8th February, 1886.]

Bengal Act VII of 1869, *s.* 27—*Limitation Act* (*XV of* 1877), *sch. II, art.* 96—*Suit for money paid in excess of Road Cess.*

In a suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road cess: *Held* (reversing the decisions of the Courts below) that the suit was governed, not by the special law of limitation contained in s. 27, Bengal Act VIII of 1869, but by art. 96, sch. II of the Limitation Act XV of 1877.

THE principal defendants in this suit were the talukdars of the mehal Dhubail, and the plaintiffs were holders of small taluks within the mehal, of which the road and public works cesses were payable to the talukdars of the mehal. The suit was brought on the allegation that these defendants had fraudulently realized from them road and public works cesses from 1280 to 1286 (1873—1879) in excess of what was rightly due, through the principal defendant's authorized agent, the second defendant, by whom the cesses were collected. Some of these cesses were realized by decrees, and some under private receipts. The suit was instituted on 11th July 1882 for the excess payments, amounting to Rs. 614-7 annas. The only defence material to this report was that the suit was barred by the one year's period of limitation provided in s. 27, Bengal Act VIII of 1869. Both the lower Courts dismissed the suit on this ground.

[534] Baboo *Nilmadhab Bose*, for the appellants.

Baboo *Kali Charan Banerji*, for the respondents.

JUDGMENT.

The judgment of the Court (FIELD and MACPHERSON, JJ.) was delivered by

FIELD, J.—This was a suit to recover a sum of money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road cess and public works cess. The Courts below have held that the suit is barred by the one year's rule of limitation contained in s. 27 of the old Rent Act, Bengal Act VIII of 1869. We think that in taking this view they have fallen into error. The Cess Act declares that sums due as cess shall be recoverable as rent, but there is no provision that sums over-paid as cess shall be recoverable as an excessive demand of rent, nor is there any provision, express or implied, which applies to such a suit the special law of limitation contained in the Rent Act. We think that the rule of limitation applicable in the present case is that contained in art. 96 of the second schedule of the Limitation Act.

In this view the case must go back for trial upon the merits.

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*Appeal from Appellate Decree No. 166 of 1885, against the decree of Baboo Nuffer Chandra Bhutto, Subordinate Judge of Nuddea, dated the 10th of November 1884, affirming the decree of Baboo Bepin Behari Sen, Second Munsif of Khooshtea, dated 28th of December 1882.

We may observe that those sums, which are said to have been recovered under decrees, cannot be obtained back in the present suit. The proper course is to apply for a review of the decrees under which those sums were recovered, that is, if the plaintiffs are so advised, and if they are within time. 1886 FEB. 8. — APPELLATE CIVIL. — 12 C. 533.

As to the other sums which were paid out of Court, the plaintiffs' case is that they were paid under a mistake. It may be quite possible that they may have been voluntarily paid; but the fact of their having been voluntarily paid will not the less entitle the plaintiffs to recover, if they succeed in showing that they paid them under a *bona fide* mistake as to the amount which the defendants were entitled to recover from them.

We set aside the decree of the lower appellate Court and remand the case to that Court for trial upon the merits.

Costs will abide the result.

J. V. W. *Appeal allowed and case remanded.*

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12 C. 535.

[535] CRIMINAL REFERENCE.

Before Mr. Justice McDonnell and Mr. Justice Beverley.

UPENDRA NATH DHAL (*Petitioner*) *v.* SOUDAMINI DASI (*Opposite Party*).* [5th February, 1886.]

Maintenance—Criminal Procedure Code (*Act X of* 1882), *ss.* 488, 489.

A Magistrate has no power, under s. 488 of the Code of Criminal Procedure, to make an order for maintenance at a progressively increasing rate.

He may, however, under s. 489, from time to time, alter the rate of the monthly allowance granted as maintenance under s. 488.

[F. 14 M. 398 = 2 Weir 651.]

REFERENCE to the High Court under s. 438 of Act X of 1882.

On the 29th October 1885 the Deputy Magistrate of Midnapore, under s. 488 of Act X of 1882, passed an order for the maintenance of an illegitimate child on the following scale :—(1) From date for two years at Rs. 1-8 per month; (2) after two years for two years more at Rs. 3 per month; (3) after that time until marriage at Rs. 6 per month.

The Sessions Judge being of opinion that the order, in as far as it prescribed a prospective increase of the allowance, was improper—*Musumat Munglow* v. *Jumna Dass* (1)—sent up the case to the High Court recommending the alteration of the order.

No one appeared for either party on the reference.

The opinion of the Court (MCDONELL and BEVERLEY, JJ.) was as follows :—

OPINION.

We think that the Sessions Judge is right. A Magistrate has no power to make an order under s. 488 of the Code of Criminal Procedure

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*Criminal Reference No. 248 of 1885, made by R. M. Towers, Esq., Sessions Judge of Midnapore, dated the 30th of December 1885, against the order of the Deputy Magistrate of Midnapore, dated the 29th of October 1885.

(1) 2 N.W.P. 454.

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for maintenance at a progressively increasing rate. Under that section the allowance must be ordered at a fixed monthly rate, but under s. 489 it may be altered from time to time. We accordingly set aside that part of the Deputy Magistrate's order which directs a prospective increase in the rate, and direct that the allowance be levied at the rate of Rs. 1-8 only per mensem till such time as it may be altered under s. 480.

T. A. P. *Order varied.*

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12 C. 536.

[536] CRIMINAL REVISION.

Before Mr. Justice McDonell and Mr. Justice Beverley.

DULAR DAT RAI (*Accused*) *v.* NIJABAT HOSEIN (*Complainant*).*
[1st March, 1886.]

Revision—Criminal Procedure Code, 1882, *Chapter XXXII—Sonthal Pergunnahs—Act XXXVII of* 1855, *s.* 4, (*cl.* 1)—*Scheduled Districts' Act* (*XIV of* 1874).

Under s. 4 (cl.1) of Act XXXVII of 1855 (which is still in force in the Sonthal Pergunnahs) all sentences passed in criminal cases are final.

An order under that Act sentencing an accused to imprisonment is not open to revision under Chapter XXXII of the Code of Criminal Procedure.

ON the 29th November 1885 one Nijabat Hosein laid a complaint in the Court of the Magistrate of Deoghur in the Sonthal Pergunnahs, against one Dular Dat Rai under ss. 447 and 291 of the Penal Code. On the 6th December 1885 Dular Dat Rai was found guilty under s. 447, Penal Code, and was sentenced to a month's rigorous imprisonment. The prisoner applied to the High Court under the revisional sections and obtained a rule calling upon the Crown to show cause why the conviction and sentence should not be set aside on certain grounds which are immaterial for the purposes of this report.

Baboo *Ambica Churn Bose*, for the petitioner.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown objected that the Court had no jurisdiction to hear the application, inasmuch as Act XXXVII of 1855 was still in force in the Sonthal Pergunnahs; that the Scheduled Districts' Act, although repealing Act XXXVII of 1855, had never been put into force in the Sonthal Pergunnahs; and that, therefore, Act XXXVII remained unrepealed as far as that district was concerned; and that under s. 4 of that Act the order of the Magistrate was final, and not subject to revision by the High Court.

The order of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

ORDER.

On the 5th December last one Dular Dat Rai was convicted summarily of criminal trespass under s. 447, Indian Penal Code, by [537] the Deputy Magistrate in charge of Deoghur in the Sonthal Pergunnahs, and was sentenced to one month's rigorous imprisonment. Upon his application to this Court, the Division Bench, which at that time had

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* Criminal Revision No. 482 of 1885, against the order passed by W. M. Smith Esq., Deputy Magistrate of Deoghur, dated the 6th of December 1885.

charge of the Criminal business of the Court, made the following order :—

"Let a rule issue calling on the other side to show cause why the order complained of should not be set aside as prayed. Send for the record, and let the Magistrate have notice of this order. In the meantime, and until the further order of this Court, let the petitioner be enlarged on bail to the amount of Rs. 50."

It was objected that this Court had no jurisdiction to entertain the application. The order of the Court was, however, complied with, and the question of jurisdiction has since been fully argued before us.

The question turns upon the construction to be placed on the wording of s. 4, cl. 1 of Act XXXVII of 1855.

We have ascertained that the rule was issued under a mistaken belief that that Act had been repealed and was no longer in force.

The Act in question was repealed by the Scheduled Districts' Act, 1874 ; but s. 2 of that Act says : "This Act extends in the first instance to the whole of British India other than the territories mentioned in the first schedule hereto annexed ; and it shall come into force in each of the Scheduled Districts on the issue of a notification under s. 3 relating to such district."

The Sonthal Pergunnahs is one of the Scheduled Districts, and it does not appear that any notification under s. 3 has been issued relating to the Sonthal Pergunnahs. The Scheduled Districts' Act is, therefore, not in force in the Sonthal Pergunnahs, and Act XXXVII of 1855 has not, therefore, been repealed.

The Code of Criminal Procedure is in force in the Sonthal Pergunnahs as in the rest of British India ; but s. 1 of the Code provides that "in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power [538] conferred, or any special form of procedure prescribed by any other law now in force."

Section 2 of Act XXXVII of 1855 vests the administration of criminal justice in an officer or officers, to be appointed in that behalf by the Lieutenant-Governor of Bengal ; and s. 4, cl. 1, provides that "all sentences in criminal cases which shall be passed by such officer or officers to the extent of the powers which may be, from time to time, conferred upon them respectively by the Lieutenant-Governor of Bengal according to the provisions of this Act shall be final." The question is, whether the use of the word "final" in this section bars this Court from exercising its powers of revision under Chapter XXXII of the Code of Criminal Procedure.

We think that it has this effect, and that this Court has no revisional jurisdiction in the present case.

We think that a sentence can only be said to be final when it cannot be set aside or interfered with by any Court or authority, whether on appeal or otherwise.

Section 430 of the Code provides as follows: "Judgments and orders passed by an appellate Court upon appeal shall be final except in the cases provided for in s. 417 and Chapter XXXII." Chapter XXXII treats of Reference and Revision. According to the use of the word in the Code itself, therefore, a final order would not be open to revision unless that power were expressly reserved.

In this view we are supported by the decision of a Division Bench of this Court (MITTER and MACLEAN, JJ.). *In the matter of H. P. Boerresen,*

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dated 30th August 1880, in which it was held that this Court had no power to interfere in its revisional jurisdiction with a conviction passed by the Subdivisional officer of Doomka.

We accordingly discharge the rule. The Petitioner will be required to undergo the remainder of his sentence.

T. A. P. *Rule discharged.*

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12 C. 539.

[539] CRIMINAL REVISION.

Before Mr. Justice McDonell and Mr. Justice Beverley.

KRISHNA DHONE DUTT AND OTHERS (*Petitioners*) *v.* TROILOKIA NATH BISWAS AND OTHERS (*Opposite Parties*).*
[8th February, 1886.]

Criminal Procedure Code, Act X of 1882, s. 145—"*Tangible immoveable property*"—*Julkur, Dispute regarding a.*

A dispute concerning the right to fish in a *julkur* is not a dispute concerning any "tangible immoveable property" within the meaning of s. 145 of the Code of Criminal Procedure.

Enquiries under s. 145 should be directed to the question as to which party is in possession of the subject of dispute before any proceedings in the Court have been taken in the matter.

[F., 18 M. 41 (42).]

THIS application arose out of a dispute between Krishna Dhone Dutt and others (first party) and Troilokia Nath Biswas and others (second party) concerning the possession of a *julkur* forming part of *julkur* Narainpur, but demarcated by an embankment; *julkur* Narainpur being in the possession of certain persons who held under the first party.

On the 16th August 1885, a petition was presented by the first party to the Deputy Magistrate alleging that a breach of the peace was imminent in respect of the demarcated portion of this *julkur*, containing 105 bighas, inasmuch as the second party had excavated a *khal* or canal leading to the *julkur* with the object of drawing off and catching the fish of the *julkur*. This petition was not taken up by the Magistrate until the 24th August; but on the 23rd August it appeared that the embankment was cut, so as to effect a junction between the *khal* and the *julkur*.

On the 24th August the Deputy Magistrate, having found that a breach of the peace was imminent, called upon the different parties to put in written statements of their respective claims as regarded possession of the 105 bighas forming the subject of dispute.

[540] On the 17th November the Joint Magistrate, to whom the case had been transferred, held that neither of the parties were in possession of the portion of the *julkur* in dispute on the 24th August, and he accordingly attached that portion of the *julkur*; but found that the second parties having cut the embankment on the 23rd August were in possession of the *khal* or cutting on the 23rd August, and he therefore ordered

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* Criminal Revision No. 451 of 1885, against the order passed by H.F.T. Maguire, Esq., Joint Magistrate of Alipore, dated the 17th of November 1885.

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the second parties to be retained in possession of the *khal* or cutting till ousted by a decree of a Civil Court.

The first party applied to the High Court under the revisional section of the Code to have this order set aside.

Mr. *Henderson* (with him Baboo *Nil Madhub Bose*) for the petitioners contended, *first*, that the dispute was not one concerning any "tangible immoveable property," and that, therefore, no order should have been made under s. 145—*Bejoy Nath Chatterjee* v. *Bengal Coal Co.* (1) and *Pramatha Bhusana Deb Roy* v. *Doorga Churn Bhuttacharji* (2); *second*, that assuming that s. 145 did apply, the Magistrate should not have restricted the enquiry as to possession to the 24th August, but should have considered which party was in possession on the 16th August—*Ambler* v. *Pushong* (3), that the subject of dispute was the 105 bighas which had been found to be in possession of neither party, but the order made placed the second party in possession of the *khal* regarding which there was no dispute.

Baboo *Ambica Charan Bose*, for the opposite party.

The order of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

ORDER.

The circumstances under which this rule was issued were the following : On the 16th August a petition appears to have been presented to the Magistrate, alleging that a breach of the peace was imminent, in respect of a certain area of 105 bighas forming a part of a large *julkur*, or lake, called Narainpur *julkur*, which the Joint Magistrate says is admittedly in the possession of certain persons who hold under the first party. In that petition it was alleged that the second party had excavated a *khal* or canal leading [541] to the *julkur* with the object of drawing off and catching the fish of the *julkur*. On the 23rd August it would appear that the embankment was cut, so as to effect a junction between the *khal* and the *julkur* ; and on the 24th idem the Magistrate made an order in writing, under s. 145 of the Code of Criminal Procedure, calling upon the parties concerned to put in written statements of their respective claims as regards possession of the 105 bighas which form the subject of dispute. On the 17th November the Joint Magistrate disposed of the matter in this way. He held that, as regards the 105 bighas, no one was in possession on the 24th August, the date on which the Magistrate's order was made, and he accordingly attached so much of the *julkur*, but he found that the second parties, having cut the embankment on the 23rd, were in possession of that cutting on the 24th, and he, therefore, ordered them to be retained in possession of that cutting, till ousted by a decree of the Civil Court.

It is contended that the Joint Magistrate's order is bad on several grounds. In the first place it is said that the subject of dispute being merely the right of fishing in the *julkur*, the dispute was not concerning any tangible immoveable property; and that, therefore, no order under s. 145 should have been made by the Magistrate. In support of this contention we have been referred to the remarks made in the cases of *Bejoy Nath Chatterjee* v. *Bengal Coal Co.* (1) and *Pramatha Bhusana Deb Roy* v. *Doorga Churn Bhuttacharji* (2). We think that there is force in this contention ; and that the order of the Joint Magistrate is bad on this ground.

(1) 23 W.R. Cr. 45. (2) 11 C. 413. (3) 11 C. 366.

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In the next place it is contended that, even supposing the joint Magistrate had jurisdiction to proceed under s. 145, he was wrong in limiting the enquiry to the fact of possession on the 24th August, which was the date on which the Deputy Magistrate made his order. It is said that the enquiry should have been directed as to which party was in possession on or before the 16th August when the proceedings were instituted by the petition of that date, and that anything which occurred subsequently, which had the effect of changing the position of the parties, should not have been taken into account. We also think that there is force in this objection; **[542]** and that the enquiry in such cases should be directed to the question as to which party was in possession of the subject of dispute before any proceedings in the Court had been taken in the matter.

Then a further objection, which we consider to be fatal to the order of the Joint Magistrate, is this: That whereas the subject of dispute was the 105 bighas which the Joint Magistrate has found to be in the possession of neither party, the order he has made puts the second party into the possession of the *khal* or cutting regarding which there was no dispute, and as to the possession of which there was no question before him. The effect of this order is virtually to give to the second party possession of the whole of the *julkur*, so far as the fish may be drawn with the water into the *khal*. On all these grounds we think that the order of the Joint Magistrate was bad in law, and must be set aside.

We, accordingly, make the rule absolute, and set aside the Joint Magistrate's order.

T. A. P. *Order set aside.*

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12 C. 542.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

SAHAI NAND (*Plaintiff*) *v.* MUNGNIRAM MARWARI AND OTHERS (*Defendants*).* [22nd February, 1886.]

Act XL of 1858, *s.* 3—*Certificate of guardianship—Period from which authority of guardian dates—Court-Fees Act* (*VII of* 1870) *s.* 6.

Section 6 of the Court-Fees Act (VII of 1870), which says that a certificate under Act XL of 1858 (among other documents) "shall not be filed, exhibited or recorded in any Court of Justice, or received or furnished by any public officer," unless a certain fee be paid, means that such certificate cannot come into existence until the person who has the permission of the Court to obtain it deposits the requisite amount of stamp duty.

Independently of this section, however, the preparation of such a certificate after the order granting it, is not a purely ministerial act: it must then be applied for by the grantee; and it is from the date of the certificate being actually taken out, and not from the date of the order granting **[543]** it, that a guardian of the person and property of a minor is to be considered as appointed under Act XL of 1858.

Where, therefore, on a petition for such a certificate by *J.*, an order was made that the "application be allowed," and in a suit on certain bonds in which suit the minor in respect of whose person and property the petition for a certificate

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* Appeal from Original Decree No. 152 of 1884, against the decree of Baboo Dwarka Nath Mitter, Rai Bahadur, Second Subordinate Judge of Bhagulpore, dated the 31st of March 1884.

was made, was a defendant, he was represented by *J*, by whom no certificate had been actually taken out; *held*, in a suit by the minor to set aside the decree as not binding on him, that without the certificate *J* had no authority to appear on behalf of the minor, and the latter not having been properly represented in the suit brought against him was entitled to have the decree set aside.

Stephen v. *Stephen* (1) followed; *Chunee Mal Johury* v. *Brojo Nath Roy Chowdhry* (2) dissented from.

[F., 13 C. 219 (221).]

THE facts of this case were as follows :—

The plaintiff-appellant is the Mohunt of Muth Bela. The defendant-respondent, Mungniram Marwari, had lent two sums of Rs. 4,000 and Rs. 500 respectively to Hari Pershad Nand, the plaintiff's predecessor in the Mohuntship, upon the security of two mortgage bonds executed by Hari Pershad, hypothecating certain properties belonging to the Muth. The lower Court found that these moneys were lent to Hari Pershad Nand personally, and had no relation whatever to, and were not lent for any purpose connected with, the Muth. Hari Pershad died on the 29th of September 1875. After his death one Jit Lall applied by petition to the Court, under the provisions of Act XL of 1858, to be appointed guardian of the person and property of the plaintiff who was then a minor. In that petition the applicant stated that the plaintiff in this suit was about thirteen years of age, that he had been appointed to the Mohuntship of Muth Bela, and that the Petitioner was his Chucha Guru, and as such had been in possession of the Muth and of the properties appertaining thereto; and he asked for a certificate appointing him guardian of the minor under Act XL of 1858. That petition was heard by the Judge, Mr. Lowis, and the operative part of his order on it was that the "application be allowed." Though this order was made, no certificate was, as a matter of fact, ever taken out. After this order had been made the respondent brought [544] a suit against the appellant on his mortgage bonds. The appellant was described in the plaint as Mohunt Pershad Nand, minor disciple and heir of Mohunt Hari Pershad Nand, deceased, *under the guardianship* of Jit Lall Nand." The suit was heard *ex parte*, and a decree was given for the plaintiff.

On the 9th May 1877 the mortgaged properties were put up for sale, and the respondent himself purchased one of them, *viz.*, 16 annas settled lakhiraj of mouzah Bela, Sheottur pergunnah Bisthazari, and entered into possession thereof.

The plaintiff brought this suit for a declaration that the decree made in the respondent's suit against him was not binding upon him, and for possession of mouzah Bela and for mesne profits.

The only ground of his claim material to this report was that he was not represented in the suit, that as no certificate had been taken out by Jit Lall, he, Jit Lall, even if he had appeared to defend the suit, had no authority to do so.

The Subordinate Judge framed certain issues, of which the only material one, *viz.*, the fourth issue, "was Jit Lall, the duly constituted guardian of the plaintiff, who should have represented him," was decided by him in the affirmative. Against that decision this appeal was preferred.

The arguments and cases cited sufficiently appear in the judgment.

Mr. *Woodroffe*, Mr. *C. Gregory*, Babu *Tarack Nath Sen*, Babu *Rashbehari Ghose* and Babu *Jogendra Chandra Ghose*, for the appellant.

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(1) 8 C. 714 = on Appeal, 9 C. 901. (2) 8 C. 967.

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Mr. *Evans*, Mr. *O. C. Mullick*, and Babu *Dwarka Nath Chakrabati*, for the respondents.

The judgment of the Court (TOTTENHAM and NORRIS, JJ.) after stating the facts proceeded as follows :—

JUDGMENT.

The Subordinate Judge appears to have based his judgment upon the case of *Chunee Mal Johury* v. *Brojo Nath Roy Chowdhry* (1), where it was held that the making of the order under the provisions of Act XL of 1858, and not the subsequent taking out of the certificate, is that by which a guardian is [545] appointed of the person and property of a minor within the meaning of s. 3 of the Indian Majority Act. With great respect to the Judges who decided that case, we are unable to agree with them. *Stephen* v. *Stephen* (2) is an authority the other way ; and though on appeal it was found that the learned Judge, Wilson, J., who had decided the case, had mistaken the facts, not only was no doubt thrown by the Court of Appeal on his view of the law, but Garth, C. J., says, "I think until the certificate has been actually issued, the estate of the minor does not vest in the person who obtains the certificate,"—see *Stephen* v. *Stephen* (3). Mr. Evans for the respondent contended that the order directing the certificate to be granted operated as a grant of the certificate, and clothed Jit Lall with as much authority as if he had actually taken out the certificate. He contended that after the order was made nothing remained to be done but a purely ministerial act by the officer of the Court. As to the effect of the order he cited *Ex parte Hookey, In re Risca Coal and Iron Company* (4), and as to the drawing up of the certificate being purely a ministerial act, he cited *Kylasa Goundan* v. *Ramasami Ayyan* (5), and *Vithal Jonardan* v. *Vithojirao Puteajirao* (6). The case of *Ex parte Hookey*, Mr. Evans himself admitted wat not entirely sufficient for his purpose, that it only bridged over a portion of his difficulty. That case decided that when an order had been given orally in Court by a Judge upon a certain date, and had not been drawn up until some time afterwards, time for the purpose of limitation must be considered to run from the date on which the order was delivered orally in Court. Independently of the provisions of s. 6 of the Court Fees Act, we do not think that the preparation of the certificate is a purely ministerial act; we think that after an order is made for its being granted, the grantee must apply for it. But the section referred to seems to us to put the point beyond all doubt. It says: "Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargeable in the *first* or *second* schedule to this Act annexed shall be filed, exhibited [546] or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document." A certificate under Act XL of 1858 is one of the documents mentioned in the second schedule of the Court Fees Act. When the section says that such a document shall not be filed, exhibited or recorded in any Court of Justice, or received or furnished by any public officer, it means that a certificate cannot actually come into existence until the person who has the permission of the Court to obtain it deposits the requisite amount of

(1) 8 C. 967. (2) 8 C. 714. (3) 9 C. 901.
(4) 4 DeG. F. and J. 456. (5) 4 M. 172. (6) 6 B. 586.

stamp duty. We are of opinion that the certificate under Act XL of 1858 was the very foundation of Jit Lall's title. Without it he had no authority to appear in the proceedings in the suit brought by Mungniram Marwari against the present plaintiff.

On this ground, we think that the judgment of the Subordinate Judge must be set aside, and this appeal allowed with costs.

The decree will be a decree for possession, and the Court below will be directed to enquire as to what mesne profits, if any, the appellant is entitled to under s. 212, and as to what mesne profits, if any, he is entitled to under s. 211 of the Civil Procedure Code.

J. V. W. *Appeal allowed.*

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12 C. 546.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice Macpherson.

DEBENDRA KUMAR MANDEL (*One of the Defendants*) *v.* RUP LALL DASS AND ANOTHER (*Plaintiffs*).* [5th February, 1886.]

Civil Procedure Code, 1882, *ss.* 268, 274—*Attachment and sale of Mortgage bond—Lien of purchaser on mortgaged property after attachment under s.* 268—*Presumption of Payment of Bond.*

In execution of a decree obtained by them against *J* and *M* the plaintiffs attached a decree obtained by *J* and *M* against *D*, and on the allegation that *J* and *M*, in order to avoid the consequences of this attachment, executed a *benami* conveyance of their interest under the attached decree to *B* and *P*, and afterwards with the same object took in adjustment and [547] satisfaction of that decree two bonds in favour of *R* and *I* respectively, by which immoveable property was pledged as collateral security, the plaintiffs attached these two bonds by prohibitory order, under s. 268 of the Civil Procedure Code, and purchased them at the sale in execution of their decree. In a suit on the bonds against *D* as the principal defendant with *J*, *M*, *B*, *P*, *R*, and *I* joined as parties : *Held*, that the plaintiffs were entitled to enforce the lien created by the bonds against the immoveable property specified in them, notwithstanding that no attachment had been made in accordance with the provisions of s. 274 of the Code; a debt secured by a mortgage lien on immoveable property not being "immoveable property" within the meaning of that section.

The presumption of payment of a bond which arises from its possession by the obligor, loses much of its force when raised, not between the original creditor and the debtor, but between the debtor and the purchaser of the debt at an execution sale.

[F., 20 C. 805 (810) ; 19 B. 121 (123); 18 M. 437 (438) ; 35 B. 288 = 13 Bom. L.R. 233 = 10 Ind. Cas. 812 (813); Cons., 14 C.P.L.R. 6 ; 26 B. 305 (309) ; R., 29 C. 1. (18) (F.B.) ; 18 P.R. 1909 = 22 P.W.R. 1909 = 1 Ind. Cas. 450 ; (1911) 2 M.W.N. 590 = 10 M.L.T. 503 = 13 Ind. Cas. 91 (92) = 22 M.L.J. 105 (107).]

THE facts of this case were as follows :—

The plaintiffs obtained, on the 7th of May 1880, a decree in the Court of the Subordinate Judge of Dacca against Jugut Chandra Saha and Madhub Chandra Saha, the defendants Nos. 6 and 7 for Rs. 49,165. They transferred the execution of this decree to the Backergunge district, and on the 29th of May 1880 they asked for the attachment in execution of a decree obtained by their judgment-debtors, the defendants Nos. 6 and 7

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*Appeal from Original Decree No. 235 of 1884, against the decree of Baboo Beni Madhub Mitter, Rai Bahadur, Subordinate Judge of Backergunge, dated the 6th June 1884.

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against the defendant No. 1, Debendra Kumar Mandel the present appellant. The plaintiffs alleged that the defendants Nos. 6 and 7, in order to avoid the consequences of this attachment, executed a *benami* conveyance of their interest under their decree against Debendra Kumar Mandel in favor of Banga Chandra Saha and Pyari Mohun Poddar, the defendants Nos. 3 and 4; and caused their names to be substituted as decree-holders, and that afterwards with a view to accomplish the same object they took in adjustment and satisfaction of that decree two bonds, one for Rs. 4,000 in favour of Ram Chandra Poddar, the defendant No. 2, and another for Rs. 1,250 in favour of Ishur Chandra Saha, the defendant No. 5, and caused a petition to be filed by the defendants Nos. 3 and 4 to the effect that the decree against Debendra Kumar was satisfied. Subsequently the plaintiffs having alleged this *benami* transaction, applied for the sale in execution of the debts due upon these two bonds. The procedure adopted in attachment [548] of the bonds was that laid down by s. 268 of the Civil Procedure Code for the attachment of debts, *viz.*, by prohibitory order, and in execution of the decree of the plaintiffs of the 7th of May 1880 these bonds, or rather the debts due thereunder, were sold and purchased by the plaintiffs on the 29th of May 1882. After this purchase the plaintiffs instituted the present suit against the defendant No. 1, and they as purchasers of these bonds, as assignees by operation of law, sought to recover from the defendant No. 1, the amounts due under the bonds, and they also asked to enforce against the property mortgaged by these bonds the lien thereby created.

The Judge in the Court below gave the plaintiffs a decree, but he refused to allow the enforcement of this decree against the mortgaged property.

An appeal was preferred by Debendra Kumar Mandel, and a cross-appeal was brought by the plaintiffs against that portion of the Subordinate Judge's judgment, by which he refused to allow the mortgage lien to be enforced.

Baboo *Hem Chandra Banerjee* and Baboo *Kashi Kant Sen*, for the appellant.

The Advocate-General (Mr. *G. C. Paul*) and Baboo *Lal Mohun Dass*, for the respondents.

JUDGMENT.

The judgment of the Court (FIELD and MACPHERSON, JJ.) was delivered by

FIELD, J, (who after stating the facts as above) continued :—Two points have been argued before us upon the appeal. The first point is concerned with the service of the prohibitory order under s. 268 of the Code of Civil Procedure. The second point is concerned with an alleged payment said to have been made by Debendra Kumar Mandel in satisfaction of the two bonds.

The Judge in the Court below has found that the prohibitory order was served, and after hearing the evidence we think that there is no ground upon which we ought to interfere with his decision upon this point. We may further observe that no question has been raised as to whether the order, required by s. 301 of the Code of Civil Procedure, was served. The presumption, therefore, is that this order was served; and it may be a [549] question whether, if the order after sale required by s. 301 were served, the service of the prohibitory order, which is the form of attachment before sale required by the Code, is material or is wholly immaterial.

Then as to the second point it is urged by the defendant-appellant that he had paid a sum of money in satisfaction of the two bonds before the service upon him of the prohibitory order. We have heard the evidence upon this point, and we concur in the conclusion at which the Subordinate Judge has arrived. We do not believe that this money was paid. We think it improbable that it would have been paid before the due date of payment provided in the bonds themselves; and we think that the account given by Debendra Kumar Mandel as to the mode in which he raised this money is improbable and untrustworthy.

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But then it is said that it is an admitted fact that the bonds were in the possession of Debendra Kumar Mandel, and that from this arises the presumption that the bonds were satisfied. It must be borne in mind that this presumption is not urged as between the original creditor and his debtor; but is urged on the present occasion as between the person who has purchased the debt at an execution sale and the debtor; and we think that in this latter case the presumption has much less force than it would have as between the original creditor and his debtor. In order to rebut the presumption arising from the possession of the bonds by Debendra Kumar Mandel, the plaintiffs have produced a large amount of evidence to show that the sum of Rs. 1,250 was paid by Debendra Kumar Mandel to Jagat in Joisti 1289, that is, after the service of the prohibitory order. The fact of this payment, if it had taken place, would, it may be observed, be wholly immaterial, as regards the defendant's liability to pay the amount to the plaintiffs; and the only importance attached to the evidence is in connection with the presumption already referred to. If the evidence is true, if we believe that this payment of Rs. 1,250 was made in Joisti 1289, and that upon this payment an antedated endorsement of satisfaction was made upon the bonds, and they were handed over to Debendra Kumar Mandel, we have a complete explanation of Debendra Kumar Mandel's possession of the bonds which [550] satisfactorily rebuts the presumption. There are, undoubtedly, discrepancies in the evidence, there are traces of ill-feeling, which in all probability, have led to much exaggeration; but looking at the evidence, as a whole, we are not prepared to dissent from the conclusion at which the Subordinate Judge has arrived,—namely, that a sum of money was paid after the service of the prohibitory order, and that upon the payment of this sum of money the bonds were handed over to Debendra Kumar Mandel.

This disposes of the appeal.

The question raised upon the cross-appeal may be briefly stated thus: It is said that inasmuch as the attachment was made under the provisions of s. 268 of the Code of Civil Procedure, and as no attachment was made in accordance with the provision of s. 274, the sale in execution carried with it the debt merely without the lien. In other words, that in order to make the sale carry the lien as well as the debt, there ought to have been an attachment under the provisions of s. 274. We are not prepared to concur in the contention so raised. Section 266 of the Code provides that the property therein mentioned is liable to attachment and sale in execution, and amongst the property so mentioned we have "bonds or other securities for money-debts, &c." Section 268 provides that in the case of (a) a debt not secured by a negotiable instrument, the attachment shall be made in a certain manner. Section 274 provides for the making of an attachment in the case of immoveable property. Now there can be no doubt that the debt in the present case

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is, within the meaning of s. 268, a debt not secured by a negotiable instrument. There is no special provision in the Code for a debt secured by a mortgage; and this being so, unless such debt comes within the provisions of s. 268, there is no other provision especially applicable, unless we are of opinion that such debt is immoveable property within the meaning of s. 274. We think that it is impossible to say that a debt secured by a mortgage, by a lien upon immoveable property, more especially when the mortgagee is not in possession, can be regarded as immoveable property within the meaning of s. 274. We are, therefore, of opinion that the debt which was sold in this case after an attachment made under s. 268 carried with it the lien.

[551] In this view we think that the plaintiffs are entitled to enforce the lien created by the two bonds as against the immoveable property specified in those instruments.

The appeal will be dismissed with costs, and the cross-appeal will be decreed without costs, the learned Advocate-General consenting to this.

Appeal dismissed.

J. V. W. *Cross-appeal allowed.*

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12 C. 551.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

GARDEN REACH SPINNING AND MANUFACTURING CO., LD. (*Plaintiffs*) *v.* EMPRESS OF INDIA COTTON MILLS CO., LD. (*Defendants*).* [11th March, 1886.]

Practice—Costs—Attorney and Client—Taxation—Refreshers to Counsel—Fees—Counsel's fees—Rules of Court 707, 708.

Refreshers are not, as a general rule, to be allowed on motion heard by affidavit; but the Court hearing the motion can, in its discretion, and if applied to for the purpose, give special directions allowing costs as on the hearing of a case. In the absence of such special directions refreshers should not be allowed.

OBJECTIONS made by plaintiffs' attorney to the decision of the taxing master, disallowing the plaintiffs as against the defendant Company the amount of certain fees paid to counsel charged in plaintiffs' bill of costs, taxed on the 11th February 1886 under a decree made with the consent of the defendant Company on the 11th December 1885, and thereby directed to be paid as between attorney and client.

It appeared that in the above case two briefs were delivered to the plaintiffs' counsel for the argument of a rule calling on the defendants to show cause why an injunction should not issue against them; one of such briefs (the senior) was marked with a fee of five gold mohurs, and the other (the junior) with a fee of four gold mohurs. The hearing of the rule occupied from 2-30 P.M. to 5 P.M. on the first day, and from 4-30 P.M. to 5-30 P.M. on the second day. On the second day additional fees **[552]** were paid to Counsel equal in amount to the fees paid on the first day. Subsequently to the hearing of this rule by Mr. Justice Wilson, and the granting of an *ad-interim* injunction which virtually decided the suit, the defendant consented to a decree on the 11th December

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* Suit No. 290 of 1885.

1885, making the injunction perpetual and directing payment to the plaintiffs of the sum of one thousand and forty-one rupees as damages and costs of the suit to be taxed as between attorney and client. On the 18th February 1886 the plaintiffs' bill of costs was taxed, and at such taxation the attorney for the defendant Company objected to the additional fees paid to Counsel on the second day being allowed as against his client, on the ground that additional fees to Counsel could not properly be paid on the hearing of a motion or rule on affidavits. The taxing master allowed the objection, making the following remarks:—

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"It is the practice, unless otherwise ordered by the Court, not to allow an additional fee to Counsel in any matters where no oral evidence is taken. This practice is in accordance with the rule laid down in *Harrison* v. *Wearing* (1), and *Brown* v. *Sewell* (2). As to whether on a taxation between attorney and client, payable by one party to another, a fee not properly chargeable can be allowed, *see* the rule laid down in *In re Blyth* v. *Fanshawe* (3), which was followed in *Broad* v. *Broad* (4)."

The plaintiffs' attorney on the 1st February 1886, under rule 708 of the Rules of Court, filed his objections to the decision of the taxing master on the ground that fees for the second day's hearing should have been allowed; and applied to the Court for re-taxation.

The matter came up for argument before Pigot, J., on the 1st March 1886.

Mr. *Sale*, for the plaintiffs.

The principle laid down in *In re Blyth* v. *Fanshawe* (3) and in *Broad* v. *Broad* (4) applies only to unusual and exceptional expenses; that principle is not applicable to all cases where costs are allowed as between attorney and client, but not as [553] between party and party—*Foster* v. *Davies* (5). Refreshers as a matter of practice are usually paid when the hearing of a motion such as this is, goes over into a second day; they cannot be said, therefore, to be unusual expenses, nor are they necessarily unreasonable. In this motion the whole point in dispute was decided and it could not be said that refreshers were unreasonable. Motions for injunctions stand on a different footing from other motions; if reasonable the Court will allow the refreshers. In *Harrison* v. *Wearing* (1) the taxation seems to have been ordered as between party and party. The rule there laid down has never expressly been extended to taxation between attorney and client.

Mr. *Holder*, for the defendants, relied on *Harrison* v. *Wearing* (1).

The order of the Court was as follows:—

ORDER.

PIGOT, J.—I think the objection must be disallowed. There is no rule of this Court similar in terms to rule 48, order LXV, under the Judicature Act; but by the 707th rule of the Rules of this Court on the Original Side, it is laid down that "in all cases in which the rules of the Supreme Court do not sufficiently declare what business or proceedings may be charged for in the bills of fees and costs, or in what manner, and by what steps any part of the business or proceedings ought to be conducted, the taxer of costs is directed to take the rules and practice of the Superior Courts in England as his guide."

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(1) L.R. 11 Ch. D. 206. (2) L.R. 16 Ch. D. 517. (3) L.R. 10 Q.B.D. 207.
(4) L.R. 15 Q.B.D. 252. (5) 34 Beav. 624.

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The English rule is clear, that refreshers are not as a general rule to be allowed on motion heard by affidavit, and this general rule should be followed as was done by the taxing officer in the present case. It is competent, of course, for the Judge, before whom the motion may be heard, to give special directions with respect to the costs to be allowed of any motion heard before him ; such special directions I myself gave in disposing of the motion in the case of *Kristoromoney Dossee* v. *Khetter Paul Sreeteerutno*, but in the absence of such special directions, the taxing officer should follow the general rule.

The principle on which a different rule is applicable to motions and to hearings in which *viva voce* cross examination [554] takes place is laid down in *Blyth* v. *Fanshawe* (1). I think I ought to follow it.

In the present case the suit was disposed of on the motion : it may well be that in such a case as this, in which, as I understand, a good deal of discussion necessarily took place as to the bearing of the authorities respecting the similarity or identity of trade-marks used by the contending parties on the facts disclosed on affidavit, the Judge before whom the matter came would, had he been asked to do so, have directed that costs should be allowed as on a hearing of a case ; I apprehend it would have been quite within his power to do so.

So in the case before me to which I have referred, the hearing was a protracted one, the facts complicated, and the questions at issue of great importance to the parties who ultimately succeeded. In a case of that nature it would be difficult for the solicitor to estimate beforehand the length of time which the hearing might fairly be expected to take ; were he to overestimate it, the fee paid by him might be disallowed as excessive ; and were his calculation defective in underestimating the amount of time and labour required from Counsel, either his client or his Counsel might unduly suffer.

It seems, therefore, that the power of the Court to make special orders must sometimes (though no doubt rarely) be exercised. No special order was made in this case ; whether it is still competent for the Court to make such an order, I do not enquire ; if so, it should be obtained from the learned Judge who heard the motion ; the taxing officer having no special order before him was right ; the objection is disallowed with costs.

T. A. P. *Objection disallowed.*

Attorneys for plaintiffs : Messrs. *Barrow & Orr.*

Attorneys for defendants : Messrs. *Watkins & Co.*

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(1) L.R. 10 Q.B.D. 207.

12 C. 555.

[555] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

MADAN MOHUN LAL (*Plaintiff*) *v.* F. HOLLOWAY, BY HIS AM-MOOKHTEAR L. G. CROWDY, 1ST PARTY AND OTHERS 2ND PARTY (*Defendants*).* [29th January, 1886.]

Joinder of parties—Form of suit—Joinder of defendants—Joinder of causes of action—Civil Procedure Code, 1882, *s.* 28.

A leased certain lands to *B* for a term of seven years commencing with the year 1288 Fasli (19th September 1880). On the 23rd October 1883, *A* sold the lands to *D*, who, under his purchase, became entitled to the rents of the lands from the commencement of the year 1291 Fasli (17th September 1883). When some of the instalments of the rent for the year 1291 Fasli became due, *D* applied for payment thereof to *B*, who informed him that he had paid the whole of the rent for the year 1291, in advance, to *A* on the 21st May 1883. *D* then sued *A* and *B* for the rent due, praying a decree for rent against *B*, and in the alternative, for a decree against *A* if it should turn out that *B's* allegation of payment was correct. The lower Courts found that *B* had paid *A* in good faith, and they dismissed the suit as against him. They also dismissed the suit as against *A* on the ground that the claims against *A* and *B* could not be joined in one suit.

On appeal to the High Court: *Held*, that the frame of the suit was unobjectionable, and that on the facts found by the lower Courts *D* was entitled to a decree against *A*.

[F. 20 C. 285 (291); 31 B. 516 (521) = 9 Bom. L.R. 482; 5 M.L.T. 282 = 6 M.L.T. 139 = 18 M.L.J. 238 (245) = 31 M. 252 (257); R. 29 M. 50 (51) = 16 M.L.J. 39; 6 C.L.J. 190; 4 Ind. Cas. 34 = 19 M.L.J. 399 (400)]

THIS was a suit by the purchaser of certain lands against his vendor and against a Mr. Holloway who had, on the 2nd October 1880, taken a lease of the land from the vendor for a term of seven years (from 1288 to 1294 Fasli, both inclusive) at a yearly rent of Rs. 2,700. The plaintiff purchased the lands on the 25th October 1883, and under the purchase he was entitled (as between himself and his vender) to receive from Mr. Holloway the rent for the year 1291 Fasli (commencing from the 17th September 1883). In the early party of December 1883, the plaintiff wrote to Mr. Holloway telling him of his purchase, and requesting payment of the instalments due for the months of Assin and Kartick 1291 (from 17th September 1883 to 14th November [556] 1883, both inclusive). On the 6th December 1883, Mr. Holloway replied, stating that the rent for the year 1291 had been paid in advance to the vendor on the 21st of May 1883. The plaintiff then wrote to the vendor requesting him to hand over the money so paid to him, but to this letter he received no reply.

On the 7th March 1884 the plaintiff brought the present suit for the instalments of rent due for Assin, Kartick, and Pous, 1291, praying as against Mr. Holloway that in default of payment the latter might be ejected from the lands under the provisions of s. 52 of Bengal Act VIII of 1869, and in the alternative that the vendor-defendant might be ordered to satisfy the plaintiff's claim. The plaint charged that the payment alleged by Mr. Holloway was a collusive transaction entered into for the purpose of defrauding the plaintiff.

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*Appeal from Appellate Decree, No. 1904 of 1885, against the decree of F. W. Badcock, Esq., Officiating Judge of Bhagulpur, dated the 13th of June 1885, affirming the decree of Baboo Saroda Prasad Chatterji, Second Subordinate Judge of that district, dated the 7th of January 1884.

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Both the lower Courts found that the rent for 1291 Fasli had been paid as alleged by Mr. Holloway, and that the payment was made *bona fide*: they therefore dismissed the suit as against him. They also dismissed the suit as against the vendor, on the ground that the claim against him was of an entirely different nature from that against Mr. Holloway, and that both claims could not be joined in one suit. The plaintiff appealed to the High Court.

Mr. *Twidale*, for the appellant.

No one appeared for the respondent.

JUDGMENT.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—In this case there is no appearance on behalf of the respondent.

We are of opinion that the judgment of both the Courts below, refusing to give the plaintiff relief against the defendant No. 2, is erroneous. The ground alleged by the Courts below for dismissing the suit as against the defendant No. 2 was that the claim against him was of a different nature from that against the defendant No. 1, and that it was not clearly set out in the plaint.

The plaintiff was the purchaser of the property in suit from the defendant No. 2, and on coming into possession he brought [557] this suit against the defendant No. 1 for arrears of rent due partly for a period before his incumbency and partly for a subsequent period. He sued both the tenant and his vendor, because the defendant No. 1, on demand for rent being made, had alleged that he had already paid rent in advance to the defendant No. 2, and the defendant No. 2 omitted to take any notice of the plaintiff's reference to him.

Upon trial the Courts below were satisfied that the defendant No. 1 had *bona fide* paid the arrears of rent claimed in advance to the plaintiff's vendor, and that he could not be held liable for that amount to the plaintiff. But as the suit was for rent, the Courts below were of opinion that as against the defendant No. 2 the claim as for damages could not be entertained.

We think that s. 28 of the Code of Civil Procedure authorises the Court to give relief in cases like the present. That section says that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter." In this case relief was claimed against these two defendants alternatively in respect of the same matter, namely, a certain portion of the rent for 1281 Fasli. As it was not due by the actual tenant, but was found to have been received by the tenant's previous landlord, and to be due to the plaintiff, we think that the Courts below should give a decree for that amount. We set aside the decree of the lower Courts dismissing the suit as against the defendant No. 2, and send the case back for adjudication of the question at issue between him and the plaintiff.

The appellant is entitled to the costs of this appeal as against the defendant No. 2.

P. O'K. *Appeal allowed.*

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CRIMINAL REFERENCE.

12 C. 558.

12 C. 558.

[558] CRIMINAL REFERENCE.

Before Mr. Justice McDonell and Mr. Justice Beverley.

RAM SUNDER DE (*Complainant*) *v.* RAJAB ALI AND ANOTHER (*Accused*).* [16th February, 1886.]

Bench of Magistrates—Order irregularly made—Hearing of part of case by one Bench and Decision by another.

Where in a summary case a Bench of Magistrates, after recording the evidence for the prosecution, postponed the case for the hearing of evidence for the defence; and, on the day fixed for hearing another Bench of Magistrates, none of whom had been members of the former Bench, recorded the evidence for the defence and acquitted the accused; *Held*, on a reference to the High Court, that the order must be set aside as being irregularly made (1).

THE facts, as far as they are material for this report, were stated in the reference as follows:—

"The complainant prosecuted the defendants for mischief, the alleged offence having consisted in the destruction of a fence which had been some years *in situ*. After previous enquiry, under s. 202, the case was made over by me to the Comillah Bench of Honorary Magistrates for trial. A Bench, consisting of three Honorary Magistrates, recorded the depositions of witnesses summarily, and postponed the case to admit of the appearance of witnesses for the defence. On the day fixed for hearing the latter, four Honorary Magistrates, none of whom had previously attended, recorded the evidence for the defence, and acquitted the accused on the ground that the case was a civil one.

"The deliberate destruction of a fence which had been in existence for "five or seven years" appears to me to amount to mischief punishable under s. 426 of the Civil Procedure Code. It is absurd to allege that a man has a right to take the law into his own hands and enforce so ancient a claim so summarily. Things might, indeed, be different had the fence been newly erected, but no civil claim will excuse the causing such wrongful loss as appears to have been caused in this case. Again, the fact that [559] one set of Honorary Magistrates commenced the proceedings, and after hearing the evidence for the prosecution, remanded the case for the defence (thereby showing that they considered a *prima facie* case made out), while another set acquitted the defendants, was in itself materially prejudicial to the prosecutor, and the more so in that the case having been summarily tried, the record on which the second set based their opinion was necessarily scanty."

No one appeared on the reference.

The judgment of the Court (MCDONELL and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

Without going into the question whether or not any criminal offence has been committed, we think that the order of the Bench acquitting the accused must be set aside on the ground that no member of that Bench was a member of the Bench which heard the evidence for the prosecution in the case. The trial was a summary one in which the evidence is not

* Criminal Reference, No. 17 of 1886, made by F. H. B. Skrine, Esq., Officiating Magistrate of Tipperah, dated the 3rd of February 1886.

(1) See *Sufferuddin* v. *Ibrahim*, 3 C. 754, and *Tarada Baladu* v. *Queen*, 3 M. 112.

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recorded at any length, and it was, therefore, the more necessary that the case should have been disposed of by one or more Magistrates before whom the witnesses had been examined. We accordingly set aside the order of dismissal, and direct that the matter be tried *de novo*, or, if possible, disposed of by a Bench of whom one or more of the Magistrates who heard the evidence for the prosecution shall be members.

J. V. W. *Order set aside.*

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12 C. 559.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

GOLUCK CHANDRA MYTEE (*Judgment-debtor*) *v.* HARAPRIAH DEBI (*Decree-holder*).* [13th January, 1886.]

Execution of decree—Limitation—Civil Procedure Code (Act XIV of 1882), *s.* 230.

In the last paragraph of s. 230 of the Code of Civil Procedure, Act XIV of 1882, the words, "the law in force immediately before the passing of [560] this Code" refer to and include Act X of 1877, as amended by Act XII of 1879.

Musharraf Begam v. *Ghalib Ali* (1) dissented from.

[F., 9 M. 454 (456); 11 B. 524 (525); R., 8 A. 419 (421).]

THIS was an application made on the 10th of November 1884 for execution of a money decree which was passed on the 5th of July 1872. The judgment-debtor objected that the application was barred by limitation. The Court of first instance allowed execution to issue. On appeal the lower appellate Court said: "The appellant admits that the Full Bench ruling in *Musharraf Begam* v. *Ghalib Ali* (1) is against him, and states that the appeal is made to this Court with the ulterior view of bringing the question of law before the High Court. In the absence of any rulings to the contrary in the Calcutta High Court, the ruling of the Allahabad High Court must be followed. In the North-West Provinces it was long ago held that the last clause of s. 230 of the Civil Procedure Code referred to the law of limitation—*Sohan Lal* v. *Karim Baksh* (2); and the Full Bench ruling already quoted has since been recognized in the case of *Bhawani Das* v. *Daulat Ram* (3). The appeal is dismissed with costs." The judgment-debtor appealed to the High Court.

Baboo *Bhobani Churn Dutt*, for the appellant.

Baboo *Biprodas Mukerji*, for the respondent.

The following judgments were delivered by the Court (TOTTENHAM and O'KINEALY, JJ).

JUDGMENT.

TOTTENHAM, J.—The point before us in this appeal is as to the proper construction of s. 230 of the Code of Civil Procedure.

The decree sought to be executed is one for money, and it was passed more than twelve years before the present application was made. It

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* Appeal from Appellate Order, No. 109 of 1885, against the Order of H Gillon, Esq., Officiating Judge of Midnapur, dated the 6th of January 1885, affirming the order of Baboo Gonesh Chandra Chowdhuri, Subordinate Judge of that District, dated the 13th of November 1884.

(1) 6 A. 189. (2) 6 A. 281. (3) 6 A. 388.

appears that under the late Code of Civil Procedure (Act X of 1877), an application was made to execute it, which application was granted.

It is contended by the judgment-debtor in the present instance that by the terms of the last paragraph of s. 230 of the [561] present Code, the application is barred, beeause, had the present Code not been passed, and had the Code of 1877 as amended by Act XII of 1879 been still in force, the decree in question would have been barred under the provisions of the corresponding section.

The last paragraph of s. 230 of the present Code allows proceedings to be taken to enforce any decree within three years after the passing of the Code, "unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years."

For the decree-holder it is contended upon the authority of the decision of a Full Bench of the Allahabad High Court in *Musharraf Begam* v. *Ghalib Ali* (1) that the words, "the law in force immediately before the passing of this Code," refers exclusively to the Limitation Act, XV of 1877, and not to any other law dealing with the present subject.

The majority of the Allahabad Full Bench held that the former Code of 1877 could not be taken into consideration as forming part of "the law in force immediately before the passing of this Code." That at least is the practical effect of the decision. The Courts below have acted upon this ruling of the Allahabad High Court, there being nothing to the contrary in the reported cases decided by the Calcutta High Court. But with all respect for the majority of the Allahabad Full Bench, we find ourselves altogether unable to assent to the ruling in question. It is quite true that the law in force immediately before the passing of the Code of 1877 on this subject was the law of limitation and nothing else; but it appears to us that the words, "the law in force immediately before the passing of this Code," used in the corresponding section of the present Code, cannot now be limited to that particular Act of limitation. It seems to us that "the law in force" means the whole law on the subject.

There is no dispute that if the old Code had remained in force, the present application could not have been entertained. The majority of the Allahabad Full Bench expressed the opinion that there was nothing in the third paragraph of s. 230 which [562] prescribes a period for taking proceedings. We find it impossible to hold that the following words of paragraph 3 "no subsequent application to execute the same decree shall be granted after the expiration of twelve years," do not prescribe a period within which proceedings must be taken. It appears to us that they prescribe the period of twelve years.

We may note that art. 179 of the second schedule of the Limitation Act upon which the decree-holder himself relied is by its terms not applicable to any case provided for by s. 230 of the Code of Civil Procedure, and as according to our reading cf that section the present case crearly falls under it, it follows that art. 179 does not apply; and the application not being made within the period prescribed by that section it was barred.

That being so, we must set aside the order of the lower Court and dismiss the application with costs.

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(1) 6 A. 189.

1886 JAN. 13. — APPELLATE CIVIL. — 12 C. 559.

O'KINEALY, J.—I am also of the same opinion, and as I differ from the opinion expressed by a majority of the Judges of the Full Bench of the Allahabad High Court, I think it due to those learned Judges that I should give my reasons for so differing.

The decree is dated the 5th of July 1872. After the Code of 1877 was passed an application for execution was made and granted on the 19th January 1881. It is not denied, and it appears to me that it cannot be disputed, that, under s. 230 of the Code of 1877, if that Code had remained in force, the present application would be barred, admittedly barred, on the 6th of July 1884. Therefore, according to the period allowed by the law in force before the passing of the present Code, Act XIV of 1882, the decree was barred in July 1884. The present application was made on the 10th of November 1884.

It is argued that this application is saved by the last clause of s. 230 of the present Code, which runs as follows: "Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code, unless when the period prescribed for taking such proceedings by the law in force, immediately before the passing of this Code, shall have expired before the completion of the said three years." It is said that the words "the law in force" in this clause have a technical meaning. They do not mean [563] the law in force but only such portion of it as is to be found in the Limitation Act. Why this limited portion of the law then in force should be selected as adequately covering the words, I cannot clearly understand. Before the present Code the law of limitation was, so far as I can see, partly in the Limitation Act and partly in the third paragraph of s. 230 of the old Code, which was expressly excluded from the operation of the Limitation Act by art. 179, sch. II of that Act. The only way in which this view can be supported is by assuming that the words "law in force" had acquired a technical meaning before the present Code was passed, and meant the laws in force before the passing of Act X of 1877, and not the laws in force before the passing of the present Code. But so far from believing that the words have any technical meaning, I think they are used in their popular and ordinary sense, and when so construed they present no ambiguity. I think they mean what an ordinary individual would consider they mean, the whole law in force before Act XIV of 1882 was passed.

I feel, therefore, constrained to hold that, as has already been pointed out by my learned brother, the application was barred and should have been dismissed in the Court below.

P.O'K. *Appeal allowed.*

12 C. 563.

1885 Dec. 7. — Appellate Civil. — 12 C. 563.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

KARTICK CHANDRA PAL (*One of the Plaintiffs*) *v.* SRIDHAR MANDAL (*Defendant*).* [7th December, 1885.]

Res judicata—Rent suit—Intervenor—Dismissal for Default—Questions of title—Issues—Code of Civil Procedure, s. 13.

In a suit for arrears of rent and possession of certain property a person intervened and was made defendant on his alleging that he was entitled to an eight annas share of the property in question, and that the plaintiffs were not entitled to any portion thereof. Issues were fixed on the questions of title, but the plaintiffs failed to adduce evidence and their suit was dismissed. They afterwards brought a suit for possession of the same property, on the same title, against the intervenor in the former suit.

Held, that the second suit was barred as *res judicata*.

[R., 9 C. W. N. 679 (688); 6 C. L. J. 362 (367).]

[564] THIS was a suit for the recovery of immoveable property. The plaintiffs alleged that a six-roomed house, together with one bigah five cottahs of land, all situated in the district of Hooghly, had been the property of one Pitambur Mandal; that in 1858 two rooms in the house and two cottahs of the land were, under the terms of a compromise, made over by him to one Dinamoyi Dossee, the widow of Pitambur's brother and the mother of the defendant, for her maintenance; and that in 1871, Pitambur sold to the plaintiffs' father the remaining portion of the house and land, but continued to reside in and occupy the same as before, paying rent therefor to the plaintiffs' father.

The plaintiffs further alleged that in 1876 they brought a suit for arrears of rent and for ejectment against Pitambur Mandal; that the defendant intervened in that suit, and was made a defendant, on his alleging that he was entitled to an eight annas share in the six-roomed house and in the one bigah five cottahs of land; and that the sale by Pitambur to the plaintiffs' father was a sham transaction, but that the suit was dismissed for default, without any adjudication as to title having been made.

The plaintiffs then stated that on the death of Pitambur Mandal in 1878, the defendant took forcible possession of the whole of the house and land, and they prayed for a declaration of their title to the portion conveyed to their father as aforesaid by Pitambur, for khas possession thereof, for wasilat and for costs.

The defendant stated that the house and land had at one time been the property of his grandfather Guru Churn Mandal; that on Guru Churn's death, eight annas share of the property devolved on Pitambur and eight annas on the defendant; that the alleged sale by Pitambur to the plaintiffs' father was a sham transaction; and that on the death of Pitambur he (the defendant) had become entitled to and possessed of the whole of the said house and land. He also pleaded limitation and *res judicata*. The plaint was filed on the 16th of January 1883.

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* Appeal from Appellate Decree No. 2094 of 1884, against the decree of Baboo Bhuban Chandra Mukherji, Second Subordinate Judge of Hooghly, dated the 23rd of August 1884, affirming the decree of Baboo Ananta Ram Ghose, Munsif of Amtah, dated the 15th of January 1884.

1885 DEC. 7. — APPELLATE CIVIL. — 12 C. 563.

The Court of first instance dismissed the suit with costs. On the question of *res judicata*, the Judge of the lower appellate Court said: "In the ejectment suit, instituted against Pitambur by the plaintiffs, the defendant intervened and challenged [565] the *bona fides* of the plaintiffs' kobala, as well as the right of Pitambur to the four rooms. The plaintiffs did not adduce any evidence, and the suit was dismissed. They applied for a review of judgment which was also rejected. In that suit questions of title were raised by the defendant and issues fixed; the onus was clearly on the plaintiffs who did not adduce any evidence. Consequently they are not entitled to raise those issues again, and the plaintiffs' claim to those four rooms is clearly barred by *res judicata*." As to the remaining portion of the claim, the Judge of the lower appellate Court did not believe that the sale by Pitambur to the plaintiffs' father was genuine; and he affirmed the judgment of the Munsif. One of the plaintiffs appealed to the High Court.

Mr. *Doss* (Baboo *Gocool Chunder Dhur* with him), for the appellant, cited *Rungrav Ravji* v. *Sidhi Mahomed Ebrahim* (1), *Brammomoye Dassee* v. *Kristo Mohun Mookerjee* (2); *Shokhee Bewah* v. *Mehdee Mundul* (3); *Mofizoodeen* v. *Amoodeen* (4); *Futtemah Begum* v. *Mahamed Ansur* (5).

Baboo *Rajendra Nath Bose* and Baboo *Ashutosh Dhur*, for the respondent.

JUDGMENT.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—We think that as regards the house in suit the lower Court was right in holding that the suit was barred by *res judicata*. It appears that in the former suit between the parties issues had been fixed on the question of title. In that suit the plaintiffs having failed to adduce evidence, which it was incumbent upon them to do, the suit was dismissed; and must be held to have been dismissed on the merits. The learned counsel who appears for the appellant has cited various cases from which he argues that *res judicata* does not apply unless in the former suit evidence has been received and formal judgment passed upon the evidence recorded. The cases which he cites do not appear to us to apply to the case before us. In one [566] case in this Court it appears that it refers to a former suit in which the Court had expressly abstained from coming to a decision upon the point in issue. It was therefore held that there was no adjudication and no *res judicata*. In a recent case (1) the Bombay High Court has held that *res judicata* does not apply when the former suit has been dismissed under s. 102 of the Code for default to appear on the part of the plaintiff. Those cases do not appear to us to apply to the present case.

With regard to the remaining portion of the subject-matter of suit, namely, the orchard, we find that the Court below has, upon the evidence, come to the conclusion that the kobala set up by the plaintiff was not a genuine transaction, that is, the Court was not satisfied that any consideration passed, and that, on the other hand, it was satisfied that the alleged

(1) 6 B. 482. (2) 2 C. 222. (3) 9 W. R. 327.
(4) 23 W. R. 58. (5) 9 C. 309.

vendor had never given up possession. The learned Counsel for the appellant says that upon the evidence the lower appellate Court is wrong. But in second appeal it is not open to us to discuss the evidence. The appeal is dismissed with costs.

1885 DEC. 7. — APPELLATE CIVIL. — 12 C. 563.

P. O'K.

Appeal dismissed.

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12 C. 566.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

HARIDAS SANYAL AND OTHERS (*Plaintiffs*) *v.* PRAN NATH SANYAL AND OTHERS (*Defendants*).* [2nd January, 1886.]

Partition—Suit for partition of portion of joint property—Partial partition.

The plaintiffs and the defendants being jointly entitled to and in possession of three *khanabaris* in a village and other immoveable property, the plaintiff sued for partition of one of the *khanabaris* only.

Held, that the suit would not lie.

[F., U.B.R. (1897—1901), Vol. II, 229 ; 18 Ind. Cas. 866 ; U. B. R. 2nd Qr. (1909) C.P.C. O. 11, 1—2, p. 21 (23) = 4 Ind. Cas. 812 (814) ; R., 3 Ind. Cas. 247 ; 38 P.W.R 1909 = 69 P.L.R. 1909 = 1 Ind. Cas. 897 ; 14 Ind. Cas. 524 (529) = 23 M.L.J. 64 (72) = 11 M.L.T. 393 ; 32 P.R. 1908 = 151 P.L.R. 1908 = 75 P.W.R. 1908 ; 20 C. 379 (383); 24 B. 128 (133) ; 1 Bom. L.R. 620 ; Appl., 18 B. 611 ; D., 112 P.L.R. 1906 = 43 P.R. 1906.]

THIS was a suit for partition of 1 paki 3¾ gundahs of land and the buildings thereon, which constituted the joint-family dwelling-house of the plaintiffs and the defendants. The plaintiffs and the defendants had occupied the house and land jointly down to the year 1288 (1871-72), when the former removed to another house which was their separate property. The plaintiffs alleged that, on the 12th November 1883, they had written to the defendants [567] asking them to come to an amicable partition of the property now in question, but they had refused to do this ; they further alleged that the joint possession of this piece of land was a constant source of quarrel between the plaintiffs and the defendants, and that it was necessary there should be a partition of it. The material portions of the written statement were as follows :—

" 7. The plaintiff having constructed a separate house at a different place, has been residing in that new house, and we have been residing in the said ancestral dwelling house, and have been in possession of the entire land of that house. We and the plaintiff have many rent-free *ijmali* lands in Kedarpur and in other villages. Instead of suing for partition of all those rent-free lands, the plaintiff has asked for partition of one plot of land only.

" 8. It is a rule observed in making a partition that lands are allotted to the several parties with reference to their convenience and proximity. The plaintiff having deserted the house under claim, has built another house ; and, as we are residing in the said (former) house, the plaintiff can get some other rent-free land in lieu of the land of the house in question. Hence, instead of the entire *ijmali* rent-free land belonging

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* Appeal from Appellate Decree No. 1152 of 1885 against the decree of Baboo Bajendra Coomar Bose, Additional Subordinate Judge of Mymensingh, dated the 11th of March 1885, reversing the decree of Baboo Monmotho Nath Mookerjee, Munsif of Attiah, dated the 17th of November 1884.

1886 JAN. 2. — APPELLATE CIVIL. — 12 C. 566.

to us and the plaintiff, the land of the dwelling house cannot be partitioned, and such partition would be illegal.

"9. We having made preparation for erecting a *dalan* on the place distinctly and separately belonging to us within our ancestral *khanabari*, there has arisen a perpetual enmity between us and the plaintiff's father and the plaintiff. Out of this enmity, and with the evil intention of injuring us and throwing obstacles in the way of our erecting the *dalan*, the plaintiff has brought this false and malicious suit for partition."

The Court of first instance gave the plaintiffs a decree, but this decision was reversed on appeal. The judgment of the lower appellate Court was as follows:—

"This is a suit for enforcing partition of a piece of rent-free homestead, which admittedly forms the *khanabari* of the plaintiffs and defendants. Since 1281 the plaintiffs have ceased to reside in this homestead, having removed therefrom and made a new *bari* of their own on a plot of land which they allege belongs [568] to them exclusively. The defendants have not been able to show that they have any interest in the land last mentioned. The Munsif has decreed the plaintiffs' claim. It is now urged in appeal by the defendants that, as there are other lands belonging to them and the plaintiffs which are held by them in *ijmali*, the plaintiffs are not entitled to have a partition as respects only one portion of the undivided property. It appears to me that this objection is valid. That there are two other-*ijmali lakheraj* homesteads adjoining to the *bari*, of which partition is now sought for, one of which is tenanted and the other unoccupied, and that *putni* interests are held in *ijmali* by the parties both in the village where the *khanabari* is situated as well as in a neighbouring village, has been proved even by the plaintiffs' witnesses, and has been admitted before me on the part of the plaintiffs during the hearing of this appeal. In this state it is but proper that all the undivided properties held and owned by the parties must be brought under partition instead of only one portion thereof; and it has not been shown that the plaintiff would be put to any great inconvenience if his prayer for partition of the *khanabari* in question were not granted, since he has already got a new *bari* of his own. On the other hand, there is good ground for saying that the defendants would suffer if only this *khanabari* were partitioned independently of the two *lakheraj baris* that are adjoining to it. I would refer to the following rulings in support of the contention that partial partition cannot be allowed —*Hari Narain Brahme* v. *Ganpatrav Daji* (1); *Lalljeet Singh* v. *Raj Coomar Singh* (2); *Nanabhai Vallabhdas* v. *Nathabai Haribhai* (3). Consequently the order of the Munsif, granting partition of the lands in question, will be set aside, and this appeal decreed, and the suit of the plaintiffs dismissed with all costs and interest at 6 per cent. The defendants will have of course no right to raise permanent structures on the lands in question."

The plaintiffs appealed to the High Court on the ground that "the lower appellate Court is wrong in holding that the present [569] suit, which is a suit for partition of the paternal *khanabari*, is not maintainable, because the parties have other lands which are held by them in *ijmali*."

Baboo *Durga Mohun Das*, and Baboo *Grish Chundra Chowdhuri*, for the appellants.

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(1) 7 B. 272=8 C.L.R. 367. (2) 25 W.R. 353. (3) 7 B.H.C.A.C, 46.

Baboo *Guru Das Banerji*, for the respondents.

1886 JAN. 2. APPELLATE CIVIL. 12 C. 566.

JUDGMENT.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—This was a suit for the partition of a *khanabari* belonging to the parties in this suit. The defendants objected that, if this particular *khanabari* only were partitioned, the result would be serious to them; that there are two other *khanabaris* adjoining the one in question, and that the partition ought to be applied to them also as well as to other joint-family property. The lower appellate Court has decided that this suit for partition of this single *khanabari* could not be maintained, and has dismissed it.

We think that the weight of authority is in favour of the lower appellate Court's decision. The cases are quoted by Mr. Mayne in his book on Hindu law (1). In the present instance we think that the decision of the Court below is reasonable as well as in accordance with law. The appeal is dismissed with costs.

P.O'K. *Appeal dismissed.*

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12 C. 569 (F.B.).

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Cunningham, Mr. Justice Wilson, Mr. Justice Prinsep and Mr. Justice Trevelyan.

MANGNIRAM MARWARI (*Plaintiff*) v. DHOWTAL ROY AND OTHERS (*Defendants*).* [23rd March, 1886.]

Interest—Interest after filing of plaint—Interest at rate stated in bond—Discretion of the Court—Civil Procedure Code (*Act XIV of* 1882), s. 209.

Interest after date of suit is in the discretion of the Court, notwithstanding that a fixed rate of interest is mentioned as payable "up to realisation" in the bond sued upon.

[**Diss.**, 12 M. 485 (486); **R.** 2 O.C. 37 (44); 17 C.P.L.R. 38 (39); **D.**, 26 C. 360 (363).]

[570] THIS was a suit brought on the 2nd September 1884 to recover Rs. 3,400 due as principal and Rs. 6,520 as interest, on a mortgage bond in the ordinary form, dated the 14th February 1880, praying for the sale of the mortgaged properties, and in default of their proving sufficient, for a personal decree.

The bond declared that the principal sum should fall due in Bhadro 1287 (F. S.) (August-September 1880), and contained a covenant by the defendants running as follows: "Should we fail at the above date to pay the said sum, we shall, without objection or hesitation, pay interest from the date of the bond to the day of realisation at the rate of two per cent. per mensem; the interest of each two months on the aforesaid sum we shall pay in a lump sum; should we fail to pay each two months' interest at once, the interest of each of these two months shall pass into principal, upon which we shall also pay interest at the above rate."

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*Full Bench on Regular Appeal 266 of 1885, against the decision of the Second Subordinate Judge of Bhaugulpore, dated 10th December 1884.

(1) See Mayne's Hindu Law, s. 417, 3rd Ed., p. 469.

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The defendants admitted the bond, but contended that the interest was too high, and that compound interest ought not to be allowed. The Subordinate Judge found that the defendants had entered into the contract with their eyes open, and gave the plaintiff a decree against the properties mortgaged, and in the event of their insufficiency, a personal decree against the defendants for the amount of principal claimed with interest at the rate stipulated in the bond, and calculated thereunder up to the filing of the plaint, and interest at three per cent. per annum from the date of suit up to the date of realisation.

The plaintiff appealed to the High Court on the ground (1) that interest should have been allowed up to the date of payment, at the rate stipulated in the bond; and (2), that failing that, they were entitled to interest up to the date of decree at the rate stipulated in the bond. The second point was alone contended for at the hearing of this appeal before Mr. Justice Wilson and Mr. Justice Field. Mr. Justice Wilson was of opinion that upon the true construction of s. 209 of the Civil Procedure Code, the rate of interest after plaint was in all cases in the discretion of the Court; whilst Mr. Justice Field having regard to the decision in *Orde* v. *Skinner* (1) was of a different opinion; [571] the matter therefore was referred to a Full Bench. The following judgments were delivered in referring the case:—

WILSON, J.—This was a suit upon a mortgage bond executed by the defendants in favour of the plaintiff to secure the repayment on a fixed date of a loan of Rs. 3,400, with interest at two per cent. per mensem. The bond contains a covenant by the defendants that "should we fail at the assigned date to pay the said sum, we shall, without objection or hesitation, pay the said interest from the date of the bond to the day of realisation at the above rate, namely, two per cent. per mensem. And we further covenant that the interest of each two months on the aforesaid money we shall pay in a lump sum. Should we fail to pay each two months' interest at once, the interest of each of these two months shall pass into the principal, upon which we shall also pay interest at the above rate."

The Subordinate Judge has given a decree in the plaintiff's favour for the amount of the bond debt, with interest calculated as agreed down to the filing of the suit. From the filing of the suit to decree, and also upon the decree, he gave interest at a lower rate.

Against so much of this decree as deals with interest after suit was brought the plaintiff has appealed. The only point contended for on the argument was that the Court was bound as matter of law to give interest and compound interest according to the bond down to decree.

If the Court had a discretion in the matter, it was not disputed, and could hardly be disputed, that that discretion was properly exercised. The loan was secured by mortgage; the rate of interest was 24 per cent., with rests at two months' interval and compound interest; the result being that the liability was nearly tripled in four years and a half.

It was pointed out that the agreement in this bond was expressly to pay interest "to the day of realization." I do not see that those words affect the case materially, for in any case a contract to pay interest on a debt would be construed, I presume, as a contract to pay as long as the debt was unpaid, unless the contrary appeared. We have therefore to deal

(1) 7 I.A. 196=3 A. 91.

with the bare question of law, whether in a decree for a debt, which debt bore an [572] agreed rate of interest, a Court is bound to give the agreed rate of interest down to decree, or whether it has a discretion in respect of the period between suit brought and decreed. The answer to this question depends upon the construction of several enactments.

1886 MARCH 23. — FULL BENCH. — 12 C. 569 (F.B.).

The first to be considered is Act XXVIII of 1855. That is entitled "an Act for the repeal of the Usury Laws" It recites that "it is expedient to repeal the laws now in force relating to usury." The Usury Laws previously in force (of which the principal were 13 Geo. III, c. 63, s. 3, and in Bengal certain sections of Regulation XV of 1793, Bengal Code) determined the rate of interest which might be contracted for and allowed, and provided for nothing else. There was nothing in them about how long interest should run, or down to what date the Courts should calculate it. Act XXVIII of 1855 is in substitution for these. Putting aside the repealing section, the saving clause and s. 4, which deals with another matter, there are four sections in the Acts, ss. 2, 3, 5, and 6. Section 2 is this: "In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties; and if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable."

Section 3 says: "Whenever a Court shall direct that a judgment or decree shall bear interest, or shall award interest upon a judgment or decree; it may order the interest to be calculated at the rate allowed in the judgment or decree upon the principal sum adjudged, or at such other rate as the Court shall think fit."

Section 5 deals with the rate of interest to be deposited under the regulation proceedings in cases of mortgage by way of conditional sale, and s. 6 with the calculation of interest upon adjustments of accounts.

In every one of these sections what is dealt with is simply the rate of interest. There is not a word anywhere about the time down to which it is to run—indeed any provision on this subject would have been quite beyond the purview of the Act.

I do not say that, if there were no later legislation, a Court awarding interest on a debt would not be bound to give it down [573] to decree, at the agreed rate, or the reasonable rate found by the Court, as the case may be. But if so, it would not be by reason of any provision in the Act; but upon the general principle that the rights of the parties, including any rights to interest, ordinarily remain unchanged until they become merged in a decree.

Another thing to be noted is that ss. 2 and 3, so far as they go—that is, in regulating the rate of interest—are exhaustive and cover, s. 2, every suit in which interest is recoverable; and s. 3, every case of interest upon a decree.

The next enactment was, s. 193 of the Civil Procedure Code, Act VIII of 1859. That section enacted:—

"When the suit is for a sum of money due to the plaintiff, the Court, may, in the decree, order interest to be paid on the principal sum adjudged from the date of suit to the date of payment at such rate as the Court may think proper."

This was repealed and superseded by s. 10 of the amending Act XXIII of 1861, which was to this effect:—

"When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court may think proper to be paid on the principal sum adjudged from the date of suit to

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the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the date of suit; with further interest on the aggregate sum so adjudged and on the costs of the suit from the date of the decree to the date of payment."

For this was substituted s. 209 of the Procedure Code, Act X of 1877, which was identical with s. 209 of the Code now in force, Act XIV of 1882. That section is as follows:—

"When the suit is for a sum of money due to the plaintiff, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit."

In these provisions it is plain that the attention of the Legislature was directed to that which was not dealt with in Act XXVIII of 1855, and which would have been beside the purpose of that Act, namely, the difference between the [574] period before suit and the period pending the suit, and the power which ought to be given to the Court in dealing with the latter of these periods. This is provided for in the earlier part of the present section. In the same way the later words of the section, dealing with interest upon decrees, empowers the Court to fix the time for which such interest shall run, a matter as to which Act XXVIII of 1855 was silent.

And the language of this section is perfectly general; there is nothing said of any distinction between the case of an agreed rate of interest and the case of no agreement on the point. The words are that "when the suit is for a sum of money due," the Court may order "interest at such rate as the Court deems reasonable from the date of the suit to the date of the decree."

Theconstruction of the section contended for on behalf of the appellant was to limit the application of the earlier part of the section to cases in which no rate of interest has been agreed upon, and read it as placing the matter of interest pending the suit in the discretion of the Court in such cases only. To this construction there are several objections. *First*, there is no trace in the language of the section of any such distinction. *Secondly*, this construction would make the enactment a dead-letter; for in cases of no agreed rate of interest the matter was already placed in the discretion of the Court by s. 2 of Act VIII of 1855. *Thirdly*, the whole section consists of one unbroken sentence, and to whatever cases one part of that sentence applies, the whole must apply. The result of the construction contended for would be that the power to limit the interest on decree to a fixed time, given by the last words of the section, would be confined to cases in which no rate of interest has been agreed upon—a result—which can hardly have been contemplated.

But it is necessary to examine the authorities. The point in question has often been before this Court on its Original Side. In *Anderson* v. *Srimonto* (1), Macpherson, J., held, after consideration, that he was not bound to give interest at an agreed rate after plaint.

[575] In *Dhunput Singh Dogare* v. *Sheik Golam Hadi* (2), Levinge, J., took a different view, holding that the language of s. 2 of Act XXVIII

(1) Coryton 3. (2) Coryton 12 = 2 Hyde 106.

of 1855 was clear and peremptory, and required him to allow interest in the case before him, at the agreed rate down to decree, and that s. 10 of Act XXIII of 1861 did not alter the law. The view taken by Macpherson, J., has for some years past been consistently acted upon by the Judges sitting on the Original Side of the Court. A number of cases showing this are collected in a note to page 188 of Belchambers' Practice of the Civil Courts. In *Carvalho* v. *Nur Bibi* (1), a Division Bench of the Bombay High Court decided to the same effect.

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On the other hand it was held by a Division Bench of the Madras High Court in *Bandaru Swami Naidu* v. *Atchayamma* (2), that where there is an agreed rate of interest, interest at that rate must be awarded up to decree. The decision, however, of the Madras Court, as well as that of Levinge, J., was based upon the view that Act XXVIII of 1855 contained an enactment on the point in question, and I have given my reasons for differing from this view.

The only other authority, so far as I know, bearing upon the matter, is a passage in the judgment of the Privy Council in *Orde* v. *Skinner* (3). In that case the Court below had given a decree for money due, and had given interest up to decree at a rate which was found to be reasonable and which was in accordance with the practice of the parties. The objection raised before the Privy Council was "that the Court rate of interest is now six per cent, and that the interest decreed should have been calculated throughout at that rate." Their Lordships point out that the only enactment regulating the conduct of the Judge in respect to the allowance of interest, then in force, was s. 10 of Act XXIII of 1861. It is then said: "Of course the Court must exercise a judicial discretion in giving effect to this section, and would not be justified in granting an inordinate or unusual rate of interest. **[576]** Up to a certain time, however, 12 per cent. was notoriously the rate of interest prevalent in the mofussil wherever interest was allowed by the Court, and it has not been shown that there is any enactment which absolutely controls the discretion given by this Act of 1861 to the Judge. A practice indeed of giving upon the aggregate sum for principal, interest and costs, interest only at 6 per cent. does seem to have grown up; but that may have been in order to prevent the parties from abstaining from enforcing their decrees and allowing their demand to roll on at 12 per cent. The rate of interest, however, to be allowed on the principal debt up to the date of the decree, ought to be that, if any, which has been fixed by contract, expressed or implied, between the parties; and it appears upon the accounts that the rate of interest allowed among the sharers themselves was that prevalent in the mofussil, *viz.*, 12 per cent. Hence their Lordships are of opinion that the Judge in calculating the rate of interest as he has done, has done nothing which he was not entitled to do."

The question now before us did not arise in that case at all; the language of their Lordships was used with reference to a different matter; and it seems to me that it is not an authority upon the point with which we have to deal.

I think that upon the true construction of s. 209 of the Procedure Code, the rate of interest after plaint is in all cases in the discretion of the Court, and I think the preponderance of authority is to the same effect. I should therefore dismiss this appeal with costs.

(1) 3 B. 202. (2) 3 M. 125. (3) 7 I.A. 196 (211)=3 A. 91.

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But there is a conflict of authority, and my learned colleague entertains doubts about the matter. I concur, therefore, in referring the question to a Full Bench.

FIELD, J.— I think that there is great force in the arguments used by my brother Wilson; but I confess that I have some difficulty in getting over the decision of the Privy Council in *Orde* v. *Skinner*. Their Lordships say at the end of their judgment: "The rate of interest, however, to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, expressed or implied, between the parties; and it appears upon the accounts that the rate of interest allowed among the sharers themselves was that prevalent in the [577] mofussil, *viz.*, 12 per cent."—(see page 211 of the Report in L. R., 7 I. A.). The suit was between sharers, the plaintiffs being the children of James, one of the sons of the deceased Colonel Skinner, and the defendant being Alexander, another of the sons of the same person. It would appear then that from the fact of 12 per cent. being the rate of interest allowed among the sharers themselves, their Lordships of the Privy Council inferred an implied contract to pay this rate. It appears that the Judge in the Court below had allowed 12 per cent. *first*, up to the date of suit, and, *secondly*, upon the principal amount from the date of institution to the date of decree; and he further directed that the decree when compounded of the principal, interest, and costs, should carry interest at 6 per cent. The contention before the Privy Council was that the interest decreed should have been calculated at 6 per cent. throughout, that is, both for the period before the date of institution and the period between the date of institution and the date of decree.

The proper interest to be allowed for the period between the date of institution and the date of decree was then a question raised before the Privy Council. No doubt this question took a particular shape, whether the Judge in the Court below was justified in giving 12 per cent.; while the question now before us is whether the Judge in the Court below was bound to give the rate agreed between the parties. But it may appear that the observation of their Lordships of the Privy Council is equally applicable to the question in either shape. Their Lordships say: "The rate of interest to be allowed on the principal debt up to the date of the decree ought to be that, if any, which has been fixed by contract, expressed or implied, between the parties;" and then, finding that there was an implied contract to pay 12 per cent., they express their opinion that the Judge in allowing interest at this rate had done nothing which he was not entitled to do.

As it is, however, desirable that the question should be settled and that the practice should be made uniform, I think that it will be well to refer the question to a Full Bench.

Mr. *Twidale* (with him Baboo *Dinonath Chuckerbutty*) for the [578] appellant.—S. 2 of Act XXVIII of 1855 allows the Court to decree interest at the rate agreed upon by the parties, and also lays down the rate of interest to be allowed on a decree, but nowhere does the Act lay down the time down to which interest is to run. *Dhunput Singh Dogare* v. *Sheikh Golam Hadi* (1) lays down that interest at the stipulated rate, no matter how usurious, will be awarded down to decree, but in *Anderson* v. *Srimonto* (2) interest at the stipulated rate was only allowed up to the date of suit; these were both decisions under the Interest Act

(1) Coryton's Rep. 12=2 Hyde 106.

(2) Coryton's Rep. 3.

[GARTH, C. J.—Do not the words of s. 209 of the Code "*in addition to any interest adjudged on such principal sum*" apply to something outside the section, to interest which the Court may allow from the time of suit] ? Section 209 does not apply where a rate has been agreed upon by the parties.

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Interest at the rate agreed upon has been given up to decree in *Bhugwan Doss* v. *Tekait Than Narain Deo* (1), and in *Rashessur Surmah* v. *Kaleekanath Surmah* (2), and up to date of realization in *Shaikh Reasut Hossain* v. *Jusmut Roy* (3). See also the remarks of Wilson, J., in *Futtehma Begum* v. *Mahomed Ausur* (4). In *Carvalho* v. *Nur Bibi* (5) the stipulated rate was only allowed up to suit, but then the High Court refused to interfere with the discretion exercised by the lower Court, and that case does not refer to Act XXVIII of 1855. In *Bandaru Swami Naidu* v. *Atchayamma* (6), interest at the stipulated rate up to decree was allowed ; and the case of *Orde* v. *Skinner* (7) is to the same effect.

[TREVELYAN, J.—Would not ss. 86—88 of the Transfer of Property Act apply to this suit ?]

The right to bring such a suit as this is preserved by s. 2 of the Transfer of Property Act.

[579] [GARTH, C.J.—This is a suit on an ordinary mortgage, and no objection as to the suit not lying was raised in the Courts below ; on the other hand, under the Transfer of Property Act, the interest you would obtain would be higher, but the time for receipt would be extended.]

The form of decree given in the schedule to the Code is the same as that contained in s. 86 of the Transfer of Property Act.

No one appeared for the respondents.

The opinion of the Full Bench was as follows :—

OPINION.

GARTH, C.J. (WILSON, CUNNINGHAM, PRINSEP and TREVELYAN, JJ., concurring).—The question, as I consider, which we have to decide in this reference, is, whether under the circumstances stated the Judge in the first Court was bound to give interest at the rate agreed upon between the parties ; or, whether the rate of interest after plaint and before decree is always under such circumstances in the discretion of the Court?

I think that, having regard to s. 209 of the Procedure Code, the rate of interest after plaint is in the discretion of the Court.

It was, however, suggested during the argument that this case from the first should have been tried in accordance with the law laid down in the Transfer of Property Act (ss. 86 to 88) ; and that this being a suit for sale of the mortgaged property, the Court, under s. 86, was bound to make a decree ordering that an account be taken of what would be due to the plaintiff for principal and interest on the mortgage, and for his costs of suit on a day within six months from the date of declaring in Court the amount so due ; and also ordering that in default of the defendant paying as therein mentioned, the mortgaged property, or a sufficient part of it, should be sold, and that the proceeds of sale should be paid into Court, and be applied in payment of what should be found due to the plaintiff ; the balance being paid to the defendant or any other person entitled to receive the same.

It seems to me, however, that as the plaintiff has brought the present suit in accordance with the old procedure before the Transfer of

(1) 23 W.R. 309. (2) 11 W.R. 455. (3) 15 W.R. 396. (4) 9 C. 309 (314).
(5) 3 B. 202. (6) 3 M. 125. (7) 7 I.A. 196=3 A. 91.

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Property Act was passed, without any objection being taken to that course by the other side; and as the Court below [580] has dealt with the case upon that footing, and has given the plaintiff a decree for the immediate payment of the amount of the debt and interest; and as moreover both parties are still content with the case being dealt with on that footing (subject of course to the question of the rate of interest), we ought not now to change the whole nature of the suit, and send the case back to the first Court to be tried upon a different principle.

Indeed this being a reference to a Full Bench on regular appeal, our duty, I consider, is simply confined to answering the question put to us, and when our answer has been given, the Court of appeal will have to give the final decree.

I think, therefore, it is sufficient to say that the lower Court was not bound to give interest at the rate agreed upon in the mortgage-deed, but was at liberty to give any lower rate of interest it thought proper.

T. A. P.

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12 C. 580 (F.B.).

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Cunningham, Mr. Justice Prinsep, Mr. Justice Wilson, and Mr. Justice Trevelyan.

BROJO BEHARI MITTER (*Plaintiff*) *v.* KEDAR NATH MOZUMDAR (*Defendant*).* [23rd March, 1886.]

Res-judicata—Civil Procedure Code (*Act XIV of* 1882), *s.* 13—*Pro-forma defendant.*

A brought a suit against *B*, claiming certain property as tenant of *C*, who was also made a defendant in the suit; the suit was on the merits decided in favour of *B*.

C, then brought a suit against *B* for possession of the same property; *held*, that such suit was not barred by s. 13 of the Civil Procedure Code.

[Diss.. 15 M. 264 (265); F., 13 C. 352 (357) (F.B.); 6 C.P.L.R. 87 (89); 1 A.L.J. 363 (366)=27 A. 58=24 A.W.N. 162; Appl., 25 B. 74 (77); R., 23 C. 693 (697); 5 C.W.N. 421 (423); U.B.R. (1907) 2nd Qr, C.P.C. 5 (7).]

REFERENCE to a Full Bench made by Mr. Justice Prinsep and Mr. Justice Trevelyan.

In 1880 one Uma Churn Bagdi, claiming to be entitled to possession of a certain tank as tenant of one Brojo Behari Mitter and others, brought a suit to recover possession thereof against Kedar Nath Mozumdar, and Brojo Behari as a *pro-forma* defendant.

[581] Brojo Behari appeared by a separate pleader giving evidence in support of the plaintiff's case. By the decree in that suit Uma Churn Bagdi's claim, so far as it related to the share alleged to be held by him as tenant of Brojo Behari Mitter, was dismissed, and it was declared that Brojo Behari Mitter "was not to be deemed the owner of any portion of the pond," and that Kedar Nath Mozumdar "was to be deemed the owner of the share" claimed by Uma Churn Bagdi.

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* Full Bench Reference on Special Appeal No. 698 of 1885, decided by Babu Bhubun Chunder Mookerji, Second Sub-Judge of Hooghly, dated 15th January 1885, modifying the decision of Babu Behari Lall Mookerji, Munsif of Haripal, dated the 17th March 1884.

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In 1883, after the termination of the suit above mentioned, Brojo Behari Mitter brought a suit against Kedar Nath Mozumdar, seeking to recover possession of the identical share which, in the previous suit, Uma Churn Bagdi claimed to hold under him.

Both the Lower Courts held that this suit (as far as it related to the tank) was barred under s. 13 of the Code of Civil Procedure, relying upon the case of *Bissorup Gossami* v. *Gora Chand Gossami* (1).

On appeal by the plaintiff to the High Court, Mr. Justice Prinsep and Mr. Justice Trevelyan, doubting the correctness of the decision above mentioned, as it conflicted with the decisions in the cases of *Price* v. *Khelat Chunder Ghose* (2), and *Nobin Chunder Mozumdar* v. *Mukta Sundari Dabi* (3), referred to a Full Bench the question whether the suit was barred by s. 13 of the Code of Civil Procedure.

Baboo *Karuna Sindhu Mookerji*, for the appellant.—I contend the suit is not barred by s. 13, because (1) the suit is not between the same parties, and (2) nor between parties under whom they or any of them claim. The first suit was between Uma Churn Bagdi and Kedar Nath Mozumdar, Brojo Behari Mitter, the landlord of the plaintiff, being a *pro-forma* defendant; and the present suit is between Brojo Behari Mitter and Kedar Nath Mozumdar.

The case of *Bissorup Gossami* v. *Gora Chand Gossami* (1) was decided on the authority of *Gobind Chunder Koondoo* v. [582] *Taruk Chunder Bose* (4), but that case was between the same parties, and is therefore no authority for the decision of *Bissorup Gossami* v. *Gora Chand Gossami*. Special Appeal 1068 of 1884, decided by Field and O'Kinealy, JJ., on the 26th June 1885, is on all fours with the present case. There the Court did not follow *Bissorup Gossami* v. *Gora Chand Gossami*, on the ground that the suit was not between the same parties. See also the case of *Price* v. *Khelat Chunder Ghose* (2); *Nobin Chunder Mozumdar* v. *Mookta Soondare Dabee* (3); *Kalee Kinkur Bachusputty* v. *Kristo Mungul Bhattacharjee* (5); also *Obhoy Churn Nundee* v. *Bhoobun Mohun Mozumdar* (6).

Baboo *Troylokho Nath Mitter*, for the respondent.—*Bissorup Gossami* v. *Gora Chand Gossami* (1) is exactly in point. There the *pro-forma* defendant gave evidence in favour of the plaintiff. The cases of *Shadal Khan* v. *Aminullah Khan* (7); *Gobind Chund Koondoo* v. *Taruk Chunder Bose* (4); *Deokee Nundun Roy* v. *Kalee Pershad* (8) are in my favour.

The opinion of the Full Bench was as follows:—

OPINION.

In our opinion this suit is not barred under s. 13 of the Code of Civil Procedure. No doubt in the former suit the matter now in issue was also in issue and was formally determined, but that suit was not "between the same parties" as this suit "or between parties under whom the parties in this suit claim." The plaintiff is the landlord of the plaintiff in the former suit, and cannot be barred by the decision of that suit, which was between his tenant, a third party, because he was joined as a defendant with that party. It is sufficient to point out that the conduct of the suit was not in his hands; and if it had been abandoned by the plaintiff so as to cause it to be dismissed, it could not reasonably be held that this suit

(1) 9 C. 120.
(2) 5 B.L.R. Ap. 50=13 W.R. 461.
(3) 7 B.L.R. Ap. 38=15 W.R. 309.
(4) 3 C. 146.
(5) 11 W.R. 462.
(6) 12 W.R. 524.
(7) 4 A. 92.
(8) 8 W.R. 366.

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was barred. If this were possible, a person in the position of the plaintiff would be helpless, for he would not be able to re-open the case or to contest the order passed by appeal to a higher Court.

[583] The judgment of the Full Bench in the case of *Gobind Chund Koondoo* v. *Taruck Chunder Bose* (1), is not in point.

The suit must therefore be remanded to the lower appellate Court for trial on its merits. Costs to abide the result.

T. A. P.

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12 C. 583 (F.B.).

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Cunningham, Mr. Justice Wilson, Mr. Justice Prinsep, and Mr. Justice Trevelyan.

BHOBO SUNDARI DEBI (*Defendant*) *v.* RAKHAL CHUNDER BOSE (*Plaintiff*).* [23rd March, 1886.]

Mortgage—Foreclosure, Suit for—Mortgage by conditional sale—Regulation XVII of 1806—*Transfer of Property Act* (*IV of* 1882), *s.* 2 (*cl. c.*), *s.* 86—*Procedure.*

Where a suit is brought, after the date of the Transfer of Property Act, for the foreclosure of a mortgage dated previous to the Act, the procedure to be followed is that given by the Transfer of Property Act; the procedure of Regulation XVII of 1806 not being saved by s. 2 (cl. c.) of Act IV of 1882.

Gunga Sahai v. *Kishen Sahai* (2) approved.

Per WILSON, J.—It is a general rule in construing Statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation. There is nothing in the Transfer of Property Act from which it can be beyond reasonable doubt concluded that the Legislature intended to depart from this settled principle of legislation.

Per TREVELYAN, J.—There is a clear distinction between "relief" and the mode of procedure for obtaining such relief. The "relief" remains unaffected by a change of procedure. The "rights and liabilities" of a mortgagor and mortgagee, and the "relief" in respect of such rights and liabilities, are the same under Act IV of 1882 as they were before. A different procedure for enforcing such rights and obtaining such relief has however been adopted by the Transfer of Property Act.

[Expl., 11 A. 367 (371); R., 10 M. 129 (131); 14 C. 599 (602); 13 A. 432 (F.B.); 7 Ind. Cal. 11; D., 14 C. 451 (455); 15 C. 357 (360).]

REFERENCE to a Full Bench made by Mr. Justice Prinsep and Mr. Justice Trevelyan. The facts were as follows:—

The plaintiff filed on the 18th December 1883 a suit on a mortgage bond, which was in form a mortgage by conditional sale, [584] dated 4th September 1876, seeking for foreclosure of the defendant's interest in the property mortgaged.

No proceedings were taken under Regulation XVII of 1806, and the defendant at the hearing contended that, as the mortgage had been executed before the date on which the Transfer of Property Act came into force, the procedure provided by that Act was inapplicable; and that Regulation XVII of 1806 not having been repealed at the time of the execution of the

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*Full Bench Reference on Regular Appeal No. 4 of 1885, decided by the Subordinate Judge of Kulna, dated 11th September 1884.

(1) 3 C. 146. (2) 6 A. 262.

mortgage, the plaintiff could only proceed in accordance with the provisions of that Regulation. 1886 MARCH 23.

The lower Court on the authority of the case of *Ganga Sahai* v. *Kishen Sahai* (1) overruled this objection. FULL BENCH.

The defendant appealed to the High Court and drew the attention of the Court to the decision of *Pergash Koer* v. *Mahabir Pershad Narain Singh* (2). The learned Judges abovementioned, considering the question raised to be one of great importance, referred to a Full Bench the question whether the provisions contained in Regulation XVII of 1806 or the provisions contained in the Transfer of Property Act applied to the case. 12 C. 583 (F.B.).

Baboo *Rash Behari Ghose* (with him Baboo *Chunder Kant Sen*), for the appellant.—Section 8 of the Regulation was in force when the mortgage was executed ; it was subsequently repealed by the Transfer of Property Act, but s. 2 (*cl. c.*) saves all rights and liabilities arising out of a legal relation constituted before Act IV of 1882 came into force. Under the Regulation the first thing to be done was to demand payment—*Gonesh Chunder Pal* v. *Shoda Nund Surma* (3). The Allahabad High Court says that this is a question of procedure, and that the Transfer of Property Act regulates the way in which such rights should be enforced. I submit Act IV of 1882 is a change in the substance of the law as laid down by the Regulation.

[CUNNINGHAM, J.—You might put your case as being saved by s. 2 cl. (*b*). TREVELYAN, J.—The Transfer of Property Act anticipates the remedy, is that not a question of procedure? A rule of **[585]** the Court postponing a remedy is a question of procedure, so why not this.] Besides the demand required, the Regulation also directs that a copy of the application for foreclosure should be served on the mortgagor—*Bank of Hindustan, China, &c.* v. *Shoroshibala Debee* (4).

[WILSON, J.—The Act speaks of something more than a " right or liability ;" it speaks of "relief." Now is not the relief affected if one year is not given to the mortgagor in which to redeem ?] Yes, that is strongly in my favor, see the remarks made by Mitter, J., in *Pergash Koer* v. *Mahabir Pershad Narain Singh* (2).

[WILSON, J.—The judgment in *Ganga Sahai* v. *Kishen Sahai* (1) seems to be a discussion as to what would be the effect if s. 2 were not in the Act rather than a construction of the section. The effect of that case seems to be that cl. (*c*) of s. 2 is struck out of the Act altogether.] TYRRELL, J., when quoting the case of *Republic of Costa Rica* v. *Erlanger* (5) leaves out the proviso "*as to no injustice being done*," which is to be found in the report itself. The effect of s. 6 of the General Clauses Act is to save all rights of procedure existing before the repealing Act came into force. The case of *Pergash Koer* v. *Mahabir Pershad Narain Singh* (2) shows the difficulty of engrafting into the Transfer of Property Act the procedure of the Regulation. MITTER, J. in that case says that "the mortgagor cannot be deprived of any right he had under the Regulation ; the Transfer of Property Act does not enact that any notice should be served on the mortgagor, nor is the period of demand under the Act the same as is given by the Regulation; is the mortgagor to be deprived of these rights?" I submit that the procedure of the Regulation cannot be engrafted on to the Act ; as to the question whether or no an Act as a retrospective effect. See

(1) 6 A. 262. (2) 11 C. 582. (3) 2 C. 13.
(4) 2 C. 311 (320). (5) L. R. 3 Ch. D. 69.

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In the matter of Ratansi Kalianji (1); *Kimbray Draper* (2). The Transfer of Property Act was not intended to be retrospective.

Baboo *Karuna Sindhu Mukerjee*, for the respondent.—The provisions of Regulation XVII of 1806 are mere rules of [586] procedure framed for the purpose of giving the respective rights to which a mortgagor and mortgagee are entitled.

[GARTH, C.J.—If you refer to s. 60 of the Act, you will see an illustration of one of the rights referred to in s. 2 (*cl. c*). The right to redeem, s. 2 (cl. *c*), was not intended to include rights depending upon the procedure of Courts; for example, the right to serve a notice, or to serve it in a particular way. The Allahabad case supports me in my view. CUNNINGHAM, J. —In the Allahabad case OLDFIELD, J., does not put his decision on the right being a right arising between the mortgagor and mortgagee, but that it is a right arising out of legislative enactment.]

The question is whether s. 2 of the Act is a qualification of the Act or of the section only, so as to give concurrent jurisdiction in the same case. *Pergash Koer* v. *Mahabir Pershad Narain Singh* (3) merely qualifies the Allahabad case.

The following opinions were delivered by the Full Bench :—

OPINIONS.

GARTH, C.J.—I confess I entertain considerable doubt whether, as a matter of strict law, the decision of the Allahabad Court was right.

I cannot help thinking that sub-s. (*c*) of s. 2 of the Transfer of Property Act was intended to apply to such cases as that with which we are now dealing. But as the majority of the Court think differently, and as the balance of convenience would seem to be in favour of that view, I am not disposed to dissent from their decision.

WILSON, J.—The words with which we have to deal are these :— "Nothing herein contained shall be deemed to affect any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability." I am unable to agree with my learned colleagues in thinking that there is anything clear about this language. To me it appears so vague and indefinite that I cannot pretend to put any construction upon it with confidence. But on the whole I agree in the conclusion arrived at, and mainly for the following reasons. It is a general rule in construing Statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are [587] general in their operation. I do not think we ought to conclude that the Legislature in the Transfer of Property Act meant to depart from the settled principle of legislation unless that intention is shown beyond reasonable doubt. No such intention is in my judgment so shown.

Again, a Full Bench of the Allahabad Court has placed a construction upon the words in question, and I should not feel justified in differing from that decision unless I had a decided opinion adverse to it.

TREVELYAN, J. (PRINSEP, J., concurring).—The question which has been referred to us is one of importance, and it is not in our opinion free from difficulty.

A Full Bench of the Allahabad High Court has considered it in *Gunga Sahai* v. *Kishen Sahai* (4), and in at least one case before a Division

(1) 2 B. 148. (2) L. R. 3 Q. B. 160. (3) 11 C. 582. (4) 6 A. 262.

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Bench of this Court—*Pergash Koer* v. *Mahabir Pershad Narain Singh* (1) —this express question has been raised and decided. After hearing this case argued, I do not think that the decision in the case of *Pergash Koer* v. *Mahabir Pershad Narain Singh* is correct.

In my opinion we must select either the Regulation or the Act as having application to this case. The procedure in the one and in the other must be respectively taken in its entirety. If the repeal of the regulation and the introduction of the new procedure in its place can be deemed to affect the right or liability of the mortgagor, or the relief in respect of such right or liability, the Regulation still applies, and the procedure provided by it must be followed. On the other hand, if such right, liability or relief be not affected, the Transfer of Property Act applies. The question in this case depends upon the construction to be placed upon the terms of the second section of the Transfer of Property Act. After repealing, amongst other enactments, Regulation XVII of 1806, it runs as follows: "But nothing herein contained shall be deemed to affect—

(*a*) The provisions of any enactment not hereby expressly repealed;

(*b*) Any terms or incidents of any contract or constitution [588] of property which are consistent with the provisions of this Act, and are allowed by the law for the time being in force;

(*c*) Any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability."

* * * * *

Section (*c*) is the only portion of this section which has any application to the present case.

It is contended before us that, inasmuch as under the Regulation no foreclosure can be complete until the expiration of a year from the date of the notice, and as under the Transfer of Property Act, ss. 86 and 88, it is competent to the mortgagor to redeem only within six months from the date of declaration by a Court of the amount due, the right of the mortgagor, or at any rate the relief in respect of such right, is affected by the change in the law.

I am unable to give effect to this contention.

It is impossible to say whether a mortgagor will have a longer or a shorter time for redemption under the Regulation than he has under the Act. He has, of course, as of right, the time given to him by the mortgage deed. The time that the Regulation gave him beyond the time given to him by the mortgage depended in reality upon the action of the mortgagee, who could at his pleasure postpone the giving of the notice. Under the Act the further time given to the mortgagor depends partly upon the pleasure of the mortgagee, who has the whole period of 60 years within which to bring a suit, and partly upon the accidents of litigation which may shorten or prolong the period of the pendency of the suit.

There is in reality no comparison between the time during which the mortgagor can redeem under the provisions of the Regulation and that given to him by the Act.

In my opinion the provisions both of the Regulation and of the Act are provisions of procedure. The question is whether the provisions of the Regulation are saved by the Act. This question depends entirely upon the construction to be placed [589] upon the words "right"

(1) 11 C. 582.

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"liability," and "relief" in the second section of the Transfer of Property Act, and it is necessary to ascertain what, in strictness of language, is the right of the mortgagor—what is his liability, and what is the relief in respect of such right or liability.

The right of the mortgagor is to have back his property on payment of the mortgage debt. The liability of the mortgagor is to have his property sold or foreclosed. The relief in respect of the mortgagor's right is the re-conveyance or giving back of his property to him. The relief in respect of the mortgagee's right (which is equivalent to the mortgagor's liability) is the payment of the mortgage money, or, in case of non-payment, the foreclosure of the mortgagor's equity of redemption. There is, I think, a clear distinction between relief and the mode or procedure for obtaining such relief. The relief remains unaffected by the change of the procedure. The right and liabilities of the mortgagor and mortgagee, and the relief in respect of such rights and liabilities are the same under the Transfer of Property Act as they were before. A different procedure for enforcing such rights and obtaining such relief has, however, been adopted. The procedure for enforcing a right is no portion of that right, nor does it alter or affect it.

I agree with the decision of the majority of the Full Bench of the Allahabad Court, and especially approve of the remarks of Mr. Justice Oldfield with reference to the inconvenience which must result from any other decision.

In answer to the question put to us, I am of opinion that the provisions contained in the Transfer of Property Act apply to this case.

T. A. P.

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12 C. 590 (F.B.).

[590] FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Cunningham, Mr. Justice Wilson, Mr. Justice Prinsep, and Mr. Justice Trevelyan.

UDIT NARAIN SINGH (*Defendant*) *v.* HAROGOURI PROSAD (*Plaintiff*).* [23rd March, 1886.]

Limitation Act (XV *of* 1877), *sch II, arts.* 171, 171-*A*, 171-*B*—*Civil Procedure Code* (*Act XIV of* 1882), *s.* 582—*Respondent, Decease of, after appeal filed.*

The word "defendant" in art. 171-B of the Limitation Act does not include a respondent.

Section 582 of Act XIV of 1882 affects only proceedings under the Code, and does not extend the operation of any portion of the Limitation Act

[F., 10 B. 663 (665); R., 10 A. 223 (232) (F.B.); 29 M. 529 (530) = 1 M. L. T. 348 = 16 M.L.J. 475 (F.B.).]

THIS was a reference to a Full Bench by Mr. Justice Tottenham and Mr. Justice O'Kinealy as to whether the word "defendant" in art. 171 B of the Limitation Act included the word "respondent."

It appeared that subsequently to the date on which the appeal in this case was filed in the High Court, the respondent, who was the plaintiff in the Courts below, died, the date of the respondent's death being the 6th June 1884.

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* Full Bench Reference on Regular Appeal No. 230 of 1884, made by Tottenham and O'Kinealy, JJ., dated the 12th January 1886.

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On the 17th January 1885 the heirs of the deceased respondent put in a petition, praying that the appeal might abate, no application for substitution having been made within time by the appellant. On the 21st December 1885, the appellant, who had been the defendant in the Court below, put in a petition praying that the heirs of the deceased respondent might be substituted on the record in the place of the deceased. These applications came on for hearing together, and after hearing arguments on both sides, the learned Judges above mentiond referred the question arising to a Full Bench.

The referring order was as follows:—

In this appeal two counter-applications have been made to us—one by the appellant for the substitution of the heirs of the deceased respondent, and the other by the heirs for an order that the appeal abate upon the ground that the first application has not been made within sixty days from the date of the respondent's death. [591] A Division Bench of this Court has held in the case of *Soshi Bhusan Chund* v. *Grish Chunder Taluqdar* (1) that such an application must be made within sixty days of the respondent's death, upon the ground that art. 171-B of sch. II of the Limitation Act applies to the present Code of Civil Procedure, and that s. 368 must be read with s. 582, so as to make the word "defendant" in the former section include "respondent."

The Allahabad High Court appears to have taken an opposite view in the case of *Narain Das* v. *Lajja Ram* (2).

We have some doubt as to the correctness of the ruling of this Court above cited ; for it seems to us that it does not follow that because the word "defendant" in s. 368 includes "respondent," the same must be said of art. 171-B of the schedule to the Limitation Act. It is clear from the terms of art. 171 that the Legislature did not consider that the word "plaintiff" in that article included "appellant," for by the amending Act it added the words "or appellant" to the article. No corresponding amendment was made in art. 171-B which still mentions only a "defendant."

It seems to us very desirable that the point should be authoritatively decided. We accordingly refer the question to a Full Bench, whether the word "defendant" where it occurs in art. 171-B includes "respondent ?"

Baboo *Mohesh Chunder Chowdhry*, for the appellant.—I contend that this is not an application under s. 368, and that therefore art. 178 and not art. 171-B of the Limitation Act applies. Art. 171-B makes no mention of the word "respondent"; if the word "defendant" in that article had been intended to include respondent, the legislature would have expressly so stated. In drawing up art. 171 the legislature did not intend that the word "plaintiff" should include "appellant," because by Act XII of 1879 they subsequently amended art. 171 by adding the words "or appellant" to the article. No such amendment was then made to art. 171-B. The provisions of the Limitation Act being penal in their nature, must be construed strictly, and therefore without express words to that effect the word "defendant" in art. 171-B cannot be read to include "respondent." In the case of *Narain Das* v. *Lajja* [592] *Ram* (2) the Chief Justice was of opinion that when the defendant is the appellant Chapter XXI of the Code is not applicable.

The case of *Lakshmi* v. *Sri Devi* (3) lays down that such an application as the present falls under art. 178 of sch. II of the Limitation Act.

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(1) 11 C. 694. (2) 7 A. 693. (3) 9 M. 1.

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As to the principle of construction of the Limitation Act in such cases as the present, see *Ram Sunker Bhadoory* (1) The case of *Soshi Bhusan Chand* v. *Grish Chander Taluqdar* (2) is against me, but no effect has been given to the words "so far as are applicable," nor is any notice taken of the difference in the wording of arts. 171 and 171-B of the Limitation Act.

I submit that it never was intended that in s. 171-B "defendant" should include "respondent," because when by Act XII of 1879 the word "plaintiff" in art. 171 of the Limitation Act was directed to be read as including appellant, no corresponding alteration was made in s. 171-B, which only mentions a "defendant."

Baboo *Rash Behari Ghose,* for the respondent.—If the argument of the other side is correct, there is a limitation for a plaintiff adding a party, but none for an appellant. [GARTH, C.J.—In giving a meaning to deceased "plaintiff" or "appellant" is it necessary or not to give a meaning within ss. 363 or 365 of the Code ?] The words "or appellant" in art. 171 were not necessary, but were used out of excessive caution. [WILSON, J.—Arts. 171 and 171-A make mention of s. 368 of the Code, but art. 171-B, does not allude to that section.] Article 171 refers to s. 368 of the Code ; and since we find that by virtue of s. 582 the word "defendant," in s. 368 must be read as including respondent, the article of the Limitation Act which deals with applications under s. 368 to bring in the representative of a deceased defendant, must be held to provide for similar applications in regard to a deceased respondent. The case of *Soshi Bhusan Chand* v. *Grish Chander Taluqdar* (2) is strongly in my favour.

The opinion of the Full Bench was as follows :—

OPINION.

We do not think that the word "defendant" in art. 171-B of the Limitation Act includes "respondent." It has been contended before us that the effect of s. 582 [593] of the Civil Procedure Code (Act XIV of 1882) is to substitute for the word "defendant" in arts. 171-A and 171-B of the Limitation Law the words "defendant or respondent."

We do not think that this contention is sound. Section 582 provides that in Chapter XXI, so far as may be, the words "plaintiff," "defendant" and "suit" shall be held to include "an appellant," "respondent" and "an appeal," respectively, in proceedings arising out of the death, marriage or insolvency of parties to an appeal.

This provision is in form an innovation, but from the fact that the words "or appellant" were by Act XII of 1879 added to s. 171 of the Limitation Act, it appears that the Legislature considered that the words "the provisions hereinbefore contained shall apply to appeals under this chapter so far as such provisions are applicable" in s. 582 of Act X of 1877 (the Civil Procedure Code which was in force when Act XII of 1879 was passed) empowered the Court to adapt to appeals the procedure contained in Chapter XXI of the Code, and such procedure could only, we think, be so adapted by reading "appellant" for "plaintiff," "respondent" for "defendant" and "appeal" for "suit" in Chapter XXI of 1887. That being so, it is clear that the Legislature, by not adding the words "or respondent" to arts. 171-A and 171-B of the Limitation Act intended to exclude the case of a respondent from the operation of those articles. Apart from this consideration, we think it

(1) 3 C.L.R. 440. (2) 11 C. 694.

clear that s. 582 of Act XIV of 1882 was intended to affect only proceedings under the Code, and we do not think it was intended to extend the operation of any portion of the Limitation Act.

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We are supported in the conclusion, at which we have arrived, by the decision of a Full Bench of the Allahabad High Court in *Narain Dass* v. *Lajja Ram* (1) and by that of a Full Bench of the Madras High Court in *Lakshmi* v. *Sri Devi* (2).

T. A. P.

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12 C. 594.

[594] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Ghose.

AZAM BHUYAN AND OTHERS (*Plaintiffs*) v. FAIZUDDIN AHAMED AND ANOTHER (*Defendants*).* [16th February, 1886.]

Limitation Act, 1877, *sch. II, art.* 141—*Suit by person claiming immoveable property on death of Hindu or Mahomedan female.*

N, a Mahomedan, died in 1849, leaving immoveable property which was inherited by his mother *B*, his brother *E*, and his sister *A*. It was found that *A* was never in possession of the share inherited by her, and that she died in 1878, *Held*, in a suit against *E* and his son, brought in 1884 by *A*'s heirs for possession of that share, that art. 141 of the Limitation Act did not apply, and that the suit as to that share was barred.

Per WILSON, J.—Article 141 of sch. II of Act XV of 1877 refers to suits by persons claiming on the death of a Hindu or Mahomedan female, under an *independent title*, in the same way as, in respect of suits by remainder men, reversioners, and others, art. 140 does. It does not apply to the case of a person suing on the very same cause of action which accrued to a female and suing by right of being her heir.

[R. 41 P.R. 1903; 8 C.W.N. 535 (538); 5 A.L.J. 715 (717) = A.W.N. (1908) 256.]

THE plaintiffs stated that one Mahomed Nazim, owner and in possession of taluk Kripa Ram Ghose, died (it was found by the lower Courts) in 1255 or 1256 (1848 or 1849), leaving his mother Bibijan, his brother Ewaz Bhuyan, the first defendant, and his sister Abirjan, the mother of the plaintiffs, as his only heirs; that according to Mahomedan law Abirjan inherited from him four annas eight gundas odd as her share of the said taluk; that in Joisto 1285 (May-June 1878) Abirjan died, leaving the plaintiffs, her son and daughter, her only heirs; that they inherited her share, but were dispossessed by the first and second defendants in 1286 (1879). They brought the present suit for possession of the said share and for mesne profits. The suit was instituted in February 1884.

The second defendant, Faizuddin, the son of the first defendant, alone defended the suit. The only defence material to this report [595] was that, as to the property inherited by Abirjan from Mahomed Nazim, she had never been in possession, and the suit was therefore barred by lapse of time.

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* Appeal from Appellate Decree, No. 1497 of 1885, against the decree of Baboo Rajendra Kumar Bose, Second Subordinate Judge of Mymensingh, dated the 16th of April 1885, reversing the decree of Baboo Chunder Nath Ghose, Munsif of Bajitpore, dated the 4th of September 1884.

(1) 7 A. 693. (2) 9 M. 1.

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The Munsif found that as to that property Abirjan had never been in possession, but he held that art. 141, sch. II of the Limitation Act, 1877, applied to the case; that the cause of action arose on the death of Abirjan, within twelve years of suit, and finding therefore that the suit was not barred, although Abirjan might never have been in possession, gave the plaintiffs a decree.

The Subordinate Judge on appeal held that the plaintiffs were not entitled under art. 141 to count a fresh period of limitation from the date of the death of their mother Abirjan in respect of the share inherited by her from her father Mahomed Nazim, and of which she never had possession and that their suit in respect of that was barred.

The decree of the Munsif was therefore set aside, and the suit dismissed with costs.

From this decision the plaintiffs appealed.

Baboo *Jogesh Chundra Rai*, for the appellants.

Baboo *Srinath Das* and Munshi *Serajul Islam*, for the respondents.

The cases of *Srinath Kur* v. *Prosunno Kumar Ghose* (1); *Kokilmoni Dassia* v. *Manick Chandra Joardar* (2); and *Gya Persad* v. *Heet Narain* (3) were referred to during the argument.

The following judgments were delivered :—

JUDGMENT.

WILSON, J.—We think it unnecessary to call upon the respondent in this case.

The point raised is this: that assuming Abirjan to have been out of possession ever since the death of her brother in 1255 or 1256, nevertheless the present plaintiffs, her sons and others claiming as heirs, are not barred by limitation; and that contention is based upon art. 141 of the second schedule of the Limitation Act. That article must be read with art. 140, which says, that in a suit "by a remainderman, a reversioner **[596]** (other than a landlord) or a devisee for possession of immoveable property," the period of limitation is twelve years from the time "when his estate falls into possession." Then art. 141 says that in a "like suit by a Hindu or Mahomedan entitled to the possession of immoveable property on the death of a Hindu or Mahomedan female," the period of limitation is twelve years from the date when the female dies.

In the present case it has been argued that the plaintiffs acquired a right to sue with a limitation of twelve years from the time when Abirjan died. Article 140 dealing with remaindermen, reversioners, and others, deals with a class of persons who claim under a title quite independent of the particular limited estate upon which the remainder, reversion, or other estate is dependent. And we think the case is the same under art. 141, which provides for a like suit by a person entitled to possession of immoveable property on the death of a Hindu or Mahomedan female. We think it refers to persons who claim under an independent title on the death of a Hindu or Mahomedan female.

It would be straining the language and introducing a rule inconsistent with the principle of the Act, if we were to hold that this article applies to the case of a person suing on the very same cause of action which accrued to a Hindu female, and who acquires his right to sue as her heir. We think that the lower Court is right on this point.

(1) 9 C. 934. (2) 11 C. 791. (3) 9 C. 93.

The appeal is dismissed with costs. 1886

GHOSE, J.—I am of the same opinion. I desire to add that the finding of the lower appellate Court amounts to this, that ever since Mahomed Nazim's death, the possession of Mahomed Ewaz has been a possession adverse to Abirjan, plaintiffs mother, and to the plaintiffs. That being so, the article of the Limitation Act applicable to the circumstances of this case is art. 144, which runs as follows: "For possession of immoveable property or any interest therein not hereby otherwise specifically provided for, the period of limitation is twelve years from the time when the possession of the defendant becomes adverse to the plaintiff." I do not think that the present case is specially provided for in art. 141 or any other article of the Limitation Act, and it having been found as a matter of fact that the [597] possession of Mahomed Ewaz became adverse to Abirjan so soon as Mahomed Nazim died, I should say that the plaintiffs are clearly barred.

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J. V. W. *Appeal dismissed.*

12 C. 597.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

PRANGOUR MOZOOMDAR (*Plaintiff*) v. HIMANTA KUMARI DEBYA AND OTHERS (*Defendants*).* [22nd January, 1886.]

Sale in execution of decree for arrears of rent—Suit to set aside sale—Separate suit—Effect of sale before confirmation—Second sale for arrears of rent.

The plaintiff and the defendants *C* and *D* were the co-owners of a portion of a shikmi taluk in the 10 annas share of a zemindari belonging to the defendant *A*. *A* having succeeded in enhancing the rent of the tenure obtained a decree for arrears of rent at the enhanced rate which she proceeded to execute in 1880. In 1881 she obtained another decree for arrears of rent of a subsequent period, in execution of which the tenure was put up to auction and sold for Rs. 15,000 on 20th July 1881, *A* herself being the purchaser. Before this sale was confirmed the tenure was on 20th September 1881 again put up for sale in execution of the first decree, and was purchased by *A* for Rs. 10. The plaintiff and *C* and *D* applied to have both sales set aside on the ground of irregularity. The application as regarded the sale of 20th September 1881 was rejected on 30th December 1881, and this order was confirmed by the High Court on 14th August 1882, and (on review) 21st March 1883. Meanwhile the sale of the 20th July 1881 was set aside by the order of the Subordinate Judge on 19th June 1882. In a suit against *A*, *B* (the agent of *A*) *C*, and *D*, brought on the 20th March 1884, in which the plaintiff prayed that the sale of 20th September 1881 "be declared ineffectual, and be set aside, and that the plaintiff do recover possession of the property:" *Held*, that the suit being not one to set aside the sale on the ground of fraud or anything connected with the sale itself, but on account of the setting aside of the first sale which took place long after the second sale had been confirmed, and when no execution proceedings were pending in which it was possible for the plaintiff to raise the question, the suit would lie. *Sharoda Charan Chackrabati* v. *Mahomed Isuf Meah* (1) distinguished.

Held, also, that the first sale, not having been set aside at the time of the second sale, was at that time, although it had not been confirmed a good and [598] effectual sale to pass the property as against the plaintiff and *C* and *D*, so that there was nothing left to pass under the second sale. In the interval between the sale and the confirmation of sale, there is not merely a contract for sale,

*Appeal from Original Decree No. 294 of 1885, against the decree of Baboo Rajendra Kumar Bose, Rai Bahadur, Subordinate Judge of Mymensingh, dated the 22nd of December 1884.

(1) 11 C. 376.

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but an inchoate transfer of title which only requires confirmation to perfect it; a sale actually takes place which, if not made absolute, must be set aside. *Sharoda Prosad Mullick* v. *Luchmiput Singh Doogur* (1) cited.

Where a tenure has once been sold for its own arrears, it cannot be again put up to sale for the arrears due on account of a previous period. *Mussamut Latifun* v. *Sheikh Mean Jan* (2) followed.

[Appr., 17 B. 375 (383); R., 2 C.W.N. 589 (591); 15 C. 546 (554).]

THIS was a suit to set aside a sale in execution, and to recover the property sold from the auction-purchaser.

The plaintiff and Gouranga Soondar Roy and Brojo Soondari Dossee, defendants Nos. 3 and 4, were the owners of a portion of a shikmi taluk situated within the 10 annas zemindari of pergunnah Pookhuria, which is the property of Rani Himanta Kumari Debya, defendant No. 1. Of the rest, 4 annas of the shikmi taluk was situated within the zemindari of Hem Chunder Chowdhuri and the other 2 annas within that of Rani Sakhi Debya.

Defendant No. 1, having succeeded in enhancing the rent of the 10 annas shikmi taluk from Rs. 1,360 to Rs. 5,062, proceeded in 1880 to execute a decree for arrears of rent at the enhanced rate.

In the following year she proceeded to execute another decree for arrears of rent on account of a subsequent period. In execution of this latter decree, the tenure was put up to auction and sold for Rs. 15,000 on 20th July 1881, defendant No. 1 being herself the auction-purchaser. Before this sale was confirmed, the tenure was again, on 20th September 1881, put up to sale in execution of the first decree, and was purchased by defendant No. 1 for the nominal sum of Rs. 10. The judgment-debtors applied to have both sales set aside on the ground of irregularity. As regards the second sale of 20th September, the application was rejected on 30th December 1881, and this order of the Subordinate Judge was confirmed by this Court on 14th August 1882 and (on review) on 21st March 1883. Meanwhile the first sale was set aside by the order of the Subordinate Judge, dated 19th June 1882.

[599] The present suit was instituted on 20th March 1884 to set aside the second sale on the ground of fraud. It was alleged that defendant No. 1 had agreed to a postponement of the sale, but that her agent, Horendro Coomar Bose, defendant No. 2, had fraudulently caused the sale to be held notwithstanding. There were other objections raised to the sale which are not material to this report.

The lower Court found that there was no fraud, and that the plaintiff's suit was barred by limitation.

From this decision the plaintiff appealed to the High Court.

The *Advocate-General* (Mr. *Paul*), Baboo *Rashbehari Ghose*, and Baboo *Soshi Bhusan Dutt*, for the appellant.

Mr. *Bell*, Baboo *Srinath Dass*, and Baboo *Grija Shunkur Mozoomdar*, for the respondents.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) after stating the facts as above, proceeded as follows :—

JUDGMENT.

If the suit be regarded as one for setting aside the sale, there can be no doubt that it is barred by art. 12 of the Limitation Act. The lower Court was right in finding that there was no fraud on the part of the

(1) 14 M.I.A. 529=10 B.L.R. 214. (2) 6 W.R. 112.

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principal defendants. Defendant No. 1, in the letter relied on by the plaintiff, agreed to postpone the sale for one month, on the condition that the property should remain under attachment, and that no fresh sale-proclamation should be necessary. The plaintiff applied to the Court for two months' time, and said nothing in his application as to the sale-proclamation. Defendant No. 2 accordingly refused to consent to the postponement on behalf of his mistress defendant No. 1. We fail to see any fraud in this conduct. It was not open to defendant No. 2 to consent to the postponement on terms other than those agreed to by defendant No. 1, and if the plaintiff chose to vary those terms, there was no fraud in their rejection. On the ground of fraud, then, we think the sale could not have been set aside even if the suit had been brought in time.

But it is contended by the learned Advocate-General that the present suit may be regarded not only as brought to set aside the sale, but also for the purpose of declaring that sale to be a nullity, and in this latter aspect it is not barred by limitation.

[600] In the plaint it is prayed that the auction-sale *be declared ineffectual* and be set aside, and that the plaintiff do recover possession of the property; and in the body of the plaint it is urged that, inasmuch as the property had already been sold on 20th July for Rs. 15,000, there was nothing left to sell on 20th September, and that that was the reason why it fetched the nominal price of Rs. 10.

The contention of the learned Advocate-General, therefore, is that, although the first sale had not been confirmed, it was virtually subsisting at the time of the second sale ; and that thus there was nothing to sell at the time of the second sale beyond the contingency of the first sale being set aside, and that such a contingency could not be, and was not sold.

In reply to this argument Mr. Bell contends, first, that following the decision of this Court in the case of *Sharoda Charan Chakrabati* v. *Mahomed Isuf Meah* (1), the suit is barred by s. 244 of the Code ; and secondly, that both sales being for a charge on the property in the shape of rent, the second sale was a good and valid sale, notwithstanding the subsistence of the first sale.

In answer to this the Advocate-General contends that s. 244 of the Code merely relates to questions arising before execution is taken out, and not to matters treated of in any subsequent sections of the Code. However that may be, we are not prepared in the present case to follow the decision cited by Mr. Bell, and that for this reason. Without expressing any opinion as to the correctness of that decision (to which one of us was a party), we think that the circumstances of the present case may de distinguished. In the aspect in which the suit is now being regarded, it is not a suit to set aside the sale on account of fraud or anything done in connection with the sale itself, but on account of something that took place long after. The first sale was set aside six months after the second sale had been confirmed and no execution proceedings (so far as we are aware) were then pending. It was impossible, therefore, for the plaintiff to raise this question in the execution proceedings, and his only remedy was by means of a separate suit.

[601] On the merits we are of opinion that the first sale, not having been set aside at the time of the second sale, was at that time a good and effectual sale to pass the property as against the judgment-debtor, so that there was nothing left to pass under the second sale. It is

(1) 11 C. 376.

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true that in the Full Bench case of *Sham Chand Kundu* v. *Brojo Nath Pal Chowdhuri* (1) Chief Justice Couch expressed the opinion that pending confirmation of the sale there is nothing more than a contract for sale. The title to the property is no doubt incomplete until the sale is confirmed, but on confirmation it dates back from the time of sale. We think, therefore, that there is more than a contract for sale in the interval between the sale and confirmation; there is in our opinion an inchoate transfer of title, which only requires to be perfected by confirmation. The sale is in fact complete, the consideration has been paid, and if not confirmed, the sale must be *set aside.* In other words, the whole wording of the Act goes to show, not that pending confirmation there is merely a contract for sale, but that a sale does actually take place, which must be set aside if not made absolute.

The case of *Sharoda Prosad Mullick* v. *Luchmiput Singh Doogur* (2) is in some respects similar to the present. In that case certain property had been sold in execution, but possession had been withheld by the Court until the auction-purchaser (who was also the decree-holder) furnished security for the estate which she represented. Meanwhile, the same property was sold again to another judgment-creditor. The suit was brought by the first auction-purchaser to assert her title under the first judgment-sale; and in the course of their judgment their Lordships of the Privy Council say: "The omission to give security could not in any way affect the title which had vested in the plaintiff by the previous sale. * * * * Their Lordships also consider that the Zillah Judge was in error in granting the order for the second sale under the respondent's attachment, and confirming the purchase by him when the sale of the same lands had already taken place under Muktakashi Dabee's attachment, and the purchase by her under that sale had been confirmed and had not [602] been set aside. Their Lordships cannot find that this course was in accordance with the Code of Procedure. The title had vested in Mutakashi Dabee by the sale under her attachment, and *until it was set aside there was nothing upon which the second sale could operate.* This course inevitably created a conflict between the two decree-holders who became purchasers under the judicial sales under their respective attachments, and led to the erroneous order of the 19th of June 1886 which ordered the possession to be given to the respondent. Such a course also is in any case contrary to the interests of debtors as well as creditors, as it is obvious that when property is offered at a second sale, with the cloud cast on the title by the subsisting first sale, it would be likely to go for an inadequate price." Their Lordships accordingly held that the first sale was valid, and gave the plaintiff a decree.

It is true that in that case the first sale had been confirmed, but we think this was not a material element in the decision of the case. Their Lordships' decision appears to be based on the ground that, so long as the prior sale was not set aside, it was a subsisting sale, and there was nothing left on which the subsequent sale could operate. The concluding remarks which furnish one of the reasons for coming to this decision are particularly applicable to the present case. At the first sale the property fetched Rs. 15,000, while at the second sale, no doubt in consequence of the cloud cast on the title by the first sale, it was sold for the nominal sum of Rs. 10.

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(1) 12 B.L.R. 484.

(2) 14 M.I.A. 529 = 10 B.L.R. 214.

As regards Mr. Bell's argument that the sale was in each case on account of a charge on the property, the facts of this case are very similar to those in *Mussummat Latifun* v. *Sheikh Mea Jan* (1) in which it was held that when a holding has once been sold for its own arrears, it cannot be again put up to sale for the arrears due on account of a previous period. That was exactly what took place in the present case. The second sale was in execution of a decree for arrears of rent for a period prior to that for the arrears of which the tenure had already been sold. **[603]** We think, therefore, that on the authority of the case last cited, as well as on the other grounds stated by us, the second sale should be held to be null and void.

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We accordingly reverse the decision of the lower Court, and direct that a decree be entered for the plaintiff declaring the sale of 20th September 1881 to be null and void, and restoring the plaintiff to possession of the property. The plaintiff will also have his costs in both Courts.

J. V. W. *Appeal allowed.*

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12 C. 603.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

RAKHAL CHANDRA RAI CHOWDHURI AND OTHERS (*Plaintiffs*) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (*Defendant*).*
[26th January, 1886.]

Public Demands Recovery Act (*Bengal Act VII of* 1880), *s.* 6 (*b*) *and s.* 10—*Suit to set aside certificate—Mode of Service of notice.*

Although no special provision is made in Bengal Act VII of 1880 as to the manner of service of the notice prescribed in s. 10, it is not to be presumed that the Legislature intended that service of a less effectual character should be sufficient, than it has expressly provided for similar processes under the Civil Procedure Code. Before, therefore, a service under Bengal Act VII of 1880 can be effected by posting it on the residence of the party on whom it is wished to serve it, it must be shown that some attempt has been made to effect personal service, and that such personal service for reasons stated could not be made.

In such a case when the fact of service of notice is denied the onus is on the party alleging service to prove it.

[F., 11 Ind. Cas. 472 ; R., 20 A. 294 (296) ; 34 C. 787 (798) = 11 C. W. N. 745.]

THIS suit was brought to recover Rs. 297-1 from the defendant by cancelling a certificate made by the Collector of Backergunge against the plaintiffs, under Bengal Act VII of 1880, in execution of which the plaintiffs' house was attached, and advertised for sale, and he (*sic*·plaintiff No. 1) was compelled to say the amount of the certificate.

The suit was instituted on 21st March, 1883. The only material defence was that the suit was barred by limitation, as it had not been brought within one year of the date of service of notice under s. 10 of Bengal Act VII of 1880.

[604] The lower Courts found that the notice had been on 17th February, 1882, merely posted on the plaintiffs' house, and laid the onus

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*Appeal from Appellate Decree No. 610 of 1885, against the decree of Baboo Beni Madhab Mitter, Subordinate Judge of Backergunge, dated the 30th of December, 1884, affirming the decree of Baboo Chandra Nath Ghose, Munsif of Barrisal, dated the 28th of September, 1883.

(1) 6 W. R. 112.

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on the plaintiffs to show if they could that no notice had been served; and on their failing to do so, held that there had been a sufficient service of the notice, and the suit not having been brought within a year from the date of service was barred.

From this decision the plaintiffs appealed.

Babu *Durga Mohun Dass*, for the appellant.

Babu *Annoda Pershad Banerji*, for the respondent.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

JUDGMENT.

This is a suit brought to recover money realised under a certificate under Bengal Act VII of 1880.

It has been dismissed by both Courts as barred by limitation because it has not been instituted within one year of the date of the service of notice required under s. 10 of that Act. The lower appellate Court has held that service by means of posting the notice on the dwelling-house of the plaintiff No. 1 is sufficient, and that this is proved by the evidence of the peon examined.

Bengal Act VII of 1880 makes no special provision as to the manner of service. We cannot, however, suppose that the Legislature could have intended that service of a less effective character should be sufficient than it has expressly prescribed for similar processes under the Code of Civil Procedure. We are of opinion that, before a service of the description found in this case can be accepted, it must be shown that some attempt has been made to effect personal service, and that such personal service for some reasons stated could not be made. In this case we cannot find any evidence to this effect. It would seem rather that the person deputed to serve the notice was satisfied with fixing it to the door of the premises occupied by one of the judgment-debtors. Having regard to the terms of the Code of Civil Procedure with respect to service of similar processes, and to the stringent character of proceedings under the Certificate Act, we are unable to accept the finding of the lower Court that proper service has been made, **[605]** and therefore the suit should not have been dismissed as barred by cl. (*b*) of s. 6 of the said Bengal Act VII of 1880.

We would further observe that the lower appellate Court has pleaced on the appellant-plaintiff the onus of proving that no service was effected. It was sufficient for him to deny any such service so as to put upon defendant the burden of proving that proper service has been made at a time so as to bar the suit.

The case must be returned to the lower appellate Court to be tried on the other points raised by the plaintiffs, who will get the costs of this appeal. The other costs of the suit will abide the result.

J.V.W. *Appeal allowed.*

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12 C. 605.

12 C. 605.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

SHIBENDRA NARAIN CHOWDHURI (*Judgment-Debtor*) v. KINOO RAM DASS AND ANOTHER (*Auction-Purchasers*).* [19th January, 1886.]

Appeal—Dismissal of appeal for default—Pleader present but unprepared to go on with case—Civil Procedure Code, 1882, *ss.* 556, 558.

Where when an appeal is called on the pleader is not absent, but is unprepared to go on with the case, the dismissal is a dismissal for default within s. 556 of Act XIV of 1882, and the appeal can therefore be re-admitted under s. 558, *Buldeo Misser* v. *Ahmed Hossein* (1) followed.

[**Diss.**, 16 B. 23 (26); 20 A. 294 (296) = 18 A. W. N. 35; 17 C. P. L. R. 1 (2); **Cons.**, 23 C. 991 (995); **R.**, U. B. R. (1897-1901) Vol. II, 240 (242); 5 C. L. J. 247 (F.B.) = 11 C. W. N. 329 = 2 M. L. T. 123 = 34 C. 403; 6 Ind. Cas. 851 (853) = 3 S. L. R. 208 (212); **D.**, 27 C. 529 (531).]

THIS was an appeal which had been re-admitted after being struck off on a former occasion, because the pleader, although present, was not prepared to proceed with the appeal.

Mr. *Evans*, and Baboo *Shashi Bhusan Dutt*, for the appellant.

Mr. *Woodroffe*, and Baboo *Jasoda Nandan Paramanick*, for the respondents.

A preliminary objection was taken to the hearing of the appeal that it had been improperly re-admitted under s. 558 of the Code, inasmuch as the pleader not having been absent, the order dismissing it was not one under s. 556.

[606] On this point the judgment of the Court (MCDONELL and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

A preliminary objection was taken to the hearing of this appeal on the ground that it should not have been re-admitted under s. 558. It is contended that as the pleader in this case was present, though not prepared to go on with it, the appeal was not dismissed under s. 556; and therefore it could not be re-admitted under s. 558. A similar case is that of *Buldeo Misser* v. *Ahmed Hossein* (1) in which we find that under similar circumstances the appeal was held to have been dismissed for default. And following that ruling, we think this case was properly re-admitted under s. 558.

[The appeal was dismissed on the facts which are immaterial to this report.]

J. V. W. *Objection overruled.*

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* Appeal from Order No. 209 of 1885, against the order of Baboo Jugobundhu Ganguli, Subordinate Judge of Dinagepore, dated the 4th of July 1885.

(1) 15 W.R. 143.

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APPELLATE CIVIL.

12 C. 606.

12 C. 606.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Ghose.

SRINATH BHATTACHARJI (*Defendant No.* 2) *v.* RAM RATAN DE (*Plaintiff*).* [19th February, 1886.]

Bengal Act, VIII of 1869, *s.* 27—*Limitation—Suit for possession—Question of title.*

Where the plaintiff alleged that he was the holder of a jote under the defendant by whom he had been forcibly dispossessed and sued for a declaration of his title and for restoration to possession ; and the defendant did not question the plaintiff's tenure, nor his original title, but denied the forcible dispossession, and alleged that the plaintiff had relinquished the land: *Held*, that the suit was not one to try a question of title, but was governed by the one year's period of limitation prescribed by s. 27, Bengal Act VIII of 1869.

Jonardun Acharjee v. *Haradhun Acharjee* (1) *and Imam Buksh Mondul* v. *Momin Mondul* (2) approved.

[R., 17 C. 926 (928) ; D., 14 C. 624 (627).]

THE plaint in this case stated that the plaintiff was the owner [607] under zerait right of the land in suit ; and had for a long time owned and held part of it under a jote right, by residing thereon and enjoying the profits of the crops thereof, and the remaining part by letting out the same in baya jote and receiving and enjoying it on payment of rent to the landlords ; that while he was thus in possession in Sraban and Pous 1288 (July-August 1881 and December 1881—January 1882) the first and second defendants, with the assistance of their servants the other defendants, illegally, forcibly and without consent of the plaintiff, cut and carried away the paddy crop ; from time to time took away the straw, pulse, betel-nuts, plantains, bamboos and jack fruits, &c., from the land; and in the month of Kartick 1289 (October-November 1882) had sowed khasarie seeds on a portion of the land, and had thus dispossessed the plaintiff from the land in suit, and had been since wrongfully and without any right holding and enjoying the said lands, of which they had refused to give up possession. The plaintiff prayed for a declaration of his jote right, and for possession. The suit was brought on 15th August 1883.

The second defendant, who alone defended the suit, denied the wrongful dispossession, alleged that the plaintiff had relinquished the lands, and raised, among others, the plea (the only one material to this report) that the suit was barred under Bengal Act VIII of 1869 as not having been brought within one year after the alleged dispossession.

The Munsiff found that the plaintiff had not relinquished the land, but had been forcibly dispossessed by the defendants ; and that the suit being one for recovery of possession by declaration of the plaintiff's title, was not barred by the one year's limitation prescribed in the Rent Act. He, therefore, gave the plaintiff a decree, an appeal from which was dismissed by the Subordinate Judge.

The second defendant appealed to the High Court.

Baboo *Jogesh Chandra Rai*, for the appellant.

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* Appeal from Appellate Decree No. 1590 of 1885, against the decree of Baboo Parbati Coomar Mitter, Subordinate Judge of Mymensingh, dated the 15th of April, 1885, affirming the decree of Baboo Krishna Pershad Chowdhury, Rai Bahadur, Munsiff of Hosseinpore, dated the 28th of July, 1884.

(1) B.L.R. Sup. Vol. 1020=9 W.R. 513. (2) 9 C. 280.

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12 C. 606.

Baboo *Akhil Chandra Sen*, for the respondent.

The judgment of the Court (WILSON and GHOSE, JJ.) was as follows :—

JUDGMENT.

[608] We are unable to agree in the view which has been taken in the lower Courts on the question of Limitation. It has no doubt repeatedly been held that, where the suit is one to establish title, the case does not fall within s. 27 of the Rent Act. On the other hand, we think that the Full Bench case of *Jonardun Acharjee* v. *Haradhun Acharjee* (1) and the case of *Imam Buksh Mundal* v. *Momin Mondul* (2) decided by Garth, C.J., and Mr. Justice Bose, are authorities to this effect, that where the existence of the tenure is not disputed, and the plaintiff's original title as tenant is not and never has been questioned, and where there is no question of title either raised in the suit or raised before the suit, except whether on the one hand the plaintiff has been dispossessed by force, or on the other hand his tenure has come to an end by his having relinquished it, the suit is not a suit to try title within the meaning of the rule to which we have referred, but was formerly governed by s. 23 of Act X of 1859, and is now governed by s. 27 of Bengal Act VIII of 1869. The appeal will therefore prevail, and the decrees of the lower Courts will be set aside with costs in all the Courts.

J. V. W. *Appeal allowed.*

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12 C. 608.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Ghose.

TARINI DASS BANDYOPADHYA AND ANOTHER (*Judgment-debtors*) *v.* BISHTOO LAL MUKHOPADAYA (*Decree-holder*).* [11th March, 1886.]

Limitation Act, 1877, *sch. II, art* 179, *cl.* 4—*Application for execution of decree—Step-in-aid of execution--Application to record certificate of payment by judgment-debtor in part satisfaction.*

An application by a judgment-creditor to bring an execution proceeding on the file and to record his certificate of the payment of a sum of money by the judgment-debtor is an application to take some step-in-aid of execution of the decree within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act.

[F. 9 A. 9 (10) = 6 A.W.N. 292; 20 C. 696 (698); 8 O. C. 161 (165); Appr., 12 A. 399 (F.B.); R., 32 A. 257 (260) = 7 A.L.J. 251 = 5 Ind. Cas. 295; 10 C.L.J. 467 = 3 Ind. Cas. 391.]

THIS was an application for execution of a decree, dated 25th March 1880. The application was made on the 11th March [609] 1885, and execution of the decree was barred, unless the time could be counted from an application made on the 29th April 1882 by the decree-holder to have satisfaction entered for Rs. 100 paid to him by the judgment-debtor in part satisfaction of the decree. That application was made in tabular form, and the prayer made was that his execution case, which had been struck off, should be restored, and Rs. 100 be credited to the decree, and that the petition be placed with the record. The only question was

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* Appeal from Order No 387 of 1885, against the order of J. Crawford, Esq., Judge of Nuddea, dated the 19th of August 1885, reversing the order of Baboo Satya Charan Ganguli, Munsif of Kishnagore, dated the 26th of June 1885.

(1) B. L. R. Sup. Vol. 1020 = 9 W. R. 513. (2) 9 C. 280.

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whether this was an application to take some step-in-aid of execution within the meaning of the Limitation Act.

The Munsif held it was not, and dismissed the application for execution as out of time. The Judge on appeal reversed that order, and allowed execution to proceed, holding that the applicant was entitled to count the three years period of time from the date of the application of 29th April 1882, which he held was a step-in-aid of execution of the decree.

The judgment-debtors appealed to the High Court.

Baboo *Dwarka Nath Chuckerbati*, for the appellants.

Babu *Guru Das Banerjee*, for the respondent.

The judgment of the Court (CUNNINGHAM and GHOSE, JJ.) was as follows:—

JUDGMENT.

The question in this case is, whether an application by a judgment-creditor to bring an execution proceeding on the file, and to record his certificate of the payment of a sum of money by the judgment-debtor, is an application to take some step-in-aid of execution of the decree, within the meaning of para. 4, art. 179 of the second schedule of the Limitation Act. We agree in the opinion of the lower appellate Court that it is. Section 258 forms a part of the heading E in the Procedure Code, which deals with the mode of executing decrees. Section 257 under that heading provides that one way in which money payable under a decree may be paid is that it may be paid out of Court to the decree-holder. And s. 258 then goes on to specify the mode in which this transaction is to take place, *viz*., that the judgment-creditor is to certify the payment to the Court. If he does not, provision is made to enable the [610] judgment-debtor to compel him to do so. We must therefore consider that when a judgment-creditor comes into Court and certifies to the Court the payment of a sum, that proceeding takes place in consequence of an arrangement as to payment between him and the judgment-debtor, and because if he had not certified, the judgment-debtor could, under the law, compel him to do so. The effect of the certificate is to satisfy the decree so far as the sum certified is concerned. Therefore, we think that the Court below is right in holding that the application in question is an application to the Court to do something in aid of the execution of the decree. And in holding this, we in no way conflict with previous rulings of this Court that mere taking money out of Court is not so.

The appeal is dismissed with costs.

J. V. W. *Appeal dismissed.*

12 C. 610.

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APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

AFZAL AND ANOTHER (*Judgment-debtors*) *v.* RAM KUMAR BHUDRA (*Decree-holder*).* [5th March, 1886.]

Appeal—Second Appeal—Order allowing purchaser of decree to execute it—Civil Procedure Code, 1882, *ss.* 2, 232, 244*—Transfer of Property Act* (*IV of* 1882), *s.* 131*—Decree—Debt.*

On an application under s. 232 of the Civil Procedure Code by the purchaser of a decree to be allowed to execute it, two of the judgment-debtors objected that the purchase was *benami* for the other judgment-debtor, and that they had paid off the decree to the original decree-holder. The Munsif found both objections against them, and allowed the purchaser to execute the decree. *Held*, that the question was one between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree, and that the decision of that question was a decree under ss. 2 and 244 of the Code, and therefore appealable and a second appeal lay therefrom to the High Court.

A decree is not a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act. A "debt" under that section means an actionable claim, and not a claim which has already passed into a decree.

[F., 24 B. 502 (503).]

[611] THESE were proceedings in execution of a decree originally obtained by Jagat Doollub Bose against Afzal and Asak, the appellants, and one Jainuddin on the 28th April 1883.

The original decree-holder subsequently sold the decree to Ram Kumar Bhudra, who, on the 23rd January 1885, applied under s. 232 of the Code to execute it against the three judgment-debtors. Afzal and Asak objected that Ram Kumar was not the real purchaser of the decree, but merely a *benamidar* of Jainuddin: they also alleged that they had paid up the amount of the decree to the original decree-holder through Jainuddin. The Munsif's finding on the evidence was against the judgment-debtors on both points, and he allowed Ram Kumar to proceed with the execution.

An appeal by Afzal and Asak to the Judge was dismissed on the merits; the Judge, besides, observing that orders under s. 232 of the Code seemed not to be appealable.

The judgment-debtors Afzal and Asak appealed to the High Court; the only ground of appeal material to this report was that the transfer of the decree was bad in the absence of the notice required by s. 131 of the Transfer of Property Act (IV of 1882). For the respondent an objection was taken that no appeal would lie.

Baboo *Joygopal Ghose*, for the appellants.

Baboo *Gopi Nath Mukerji*, for the respondent.

The judgment of the Court (MCDONELL and BEVERLEY, JJ.) after shortly stating the facts, was as follows:—

JUDGMENT.

On the first point we think that the question before the first Court was a question between the parties to the suit or their representatives—

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* Appeal from Order No. 281 of 1885, against the order of J. Posford, Esq., Judge of Tipperah, dated the 2nd of June 1885, affirming the order of Baboo Brojo Behari Shome, Munsif of that district, dated the 28th of March 1885.

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Bishtu Narayan Bandapadhya v. *Gunga Narayan Biswas* (1)—relating to the execution, discharge, or satisfaction of the decree, and that the decision of that question was a decree under ss. 2 and 244 of the Code, and therefore appealable; and that a second appeal to this Court will lie. (s. 584.)

On the second point we are not prepared to say that a decree [612] is a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act, so as to make the transfer void without express notice.

What is intended by a debt under that section would appear to be an actionable claim, and not a claim which has already passed into a decree.

In the Code of Civil Procedure, which was passed in the same year as the Transfer of Property Act, we find a distinction generally between debts and decrees; and we further find special provisions in s. 232 regarding the transfer of decrees and the notice necessary to be given in such cases. Moreover, s. 233 of the Code lays down the same rule in the case of decrees which is prescribed by s. 137 of the Transfer of Property Act in the case of debts.

For these reasons we hold that s. 131 of the Transfer of Property Act does not apply to decrees, and we dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

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12 C. 612.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Norris.

RUDRA PROKASH MISSER (*Petitioner*) *v.* BHOLA NATH MUKHERJEE, MANAGER OF THE PHULWARIA WARD'S ESTATE (*Opposite Party*)*. [22nd February, 1886.]

Guardian—Minor—Disability of infancy, its continuance—Period of minority, how affected by Act XL of 1858—*Majority Act* (*IX of* 1875), *s.* 3.

When a guardian has once been appointed to a minor under the provisions of Act XL of 1858, the disability of infancy will last till the age of 21, whether the original guardian continue to act or not.

[Diss. 11 A.W.N. 118; Appr., 21 B. 281 (285); Commented upon, 17 C. 944 (949); 9 Bom. L.R. 495 (504)=31 B. 590; Rel on, 13 C.W.N. 643=36 C. 768=1 Ind. Cas. 274; R., 17 M. 251 (251); P.L.R. (1900) 419 (430).]

AN application was made to the District Court by one Rudra Prokash Misser for a certificate of guardianship to the property of a minor brother, his co-sharer in an estate known as Phulwaria. The Collector of the district, it would appear, had under an order of the Civil Court, dated September 1st, 1873, been appointed manager to the estate of the applicant who was then an infant. The Collector having subsequently [613] withdrawn from the guardianship at the instance of the Court of Wards, it was contended on behalf of the applicant that, inasmuch as he had attained the age of 18 years, he was entitled to the certificate as a person *sui juris*. The District Court, relying on the provision of s. 3 of the Majority Act, disallowed the application and by an order of the same

* Appeal from Original Order No. 1 of 1886, against the order of W. Verner, Esq., Judge of Bhagulpore, dated the 30th of December 1885.

(1) 3 B. L. R. A. C. 40=11 W. R. 368.

date appointed one Bhola Nath Mukherjee manager of the applicant's estate.

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On appeal the same contention was raised before the High Court.

Mr. *O. C. Mullick* and Mr. *R. E. Twidale*, for the appellant.

Baboo *Guru Das Banerjee*, Baboo *Rash Behari Ghose* and Baboo *Jogesh Chunder Dey*, for the respondent.

The High Court (TOTTENHAM and NORRIS, JJ.) delivered the following judgment :—

JUDGMENT.

This is an appeal against an order of the District Judge of Bhagulpore refusing to appoint the appellant guardian of his minor brother under the provisions of Act XL of 1858, the ground of the refusal being that the petitioner is himself a minor, not having reached the age of twenty-one.

The learned counsel for the appellant contends that, although the petitioner has not yet reached the age of twenty-one, his minority has ceased, because the guardian once appointed by the Court, namely, the Collector, has resigned his trust ; and he asks us to hold that the first clause of s. 3 of the Indian Majority Act (IX of 1875) ceases to have effect if the guardian appointed dies or resigns his trust after the minor has attained the age of eighteen years. Section 3 of Act IX of 1875 provides that "every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice * * * shall be deemed to have attained his majority when he shall have completed his age of twenty-one years and not before." We are unable to adopt the view suggested to us of the law.

It appears to us that in order to get this construction it would be necessary to add words to the section. The learned counsel for the appellant accepts the proposition that it would be [614] necessary to add to the section the words, "provided the guardian appointed does not die or cease to hold office till the minor attains the age of twenty-one." It seems to us that a guardian of the petitioner under Act XL of 1858 having been once appointed, he must by Act IX of 1875 continue to be a minor until he reaches the age of twenty-one, whether the original guardian continues to be his guardian or not. The order of the District Judge therefore disallowing the application appears to us to be correct in law.

It has also been objected that the District Judge has appointed another person provisionally to be guardian and manager for a period of two months. It is contended that there is no provision in Act IX of 1875 for such appointment. But inasmuch as the petitioner before us is a minor, no application from him can be heard unless he is properly represented.

The appeal is dismissed with costs to be recovered from the estate.

K. M. C. *Appeal dismissed.*

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10 Ind. Jur.
458.

12 C. 614=10 Ind. Jur. 458.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

SHURNOMOYEE DASI AND OTHERS (*Defendants*) *v.* SRINATH DAS (*Plaintiff*) AND OTHERS (*Defendants*).* [18th November, 1885.]

Limitation—Mortgagor and Mortgagee—English form of mortgage—Conditional sale—Purchaser from mortgagor—Adverse possession—Regulation, XVII of 1806, *s.* 8—*Transfer of Property Act*, *s.* 86—*Limitation Act XV of* 1877, *Sch. II*, *cls.* 135, 147.

A mortgage in the English form, between Hindus, of lands in the mofussil, outside Calcutta, has always been treated by the Courts as a mortgage by conditional sale.

Under Act XIV of 1859 a mortgagee was ordinarily bound to bring his suit within 12years from the date of default, and was barred thereafter unless it could be shown (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagee after the date of default.

On the 17th of November 1865, certain property situate in the district of the 24-Pergunnahs was mortgaged by the owner thereof to secure the repayment [615] of Rs 15,785 with interest at 18 per cent. on the 17th of February 1866. The mortgagor and mortgagee were Hindus, and the mortgage was in the ordinary form of an English mortgage of real property After the date of the mortgage, and before the 15th of February 1872, the mortgagor sold various portions of the mortgaged property. On the 15th of February 1872 the mortgagee filed a foreclosure petition in the Court of the Judge of the district of the 24-Pergunnahs under Reg. XVII of 1806. Notice of the petition was served on the mortgagor alone. Neither principal nor interest was paid by the mortgagor, and on the 6th of September 1882, the assignee of the mortgagee filed a suit for foreclosure against the mortgagor, and the purchasers of the various portions of the property, under the provisions of the Transfer of Property Act, praying for foreclosure and sale.

Held, that as against the purchasers from the mortgagor the suit was barred by limitation under cl. 135, sch. II of Act XV of 1877.

[R., 7 C.P.L.R. 29 (30); 10 A.L.J. 538=15 Ind. Cas. 240 (241); 13 Ind. Cas. 504 (505); 9 O.C. 147 (152); D.. 8 C.P.L.R. 65 (66).]

THIS was a suit for foreclosure of a mortgage of certain property situated in the district of the 24-Pergunnahs. The plaint stated that on and before the 17th of November 1865, the property in question was and had been the absolute property of Hurrynarain Dey, the defendant No. 1, and that on the same 17th of November, Hurrynarain, by an indenture in the ordinary English form, mortgaged the property to one Shama Sundari Debi, to secure the repayment of Rs. 15,705 with interest thereon at the rate of 18 per cent. per annum on the 17th of February 1866. Neither principal nor interest was paid on the 17th of February 1866.

On the 15th of February 1872, Shama Sundari Debi filed a petition for foreclosure under Regulation XVII of 1806 in the Court of the Judge of the District of the 24-Pergunnahs, notice of which was duly served on the mortgagor, Hurrynarain Dey.

The 4th and 5th paragraphs of the plaint were as follows:—

"4. After the date of the said mortgage, and previous to the date of the said application for foreclosure, and also subsequently, the defendants from Nos. 2 to 29 setting up their title by purchase and otherwise from the defendant No. 1, in the several plots of the mortgaged property, have been holding possession of the same. The said persons ought to have

* Appeal from Original Decree, No. 218 of 1883, against the decree of Baboo Baloram Mullick Rai Bahadur, Second Subordinate Judge of 24-Pergunnahs, dated 7th June 1883.

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12 C. 614= 10 Ind. Jur. 458.

been made parties to the aforesaid proceedings, but Shama Sundari Debi, the mortgagee, did not do so.

"5. On the 10th of May 1879, the plaintiff purchased from the mortgagee by a registered kobala, whatever right and interest [616] she had in the said mortgage deed, dated the 17th November 1865, and in the properties covered by the same."

The defendants Nos. 2 to 29 claimed to be *bona fide* purchasers for value from Hurrynarain Dey. The latter did not defend the suit. The other facts are not material to this report, which is confined to the question of limitation decided by the High Court. The plaint was filed on the 6th of September 1882.

The Court of first instance gave the plaintiff a decree for foreclosure in accordance with the provisions of s. 86 of the Transfer of Property Act, Act IV of 1882. Some of the defendants appealed to the High Court, making the plaintiff and the other defendants-respondents.

Baboo *Kali Prasanna Dutt* and Baboo *Nil Madhub Bose*, for the appellants.

Baboo *Gurudas Banerji*, Baboo *Sharoda Churn Mitter* and Baboo *Jogendro Nath Bose*, for the plaintiff-respondent.

Baboo *Romesh Chandra Bose* and Baboo *Gopal Chandra Ghosal*, for some of the defendants-respondents.

JUDGMENT.

The judgment of the Court (PIGOT and O'KINEALY, JJ.) was delivered by

PIGOT, J.—[The first portion of the judgment is not material for the purposes of this report.]

The principal ground discussed before us, and upon which we have also come to the conclusion that this appeal must be allowed, is upon the question of limitation.

The parties to the mortgage of the 17th November 1865 were Hindus. The mortgage was a mortgage in English form, giving a power of sale and entry, and the due date was 17th February 1866.

So far as the form of the mortgage is concerned, it is clear that a mortgage in English form between Hindus of lands in the mofussil, outside Calcutta, is always treated by the Courts as a mortgage by conditional sale.

In the case of *Khelat Chunder Ghose* v. *Tara Charan Condoo Chowdhry* (1), Sir Barnes Peacock said in regard to the [617] rights of the parties under a deed of this kind: "The mortgagee was entitled to possession before foreclosure immediately default was made, and he would hold possession subject to his own right to foreclose and the mortgagor's right to redeem. His right to sue for possession did not depend upon his obtaining a decree for foreclosure. The defendant might have been sued for possession immediately default was made."

And in the suit of *Srimati Sarashibala Dabi* v. *Nand Lal Sen* (2) it was decided that no suit would lie by the mortgagee as purchaser after breach of the condition, for possession of property on a mortgage in the English form, unless foreclosure proceedings had been taken under Regulation XVII of 1806.

(1) 6 W.R. 270. (2) 5 B.L.R. 389.

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This case shows that under an English deed of mortgage, the mortgagee had no better right than he would have under an ordinary mortgage by conditional sale, except that a mortgagee with a power of entry on default could sue for possession of property without foreclosure.

Now the next point we come to is, what were the rights of a mortgagee in Bengal, holding a mortgage by conditional sale? This has been the subject of discussion before their Lordships of the Judicial Committee in the case of *Thumbusawmy Moodelly* v. *Hossin Rowthen* (1). In that case their Lordships decided that before the passing of Regulation XVII of 1806, one of the essential characteristics of a mortgage by conditional sale was that on the breach of the condition of repayment, the contract executed itself, and the transaction was closed, and became one of absolute sale without any further act of the parties or accountability between them. They also held that this was the law in force in Bengal, until Regulation XVII of 1806 made provisions for redemption and foreclosure by the procedure in that Regulation. The effect of that enactment was this, that it put a stop to the mortgage contract executing itself until the year of grace prescribed by s. 7 of that Regulation had passed. But after the year had passed, the contract, as before, executed itself, and the mortgagee was entitled to have possession given him.

There is a wide distinction between the rights existing under [618] a mortgage by conditional sale in the mofussil under the Regulations and those enforced by suit on the Original Side of the High Court in Calcutta. In the Supreme Court, a mortgagee might bring a suit for foreclosure, but no such suit was known outside Calcutta. There the foreclosure proceedings took place before the Judge as a ministerial officer, and at the end of the year of grace the mortgagee sued, not for foreclosure but for possession of the property as owner. This Regulation XVII of 1806 was repealed by the Transfer of Property Act, which came into force in 1882; and the only conclusion which can be arrived at is that up to the passing of the Transfer of Property Act at least, no present holder of an English mortgage in the mofussil could sue for foreclosure properly so called, but must foreclose in the manner prescribed by Regulation XVII of 1806. In the case of *Khelat Chunder Ghose* v. *Tara Charan Coondoo Chowdhry* (2), to which, we have already referred, it was held by this Court that under an English deed of mortgage a suit to recover possession of land under the mortgage deed was barred, unless brought within twelve years from the date of default. That case was taken on appeal before the Privy Council, and the decision was confirmed. But their Lordships seem to think that the judgment of this Court had laid down a wider rule than was absolutely necessary, and were inclined to hold that if the mortgagor was allowed to hold by permission of the mortgagee after default, a suit might be brought more than twelve years from that date. They said (3): "No such question, however, arises in the present case, for it is impossible to hold that the defendant, the purchaser, was holding, or supposed that he was holding, by the permission of the mortgagee; and when both things concur—possession by such a holder for more than twelve years, and the right of entry under the mortgage deed more than twelve years old—it is impossible to say that such a possession is not protected by the law of limitation." This was followed in the case of *Dinonath Ganguli*

(1) 1 M. 1. (2) 6 W.R. 270. (3) 14 M.I.A. 150.

v. *Nursing Prosad Dass* (1), and there it was decided that a mortgagee's cause of action arose when default was made [619] in payment of the mortgage debt, and that no new cause of action arose by reason of the foreclosure proceedings after the expiry of the year of grace, and that such a suit was barred as against an auction-purchaser within twelve years from the due date.

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The other branch of this case may be illustrated by the case of *Mankee Koer* v. *Sheikh Munnoo* (2). In that case it was decided that where the mortgagor was shown to have paid interest after the date of default, it was held that his possession being thus shown to have been permissive, he might be sued more than twelve years after the date of default.

From these decisions it would appear that under Act XIV of 1859, a mortgagee was ordinarily bound to bring his suit within twelve years from the date of default, and was barred unless it could be *shown* (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagee after the date of default.

In Act IX of 1871, art. 135, it was declared that a suit instituted by a mortgagee for possession of immoveable property mortgaged must be brought within twelve years from the time when the mortgagee was first entitled to possession. And in the case of *Lal Mohun Gangopadhya* v. *Prosunno Chunder Banerjee* (3), it was decided that whether the possession of the mortgagor was permissive or adverse, was immaterial, and that the mortgagee having failed to bring his suit within twelve years from the date of default lost his remedy.

This seems to have been the received opinion, with one exception, namely, the exception referred to in *Ghinaram Dobey* v. *Ram Monaruth Ram Dobey* (4) and in *Burmamoyee Dasi* v. *Dinobundhoo Ghose* (5), in which it was held that if the mortgage could complete the foreclosure proceedings in a DistrictCourt within twelve years from the date of default, he thus became absolute owner of the property, and the foreclosure proceedings gave him a new period of limitation.

A distinction between the decision in this case and the other [620] cases already referred has been pointed out in *Modun Mohun Chowdry* v. *Ashad Ally Bepari* (6).

After the repeal of Act IX of 1871 the present law, Act XV of 1877, was enacted. In it a new clause is inserted, namely, cl. 147, by which a suit by a mortgagee for foreclosure or sale, can be brought within sixty years from the time when the money secured by the mortgage becomes due. But, as we have already said, no suit for foreclosure could ever be brought in the mofussil. This was prohibited by the nature of the agreement and by the terms to which we shall refer later on, of Regulation XVII of 1806. Under the contract a mortgagee was originally the absolute owner from the date of default. But by Regulation XVII of 1806 it was a condition precedent to his becoming an absolute owner that foreclosure proceedings should be taken in the District Judge's Office.

When this has been done, a mortgagee, having become absolute owner by virtue of the contract sues, not for foreclosure but for possession as owner of the property. It appears, therefore, impossible to hold

(1) 14 B.L.R. 87. (2) 14 B.L.R. 315. (3) 24 W.R. 433.
(4) 7 C.L.R. 580 = 6 C. 566-N. (5) 6 C. 564 = 7 C.L.R. 583. (6) 10 C. 68 = 13 C.L.R. 53.

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that cl. 147 of the Limitation Act would apply to any mortgage by conditional sale executed between Hindus, and in respect of properties situated in the mofussil. If that be so, the law of Limitation for a conditional sale would be that given in cl. 135, corresponding to cl. 132 of Act IX of 1871, namely twelve years from the time when the mortgagor's right to possession determines. In this case, the mortgagor's right to possession determined on the date of default, namely, February 1866, and the suit for possession would be barred on the 17th February 1878. Does it make any difference under Act IX of 1871 what the possession was? The suit is barred against the mortgagor himself or any body else. See *Lall Mohun Gangopadhya* v. *Prosunno Chunder Banerjee* (1), and *Modun Mohun Chowdhry* v. *Ashad Ally Bepari* (2).

As regards the defendant Shurnomoyee Dasi, her purchase from the mortgagor must have been before the 12th September 1866, because on that day she received a pottah from the Collector of 24-Pergunnahs as owner of the property in dispute. So that as against her the suit is barred on that separate ground.

[621] We think it well to refer to one argument, which led the Subordinate Judge to hold that, after the passing of the Civil Procedure Code, suits for foreclosure would lie in the mofussil of this Presidency, as distinguished from Regulation foreclosure proceedings, which of course, are not, as above observed, suits in any sense of the word.

He held that s. 16 of the Civil Procedure Code, must be taken to have that effect. It is no doubt not applicable to the Chartered High Courts, and cannot be explained by reference to their procedure.

We think that section had not the effect of creating, for the mofussil of Bengal, a new form of suit, wholly inconsistent with the express provisions of the Regulation of 1806, which in their terms, in s. 8, expressly exclude any other mode of relief than that provided by them. The Regulation was not repealed by the Code, expressly, and we cannot hold that from the terms of s. 16 of the Civil Procedure Code (and only because that section does not apply to the High Court) it was by implication affected. That clause may well be explained upon supposition that it was intended to apply in other parts of India, where no such law as that of the Regulation of 1806 existed. No doubt the real origin of it, in the form it now bears, was that, when it was framed, it was intended that the Transfer of Property Act should be passed during the same session as the new Code—an intention which was not, however, carried out.

We are happy to think that in this case the statute of limitation operates without harshness, and for the benevolent end for which it is framed. It is certain that several of the defendants, and probably that all of them, are, or represent, *bona fide* purchasers. It is to save the long possession of such persons that the statute is in part intended; and so far as we can judge from this singular record, no hardship is done in the case.

The ground of limitation is one common to all the defendants except No. 1, and under s. 544, the decree of the Subordinate Judge, which ought to have been in favour of all those defendants, is, as to all of them, save No. 1, reversed.

Appeal allowed; suit dismissed with costs throughout.

P.O'K. *Appeal allowed.*

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(1) 24 W. R. 438. (2) 10 C. 68=13 C.L.R. 53.

12 C. 622.

1886 FEB. 8.

APPELLATE CIVIL.

12 C. 622.

[622] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

CHUNDER PERSHAD ROY AND OTHERS (*Plaintiffs*) v. SHUVADRA KUMARI SHAHEBA AND OTHERS (*Defendants*).*
[8th February, 1886.]

Sale for arrears of rent—Putni taluk—Transfer of Putni—Registered Transferee—Unregistered proprietor, Right to sue—Regulation VIII of 1819, *s.* 14.

Where a putni taluk has been sold under the provisions of Regulation VIII of 1819, an unregistered shareholder therein is entitled to sue for a reversal of the sale under the provisions of s. 14 of the same Regulation.

[F., 15 C. 345 (349); 13 C.L J. 102=15 C.W.N. 5=8 Ind. Cas. 766 (768); Re'., 16 C.L.J. 130=17 Ind. Cas. 171 (174).]

A PUTNI taluk of a certain mehal was granted by the zemindar to one Moti Singh on the 5th of August 1860. On the 16th of August 1860 Moti Singh sold and conveyed the taluk to Boido Nath Roy and Jadub Lall Thakur jointly. On the 1st of Joisto 1290 (4th May 1883) the putni taluk was sold by the Collector of Moorshedabad under the provision of ss. 8, 9, 10 of Regulation VIII of 1819 and purchased by one Bhubunnessur Singh.

On the 17th of July 1883, the plaintiffs, who are the heirs of Boido Nath Roy, and who, as such heirs claimed to be entitled to an 8 annas share of the taluk, brought the present suit against the zemindar and Bhubunnessur Singh to have the sale set aside, on the ground that the notice, prescribed by s. 8, cl. 2, Regulation VIII of 1819, had not been served, and that the arrears of rent due had been tendered to the zemindar before the sale. The heirs of Jadub Lall Thakur, the owners of the other 8 annas share in the taluk, were also made defendants.

The transfer by Moti Singh in 1860 had never been registered, and it was his name, therefore, which appeared as that of the registered putnidar. One of the objections taken by the defendants was that the plaintiffs not being registered proprietors of the taluk, had no right of suit under Regulation VIII of 1819. This contention was overruled by the Court of first instance, and the plaintiffs obtained a decree for the relief claimed. On appeal this decision was reversed on the ground that the transfer from Moti Singh, not having been registered, the plaintiff had [623] no right to sue. It was proved, however, that the fact of such transfer having been made had been known by the zemindar for many years. The plaintiffs appealed to the High Court.

Baboo *Nil Madhub Bose*, for the appellants.

Baboo *Guru Das Banerji*, and Baboo *Shoshi Bhushan Dutt*, for the respondents.

JUDGMENT.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was delivered by

PRINSEP, J.—The plaintiff is the unregistered proprietor of a putni tenure, and sues to set aside a sale held under Regulation VIII of 1819, in consequence of certain irregularities therein.

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* Appeal from Appellate Decree, No. 656 of 1885, against the decree of T. M. Kirkwood, Esq., Judge of Moorshedabad, dated the 15th of January 1885, reversing the decree of Baboo Ram Gopal Chaki, Subordinate Judge of that district, dated the 27th of June 1884.

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The lower Courts have both found in favour of the plaintiff as regards the validity of the sale; but the lower appellate Court has dismissed the suit, holding that the plaintiff as an unregistered putnidar is debarred from bringing this suit. As authorities for this the District Judge refers to *Gossan Mangal Das* v. *Roy Dhunput Singh Bahadoor* (1), being a decision of a Division Bench of this Court, and also to a case decided by the Privy Council—*Lukhi Naran Mitter* v. *Khettro Pal Singh Roy* (2). The last case is not in point. As regards the first case the report does not state the facts so as to enable us to judge whether it is any authority or not; the judgment does not even state whether the sale was held under the putni law.

Under such circumstances we do not feel bound by the authority of that case.

Section 14, cl. 1 of the Putni Regulation says: "It shall be competent to any party desirous of contesting the right of a zemindar to make the sale, whether on the ground of there having been no balance due or on any other ground, to sue the zemindar for the reversal of the same, and upon establishing a sufficient plea to obtain a decree with full costs and damages." It seems to us that the words, "any person desirous of contesting the right of the zemindar" are wide enough to include a person in the position of the plaintiff who is interested in the maintenance of the tenure which he holds. The provisions of the [624] Putni Regulation and the decisions of the Courts would seem to go no further. It seems to us that, although the zemindar is not bound to recognise any one except the registered tenant in any proceedings taken with reference to any matter connected with the tenure, it is nevertheless open to any person interested in that tenure, or, as the law puts it, "desirous of contesting the right of the zemindar" to sue him on account of any illegal act by which his rights may have been affected in respect to that tenure. If it were not so, a neglect to register might entail an absolute forfeiture.

The lower Courts having found on the merits in favour of the plaintiff, we set aside the order passed by the District Judge, declaring that the plaintiff is not entitled to bring the suit, and order that the suit be decreed on the finding recorded on the merits.

The plaintiff will receive his costs in all the Courts.

P. O'K. *Appeal allowed.*

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12 C. 624.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

UDYADETA DEB (*Judgment-debtor*) *v.* C. B. GREGSON (*Decree-holder*).* [16th February, 1886.]

Appeal—Execution of decree—Security Bond—Appeal from Order—Civil Procedure Code, Act XIV of 1880, *ss.* 545, 588.

The Court which passed a certain decree ordered execution thereof to be stayed pending appeal, on the debtor's furnishing security to the amount of Rs. 70,000, under the provisions of s. 545 of the Code of Civil Procedure. The debtor

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*Appeal from Original Order, No. 397 of 1885, against the order of A.L.Clay,Esq., Deputy Commissioner of Manbhoom, dated the 19th of November 1885.

(1) 25 W.R. 152. (2) 13 B.L.R. 146.

objected to the amount of security required, and appealed to the High Court on that ground. The decree-holder contended that no appeal lay. 1886 FEB. 16.

Held, that the order was appealable.

Held, also, on the facts that the security required was excessive.

[F., 12 B. 30 (31).]

APPELLATE CIVIL.

12 C. 624.

THIS was an appeal from an order made in execution of a decree. The judgment-debtor had applied for stay of execution of the decree, which was one granting specific performance of a contract to give a usufructuary mortgage of a property, the value of which was estimated at 4½ lacs of rupees. The application [625] was opposed by the decree-holder. The Court made the following order :—

"Decree-holder petitions this day that he has already suffered loss (by suspension of works, &c.) to an estimated amount of Rs. 50,000, while law costs are put down at Rs. 20,000. Judgment-debtor is allowed 15 days from this date to furnish security to the amount of Rs. 70,000, 19th November 1885. The judgment-debtor appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Kali Kissen Sen*, and Baboo *Karuna Sindhu Mookherji*, for the appellant.

Baboo *Bhobani Charan Dutt* and Baboo *Rash Behari Ghose*, for the respondents.

JUDGMENT.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—The appellant in this case is the judgment-debtor against whom a decree for specific performance in respect of the execution of a mortgage had been passed, with costs, and the decree provided that the decree-holder should obtain immediate possession of the property to be mortgaged. An appeal having been preferred from that decree the judgment-debtor applied under s. 545 for the stay of execution. The Court below granted the prayer for the stay of execution, but required the judgment-debtor to furnish security to the amount of Rs. 70,000. Against the last part of the order the present appeal has been preferred by the judgment-debtor.

A preliminary objection was taken on behalf of the respondent that no appeal was allowed by law in respect of an order passed under s. 545 of the Code, such order not being appealable under s. 588 ; and Baboo Rash Behari Ghose for the respondent contended that it was also not appealable under s. 244. There is, however, authority, both of this Court and of the Allahabad High Court, for holding that questions under s. 545 are matters which are appealable under s. 244, they being matters between the parties to a decree, and relating to the execution thereof.

We may refer to the cases of *Kristomohiney Dossee* v. *Bama Churn Nag Chowdhry* (1) ; *Luchmeeput Singh* v. *Sitanath* [626] *Doss* (2) ; and *Ghazidin* v. *Fukir Buksh* (3). The appeal therefore appears to us to be maintainable.

We are totally unable to understand on what principle the Court below required the judgment-debtor to deposit the very large sum mentioned in its order. The case of the decree-holder was that, in consideration of the loan advanced by him of Rs. 40,000, he should have a usufructuary mortgage of the estate in question. It does not appear that he paid to the owner of the estate any portion of the Rs. 40,000. All that he

(1) 7 C. 733=9 C.L.R. 344. (2) 8 C. 477=10 C.L.R. 517. (3) 7 A. 73.

1886 FEB. 16. — APPELLATE CIVIL. — 12 C. 624.

did was to pay into the hands of the manager under the Chota Nagpur Encumbered Estates' Act the sum of Rs. 7,000, which, of course, accrued to the benefit of the owner. That is all that the plaintiff has hitherto risked. In return for that he obtained a decree for a mortgage for nineteen years and for immediate possession.

The order of the Court below appears to contemplate some possible damages to the plaintiff decree-holder by reason of the delay which may occur to him in getting possession of the estate, and those damages have been assessed at Rs. 50,000, while the law costs are put down as Rs. 20,000.

The plaintiff decree-holder cannot possibly in this litigation obtain anything as damages. He brought a suit for specific performance in respect of the execution of a mortgage ; and he has obtained a decree for that. No question of damages can arise.

As to the law costs, namely, Rs. 20,000, neither of the pleaders engaged by the parties before us can explain to what that refers. It is not contended that Rs. 20,000 have been incurred as costs in the present case. The costs of the litigation up to this Court at the most is more than covered by Rs. 7,000. The appellant is willing to deposit security to that amount, and the respondent's pleader cannot make out any good case why the sum should be in excess of that amount.

We therefore modify the order of the lower Court by substituting the sum of Rs. 7,000. The security for the sum of Rs. 7,000 will be put in within one month from the date of the receipt of this order by the Court below.

The appellant is entitled to the costs of this appeal.

P. O'K. *Appeal allowed.*

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12 C. 627.

[627] APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Beverley.

SITANATH DASS (*Plaintiff*) *v.* MOHESH CHUNDER CHUCKERBATI AND ANOTHER (*Defendants*).* [5th March, 1886.]

Evidence Act (I of 1872), s. 33—Representatives in interest.

In order to satisfy the requirements of s. 33 of the Evidence Act, the two suits must be brought by or against the same parties or their representatives in interest at the time when the suits are proceeding and the evidence is given.

IN this suit brought on the 6th January 1883 the plaintiff sued to recover a certain property on the strength of his title as auction-purchaser at an execution sale held on the 13th June 1881 of the rights of one Gobind Chunder Bhuttacharjea and his sons Koylash and Eshan. The defence was that the property never belonged to Gobind or his sons, but that it formerly belonged to one Sumbhu Nath Sarma, from whom defendant No. 2 purchased it in September 1871.

It appeared that in 1875, eight years prior to this suit, defendant No. 2 sued to eject Eshan, who was then in occupation of the property, although holding it by sufferance under his father Gobind. That suit was dismissed, on the ground that Gobind, who was the person really interested in the property, had not been made a party.

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* Appeal from Appellate Decree No. 2007 of 1884 against the decree of Baboo Mati Lall Sircar, Second Subordinate Judge of Dacca, dated the 11th of September 1884, reversing the decree of Baboo Revati Charan Banerji, Munsif of that district, dated the 24th of August 1883.

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Gobind, however, gave evidence in that suit, and a deed, dated 1830, under which he claimed the property, was put in evidence. Subsequently to this suit of 1875 Eshan left the neighbourhood, leaving a tenant in possession of the property, who was dispossessed in 1880 by the defendant No. 2 putting defendant No. 1 in possession as his tenant. At a date subsequent to this, Gobind died.

In the present case the Munsif, making use of Gobind's deposition and the deed under which he claimed, found that the plaintiff had taken a good title; that the title of Sumbhu, if any, to the land in dispute had become extinct by more than 12 years' [628] adverse possession; that Sumbhu, if he had a title, had never taken possession of the property; and that the defendant No. 2 had never successfully established his possession under Sumbhu, until he leased the land to the defendant No. 1, and placed him in possession; he therefore gave the plaintiff a decree.

On appeal the Subordinate Judge held that neither the deposition of Gobind in the suit of 1875, nor the deed under which he claimed, were admissible in evidence in the case; that the plaintiff had failed to make out a good title; and that for certain reasons (which are immaterial for the purposes of this report) the title of defendant No. 2 under Sumbhu to the property was made out; he therefore reversed the decree of the lower Court.

The plaintiff appealed to the High Court, contending that the lower appellate Court was wrong in rejecting the deposition of Gobind and the deed under which he claimed.

Baboo *Upendra Nath Mitter*, for the appellant.

Baboo *Baikant Nath Das*, for the respondents.

JUDGMENT.

The Judgment of the Court (GARTH, C. J., and BEVERLEY, J.), after stating the facts, continued as follows :—

Gobind being dead, his evidence in the former suit would be admissible in this suit under s. 33 of the Evidence Act, provided (1) that the former suit was between the same parties or their representatives in interest; (2) that the adverse party in the former suit had the right and opportunity to cross-examine; (3) that the questions in issue were substantially the same in both suits.

We think that the first of these conditions was not sufficiently fulfilled. The Subordinate Judge says that the deposition is not admissible, because Gobind was not a party to the former suit. What the Subordinate Judge means to say is probably this: Gobind's son, Eshan, whose interest as well as that of Gobind, had been purchased by the plaintiff in the present suit, was the ostensible party on the record in the former suit; but the finding of the Court was that he had at that time no interest in the subject-matter of the suit, the real party interested being Gobind. Gobind, therefore, and not Eshan, was the representative in [629] interest of the present plaintiff; and if he had been a party to the former suit, his deposition would no doubt have been admissible. But he was no party to that suit, and the fact that Eshan subsequently acquired an interest in the property will not avail to make the evidence taken in that suit admissible in the present suit. We think that, in order to satisfy the requirements of s. 33 of the Evidence Act, the two suits must be brought by or against the same parties or their representatives in interest at the time when the suits are proceeding, and the evidence is given.

The appeal must, therefore, be dismissed with costs.

T. A. P. *Appeal dismissed.*

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FEB. 24.

INSOLVENT JURISDICTION.

12 C. 629.

12 C. 629.

INSOLVENT JURISDICTION.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

IN THE MATTER OF R. BROWN, AN INSOLVENT (CLAIM OF DWARKA NATH MITTER).* [24th February, 1886.]

Insolvent Act (11 & 12 *Vic.*, *c.* 21), ss. 23, 73—*Order and Disposition—Reputed ownership—Form of petition of appeal under Insolvent Act—Civil Procedure Code*, 1882, *s.* 590.

In 1883 *B* mortgaged to one *D* certain furniture standing in a house leased by him from one *V*. The mortgage deed provided that until default the mortgagor should have free use of the mortgaged property; that the mortgagee should be at liberty to place a durwan in charge of the furniture; and that on default by the mortgagor the mortgagee should have power to enter the premises and deal with the goods as his own. A durwan was placed in charge, and in January 1884 the mortgagor defaulted and was pressed for payment at different times previous to August 1884.

On the first August the mortgagee sent to the premises people from Messrs. Mackenzie, Lyall & Co. for the purpose of lotting and cataloguing the furniture. Admittance into the house was refused to them by *B*, although they were admitted into the compound by the durwan of the mortgagee.

At about this date (but whether before or after the 1st August was not clear) *B* asked for further time for payment, which was granted. On the 4th August the furniture was attached by *V* in execution of a decree for rent. On the 6th August *B* filed his petition in insolvency, and on the 15th September the furniture was sold by the Official Assignee.

On a hearing of the claims put in by the mortgagee, and *V*, *held*, that on the 6th August, the furniture was not in the possession, order or **[630]** disposition of *B* as reputed owner with the consent of the true owner; that under the circumstances brought out in evidence, the fact that further time for payment was granted had not the effect of a fresh consent on the part of the mortgagee to the goods being in the possession of *B* as reputed owner; that even if this had been so the attachment under *V's* execution took the goods out of the order and disposition of *B*, and that the mortgagee was entitled to the benefit of that circumstance.

In re Agabeg (1) questioned.

The procedure as to appeals from orders under the Civil Procedure Code, 1882, is not made applicable by s. 590 to appeals from orders under the Insolvent Act. No particular form is prescribed for petitions of appeal under the latter Act. In this case the so-called memorandum of appeal was held to be a good petition of appeal under the Act.

[R., 17 B. 334 (340).]

THE principal question raised in this case was whether, at the date of the insolvency of one Robert Brown, certain furniture was in the possession, order or disposition of the insolvent as reputed owner with the consent of the true owner, so as to defeat the title of the true owner.

The facts of the case were as follows :—

Robert Brown was a boarding-house keeper, carrying on business at 15, London Street, holding the house under a lease from one Arabella Vardon.

On the 6th November 1883, Brown mortgaged the furniture in that house to one Dwarkanath Mitter, to secure a sum of Rs. 7,600 with interest.

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* Appeal No. 20 of 1885, against the decree of Mr. Justice Cunningham, the Commissioner of the Court for Insolvent Debtors, dated the 13th April 1885.

(1) 2 Ind. Jur. N.S. 340.

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The mortgage deed contained the following stipulations, that the mortgage should have the right to enter upon the premises at will for the purpose of inspecting and taking inventories, the mortgagor retaining and keeping possession of the furniture and using it until such time as default be made in the payment of principal or interest; that upon default in payment of the principal or interest the mortgage should be at liberty to enter upon the premises and take, seize and carry away the mortgaged property, or otherwise to remain upon the premises for the purpose of selling, and should have the power to sell the mortgaged properties; that the mortgagee might, during the continuance of the security, keep a durwan on the premises, whose wages should be borne by the mortgagor; that such durwan should be in charge of the mortgaged properties, and that notwithstanding [631] anything before provided in the deed, as to the mortgagor retaining possession of the property until demand made for payment of principal, or default made in payment of principal and interest, the possession of the mortgaged property by the mortgagor in charge of the said durwan should be deemed and treated as if the said property was in the possession and custody of the mortgagee.

Under the power contained in the mortgage deed, the mortgagee on his own behalf placed a durwan in charge of the mortgaged properties.

Interest on the mortgage money was duly paid up to the 15th January 1884, but it appeared from the evidence that, after that date, no further payment was made on account of interest, or on account of the wages of the durwan, after May 1884, and that the mortgagee on one or more occasions previous to August 1884 (although no exact dates were spoken to) had pressed the mortgagor for payment.

On the 8th May 1884, Arabella Vardon sued Brown (the mortgagor) in the Small Cause Court for rent which had fallen due for the months of January, February, March and April 1884 and on the 11th June obtained a decree against him for the amount claimed.

On the 1st August 1884, the mortgagee gave instructions to Mackenzie, Lyall & Co. to take the necessary steps for selling, and to put up for sale the mortgaged property, and on that day, in compliance with such instructions, an assistant of the firm of Mackenzie, Lyall & Co., a sircar of the mortgagee's, and Mr. Linton went to No. 15, London Street, for the purpose of taking an inventory preparatory to a sale; they were, however, refused admittance into the house by the mortgagor, though they succeeded in entering the compound, being admitted so far by the durwan of the mortgagee.

At or about this time (but whether before or after the 1st of August was not clear from the evidence) a conversation took place between the mortgagor and mortgagee, which is referred to in the evidence of Dwarkanath Mitter, as follows:

"From 15th January 1884 up to the insolvency I received no interest. I paid a durwan for these premises in order to keep possession of the furniture. I would not have allowed Mr. Brown [632] to deal with the furniture without reference to me. When I did not get the durwan's wages, I made out a list of the furniture. I delivered the list to Mr. Linton and Bhojohurry Sircar with certain instructions. The day after, Mr. and Mrs. Brown came to me. Mr. Brown asked me to give him four or five days further time and that he would put himself in a position to pay me my money. He begged of me to give him the time,

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and said that if, within the time I gave him, the money was not paid, he would accompany me to Mackenzie, Lyall, and arrange for the sale of the furniture. Before this occasion Mr. Brown had come to me and said, that as he was not in a position to pay me, I should have the furniture sold by Mackenzie, Lyall, and pay myself out of the proceeds. I did take steps with reference to the sale of the property. I have already stated what they were, and it was after this that the second conversation took place, when he said if he did not pay me in four or five days he would go with me to Mackenzie, Lyall & Co. He did not pay me in four or five days, but came again and asked for a further extension of a day or two. I agreed. He did not pay, and it was after this that the seizure took place, when Brown took the benefit of the Insolvent Act. I had communicated with Mackenzie, Lyall & Co. about eight or ten days before I heard of the insolvency."

On the 4th August 1884 the mortgaged property was attached in execution of Arabella Vardon's decree, and on the 5th August 1884 Arabella Vardon filed a second suit against Brown for rent; on the 6th August the mortgagor presented his petition in insolvency, and the usual vestingorder wasmade; and on the 15th September the mortgaged property was sold by order of the Official Assignee.

The mortgagee then filed his claim in the Insolvent Court claiming the benefit of his mortgage; and Arabella Vardon also filed claim in which she claimed a preferential right over the mortgaged property, or its proceeds, in respect of the amount of her attachment, and of the amount of a subsequent decree for rent which she had obtained on the 4th February 1885, and of rent said to have accrued due after the insolvency. These claims were heard together and after argument the learned Commissioner of the Insolvent Court, Mr. Justice Cunningham, disallowed the **[633]** claim of the mortgagee, on the ground that the furniture was in the reputed ownership of the insolvent at the date of his petition in insolvency; holding that the position of the durwan was precisely similar to that described by Phear, J., in *In re Agabeg* (1).

With regard to the question whether the fact of the property being under attachment in execution of a decree of the Small Cause Court operated to prevent the operation of the section of the Insolvent Act, the learned Commissioner held that the property was, at the time of the petition in insolvency, in the possession, order or disposition of the insolvent, notwithstanding that it was under attachment in execution of the Small Cause Court decree. He further allowed the whole of the claim of Arabella Vardon with costs to be added thereto.

Against this order Dwarkanath Mitter, appealed.

Mr. *T. A. Apcar* and Mr. *O'Kinealy*, for the appellant.

Mr. *Pugh* and Mr. *Allen*, for Mrs. Vardon.

Mr. *Bonnerjee* and Mr. *Sale*, for the Official Assignee.

A preliminary objection was taken by Mr. *Pugh* that the appeal proceedings had been taken in the form provided by the Code of Civil Procedure, instead of in the form directed by s. 73 of the Insolvent Act.

The decision on the preliminary objection was as follows :—

ORDER.

WILSON, J.—The objection that has been raised in this case is, that the appeal proceedings in an intended appeal against an order made in

(1) 2 Ind. Jur. N. S. 340.

insolvency, have been taken in the form provided by the Code of Civil Procedure, instead of in the form directed by s. 73 of the Insolvent Act.

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We think it is correct to say that the matter is governed by s. 73 of the Insolvent Act, and that appears in this way. This is an appeal against an order. The section dealing with the procedure in appeals against orders, contained in the Code of Civil Procedure, is s. 590; and that section says that the procedure prescribed in chapter XLI, the chapter giving the mode of procedure in cases of appeals against original decrees, shall, so far as may be, apply to appeals from orders under this Code or under any special or local law in which a different procedure is not provided.

[634] Orders in insolvency are not orders under the Code of Civil Procedure. They are orders under a special law, but they are under a special law in which a different procedure is provided. It follows, therefore, that the provisions of chapter XLI are not applied to those orders by s. 590; and we must, therefore, in order to see whether this appeal is properly brought, have recourse to s. 73 of the Insolvent Act.

That section provides that the appeal is to be by petition, and what we have to see is, whether this appeal is properly brought by petition.

Now, in the Insolvency Act, there are several cases referred to in which the procedure is to be by petition. In some of these the form of the petition is given in the schedule, and the requirements which must be satisfied in order to make the petition a good petition are provided in the statute itself. In other cases it is simply said that the procedure is to be by petition, but no form of petition is given, and no specific requirements to give validity to the petition are mentioned. The present case is one of the latter. The simple enactment is, that the proceeding is to be by petition.

Rules have been framed in this Court governing many matters connected with insolvency; but, so far as we have been able to ascertain, there is no rule prescribing the form of a petition of appeal, or laying down what specific requirements must be complied with to make the petition of appeal a good one. We are, therefore, to say, in the absence of any enactment, in the absence of any rule, and in the absence of any form prescribed, whether in substance, this document contains sufficient to make it a good petition within s. 73 of the Act.

The mere fact that it is called, in its own language, a "Memorandum" cannot make it the less a good petition, if it is so in substance. The petition in question refers to the Court against whose order the appeal is brought, and the order appealed from; it properly describes the Court to which the appeal is made; it describes the party from whom relief is sought; it states the grounds on which it seeks relief; and it states the relief. That appears to us to be, in substance, a good petition, within the meaning **[635]** of s. 73 of the Insolvent Act. The appeal must therefore proceed.

On the main questions arising on the appeal Mr. *T. A. Apcar* contended that Dwarkanath, the appellant, was in possession and not Brown. The consent of the true owner was determined when Mackenzie, Lyall & Co. went down to value the furniture; he never resiled from that position, and held his hand at the request of Brown until a few days before the sale. [WILSON, J.—What did Linton and the others go to the house for on the 1st of August? Supposing all had gone as Dwarkanath intended it to go, at what point of time did the possession change?] At the time when they actually went there for the purpose. When we went on the 1st August we took real possession, and this is sufficient to exclude the operation of the reputed ownership clause. On that day our

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possession assumed a totally different aspect. See *National Guardian Assurance Co.* (1).

The lower Court held that the mortgagee had lost his priority as he had no possession previous to the insolvency. Mrs. Vardon had attached previous to the insolvency, and therefore has priority to the general body of creditors. So, even assuming that the furniture was in possession of Brown after the 1st August, the seizure by Mrs. Vardon would take it out of the order and disposition of Brown, and I am entitled to the benefit of that circumstance. Mrs. Vardon's decree and attachment were prior to the sale by the Official Assignee. As to this part of the case, see *Anand Chàndra Pal* v. *Panchilal Sarma* (2) and *Shibkristo Shaha Chowdhry* v. *A. B. Miller* (3). The attaching creditor under the present law is in a much better position on account of the insolvency. The insolvency cuts the ground away from under the feet of all the other creditors for they are unable to attach.

Mr. *O'Kinealy* on the same side referred to the section of the Code relating to attachment, and contended that the attachment and seizure by the bailiff took the case out of s. 23 of the Insolvent Act ; and that the English cases did not apply, as in India the **[636]** Sheriff could attach an equitable interest. See *Ex parte Edey* (4), *Barrow* v. *Bell* (5), *Fletcher* v. *Manning* (6), *Ex parte Foss* (7).

Mr. *Pugh*, for Mrs. Vardon, cited and relied on *In re Agabeg* (8), and contended that the conversation set out between Brown and the mortgagee, of which the appellant gave evidence, showed a fresh consent to the goods being in the possession of Brown as reputed owner, and thus re-established the state of things existing before the 1st of August ; and cited the following cases : *In re Marshall* (9), as showing the effect of placing a durwan on the premises ; and *Callisher* v. *Bischoffsheim* (10), and *Ex parte National Guardian Assurance Co.* (11), *Ex parte Wingfield* (12).

Mr. *Bonnerjee* and Mr. *Sale*, for the Official Assignee.

JUDGMENT.

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

WILSON, J., who (after setting out the facts and stating that it was unnecessary to consider the facts of Mrs. Vardon's claim except so far, if at all, as they affected the position of Dwarkanath Mitter) continued.—In order to see whether on the 6th August the goods were in the possession, order or disposition of Brown as reputed owner with the consent of the true owner, it is necessary first to consider how things stood down to the 1st August.

The provisions of the deed as to possession are difficult to understand, for the reason that they are to a large extent obviously dealing rather with words than with things. The only things that seem clear are, that until default the mortgagor was to have the free use of the goods on the premises ; but that the mortgagee was to have a durwan on the premises who should in some sense have the custody of the goods, which custody must at least, we think, have extended to preventing the removal of the

(1) L.R. 10 Ch. D. 408. (2) 5 B.L.R. 691. (3) 10 C. 150.
(4) L.R. 19 Eq. 264. (5) 5 Ell. & Bl. 540. (6) 12 M. & W. 571.
(7) 2 De. G. & J. 230. (8) 2 Ind. Jur. N. S. 340. (9) 7 C. 421=10 C.L.R. 591.
(10) L.R. 5 Q.B. 449. (11) L.R. 10 Ch. D. 408. (12) L.R. 10 Ch. D. 591,

goods, if the mortgagor attempted such a thing. And this [637] arrangement was carried out. After default the mortgagee was to have the right to step in and deal with the goods as his own.

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But down to the 1st August no attempt was made to exercise this right; so that down to that date things remained unchanged so far as regards the point we are now considering.

Possession, order or disposition by an insolvent, to defeat the title of the true owner, must be actual possession; apparent possession is not sufficient. This is very clearly shown by the case of *Ex parte National Guardian Assurance Company* (1).

And it may well be open to question, whether enjoyment of the use of goods, but without the power of removal (the latter being prevented by the presence of the servant of the true owner placed for the purpose) is possession within the meaning of the section. It is not easy to see any material difference in point of fact between the position of a man placed in possession, and remaining in the back premises of a house, as in the case just cited, and that of a durwan placed upon the premises as in the present case.

In each case the enjoyment of the goods is undisturbed; in each their removal is provided against. But on the other hand, the placing a man in possession is in England a proceeding long familar, the meaning and intention of which is well understood. It can hardly perhaps be said that in this country the putting a durwan in charge is an equally unambiguous act. We think it unnecessary to express an opinion as to whether prior to the 1st August these goods were in the possession, order or disposition of Brown as reputed owner; we assume that, as has been held by the learned Judge, they were so.

We have then to consider the effect of what took place on the 1st August. Those who went to the house went clearly on behalf of the appellant and in opposition to Brown. On that day the durwan openly acted as the servant of the appellant; he admitted the appellant's representatives within the gate adversely to Brown, and, as the latter complained to the appellant in his letter of the same date, "degraded him to his servants." Had the persons who went to the house been permitted to carry out their intention of cataloguing and lotting the goods for sale, [638] they would have openly asserted and acted upon the rights of ownership of the appellant, and dealt with the goods as his. If this had taken place, it would have been difficult to contend that the goods were any longer in the possession, order or disposition of Brown. It would, we think, have been impossible to say that they were in his possession, order or disposition as reputed owner, that is to say, under such circumstances as fairly to lead to the supposition that he was the true owner. If what it was attempted to do on that occasion would, had the attempt succeeded, have taken the goods out of the possession, order or disposition of Brown as reputed owner, it follows that the attempt prevented their being any longer in that position with the consent of the true owner. For cases in which it has been held that a demand of the goods, or an attempt to put an end to the reputed ownership is sufficient to terminate the consent are numerous, it is sufficient to refer to *Smith* v. *Topping* (2), *Brewin*

(1) L.R. 10 Ch. D. 408. (2) 5 B. & Ad. 674.

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v. *Short* (1), *Ex-parte Harris* (2), *Ex-parte Ward* (3), *Ex-parte Montagu* (4), *In re Eslick* (5).

The case of *Reynolds* v. *Hall* (6) throws an instructive light upon this case. In that case Bate, a wine and spirit merchant, executed a bill of sale of all his goods to the defendant on the 15th May, but remained in possession of the goods as before. It was arranged between Bate and the defendant that the defendant, who was an auctioneer, should sell the goods on the 17th June. The sale was advertised ; and on the 17th June, the defendant attempted to sell, but found no bidders, and went away again. On the 22nd June Bate committed an act of bankruptcy. The facts were stated in a special case, and the second question asked was this : "Was the attempted sale of the 17th June a withdrawal by the defendant of his consent to the goods being in the order and disposition of Bate ?" The Court decided in the negative. The report is short, but the ground of decision very clearly appears. In the course of the argument, at p. 522, Martin B. is reported as saying "what did the hand-bills say ? [639] If they stated that the goods were to be sold as the defendant's goods, that put an end to the bankrupt's reputed ownership."

In giving judgment Bramwell, B. says on this point : "If the hand-bills had announced that the goods were the property of the defendant, the fact would have been stated. The case only states that the sale was advertised. If the advertisement simply announced that the goods were to be sold, it would have no effect. Neither party has desired to have it set out, and therefore we must assume that it does not affect the question." And Channell, B. says : "The advertisement of the sale did not destroy the apparent ownership, and was no withdrawal of the defendant's consent to its continuance. We can see no substantial distinction between what was done in that case and what was attempted in this. In each case the true owner endeavoured to sell, and went as far as he could carry out that intention. But there is this essential difference, that in this case everything done or attempted was done or attempted openly and unmistakeably on behalf of the appellant, in the exercise of his rights, and adversely to Brown.

The case of *In re Agabeg* (7) referred to by the learned Judge who heard this matter, was much pressed upon us in argument on behalf of the respondents. In that case Phear, J., held, upon the evidence before him, that the goods then in question were in the order and disposition of the insolvent. Questions of order and disposition are questions of fact ; and the decisions in any two cases upon such questions cannot be said to be in conflict in the same strict sense as if they turned upon pure points of law. But having regard to the more recent decisions in England already referred to, we think it very doubtful whether that case could now be decided as it was decided. We find it difficult to see what the true owners in that case could have done to aseert their title more than they did do.

It was contended, however, on the part of the respondents that the conversation already referred to, of which the appellant himself gave evidence, showed a fresh consent on the part of the appellant to the goods being in the possession of Brown as [640] reputed owner, and so re-established the state of things existing before the 1st August. But, as

(1) 5 E. & B. 227. (2) 5 L.R. 8 Ch. 48. (3) L.R. 8 Ch. 144. (4) L.R. 1 Ch. D. 554. (5) L.R. 4 Ch. D. 496. (6) 4 H. & N. 519, (7) 2 Ind Jur. N.S. 340.

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has been pointed out,* it is by no means clear whether that conversation took place before or after the 1st August. It lay upon those who now rely upon it to fix its date, and they have made no attempt to do so. And supposing the conversation to have taken place after the 1st August we do not think, on the evidence as it stands, it had the effect attributed to it. The appellant had on the 1st August attempted to assert his right. He was not bound to do more in order to protect his title; he was not bound to make a second attempt by force, at the risk of a breach of the peace; he was not bound to bring a suit. The only other thing he could have done was to try to sell the furniture without catalogue or lotting, a matter probably impossible. If in this state of things Brown asked him to give him four or five days, which seems to mean to do nothing for four or five days, promising, if the money were not paid within that time, to go to Mackenzie, Lyall's and facilitate the sale, and if he assented, we do not think that necessarily amounted to a fresh consent to the goods being in the possession, order or disposition of the bankrupt. And it lay upon those who assert that the conversation had such an effect to make it clear.

We think therefore that the furniture in question was not in the possession, order or disposition of Brown as reputed owner with the consent of the appellant on the 6th August when the insolvency petition was filed.

Assuming, however, that the view we have expressed is incorrect, and that the goods were, after the 1st August, still in the order and disposition of Brown within the meaning of the section so far as any action of the appellant affects the matter, is was argued that the seizure of them under Mrs. Vardon's execution took them out of that order and disposition, and that the appellant is entitled to the benefit of that circumstance; and we think it [641] difficult to resist this contention. The duty and liability of the officer executing a decree against moveable property in the possession the judgment-debtor are defined by s. 269 of the Civil Procedure Code. "The attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof." The bailiff of the Small Cause Court, in executing Mrs. Vardon's decree, appears to have followed this provision. It is difficult to see any distinction between the position of goods so attached and that of goods seized by the sheriff under an English writ of *fieri facias*. There is some difficulty in reconciling the English decisions upon the question, whether the seizure of goods in the possession of the debtor, but of which another is the true owner, terminates the reputed ownership. The authorities in favour of the affirmative view are *Fletcher* v. *Manning* (1) and the judgment of Turner, L.J., in *Ex parte Foss* (2).

Those in favour of the other view are *Barrow* v. *Bell* (3), and *Ex parte Edey* (4). But the only ground suggested in any of those cases for saying that an actual seizure by the sheriff does not put an end

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* In setting out the facts and alluding to the transactions given in the evidence of the mortgagor, the learned Judge expressed his opinion "that the evidence left it very obscure when it was that Brown asked for four or five days further time; no attempt being made in cross-examination to clear up the difficulty, and no witness being called on the subject by Brown."

(1) 12 M. & W. 571.
(2) 2 De G. & J. 230.
(3) 5 Ell. & Bl. 540.
(4) L.R. 19 Eq. 264.

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to the reputed ownership is that the sheriff is in such a case a mere wrong-doer; his only authority being to seize the seizable goods of the judgment-debtor, and goods under mortgage, in which his interest in only equitable, not being liable to seizure under a *fieri facias*. In this country there is no distinction between legal and equitable titles for the purpose of execution, and the officer executing process by seizure is not a mere wrong-doer in a case like the present. The considerations therefore upon which it has been thought in England that seizure by the sheriff does not take goods out of the order and disposition of the judgment-debtor, do not seem to apply in this country. Upon this point, however, it is not necessary to give any actual decision. . . . .

In our opinion the appellant's claim has been established. He is entitled to have the sale proceeds applied towards satisfaction of his debt, and to rank as a creditor for the balance.

[642] Mrs. Vardon, who is the appellant's real opponent, must pay her costs in both Courts. The costs of the Official Assignee will come out of the estate.

Appeal allowed.

Attorneys for the Appellant: Messrs. *Ghose & Ghose.*
Attorneys for the Official Assignee: Messrs. *Dignam & Robinson.*
Attorneys for Mrs. Vardon: Messrs. *Swinhoe & Chundra.*
T. A. P.

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12 C. 642.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson

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THE ORIENTAL BANK CORPORATION (*Plaintiffs*) *v.* J. A. CHARRIOL AND OTHERS (*Defendants*).* [19th March, 1886.]

Limitation—Civil Pracedure Code (Act XIV of 1882), *ss.* 32, 363, 364—*Adding defendant.*

No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit.

[**Diss.**, 25 P.R. 1903 = 74 P.L.R. 1903; **F.**, 24 C. 640 (641); 27 C. 540 (544); 3 C.L.J. 576 = 33 C. 613 = 10 C.W.N. 551; **Expl.**, 28 B. 11 (29); 5 C.L.J. 242 (F.B.) = 11 C.W.N. 350 = 2 M.L.T. 137; **Commented upon**, 14 A. 524 (528) = 12 A.W.N. 104; **Cons.**, 32 C. 483 (492); **R.**, 13 A. 78 (84); 33 C. 329 (337); 35 C. 1065 (1068) = 8 C.L.J. 286 (288) = 13 C.W.N. 186 = 4 Ind. Cas. 369 (370) = 5 M.L.T. 91; **D.**, 69 P.L.R. 1906 = 118 P.L.R. 1906.]

THIS was an appeal against an order made by Mr. Justice Pigot, directing upon the petition of the Banque de la Reunion that that Bank should be added as a defendant to the suit.

The suit was brought by the plaintiff Bank on the 18th January 1882. The original defendants were the members of a Calcutta firm, Robert and Charriol; the Official Assignee as assignee of the estate of two members of that firm who were insolvent; Lucian Lebeaud of Paris, described as trading in Paris under the name of Lebeaud, and at St. Denis in Reunion under the style of Lebeaud *per et fils*, and also trading in rice at Calcutta

* Appeal No. 1 of 1886 against the order of Mr. Justice Pigot, dated the 25th January 1886, made in Suit No. 29 of 1882.

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and Chittagong in partnership with Robert and Charriol, and L. de St. Hilaire of Chittagong.

The nature of the case made in the plaint was as follows: That a joint venture had been undertaken by Lebeaud, under both his firms, and Robert and Charriol, under which a cargo of rice was to be shipped by the ship "National," on joint account from Chittagong to Reunion, and there consigned to Lebeaud *pere et fils* for sale; that, to provide funds for this venture, an arrangement was entered into between Lebeaud on behalf of all those interested in the venture, and the plaintiff [643] Bank by which a credit was to be opened with the plaintiff Bank in Calcutta to the amount of £7,000; that Robert and Charriol were to draw upon Lebeaud at Paris bills payable in London, which the Bank in Calcutta were to discount against the credit of £7,000; and that all such bills were to be drawn against, and specifically charged upon the rice so to be shipped; that Robert and Charriol availed themselves of this credit and drew two bills amounting together to £7,000 which the plaintiff Bank discounted; and that Robert and Charriol remitted most of the amount to the defendant St. Hilaire at Chittagong for the purchase of rice; that Robert and Charriol had stopped payment, as had also Lebeaud, but that St. Hilaire was nevertheless loading the "National" at Chittagong with rice purchased with the funds advanced by the plaintiff Bank.

The plaintiff Bank asked for a declaration that the rice so in course of shipment had been specifically appropriated to meet the bills discounted by it, and for an injunction, and the appointment of a receiver.

At the time of presenting the plaint the plaintiff Bank applied for and obtained an order, by which, upon the Bank undertaking to be responsible for any damages arising to the defendants by reason of the injunction, the defendants were called upon to show cause why an injunction should not issue or a receiver be appointed.

On the 8th February 1882, with the consent of all the parties to the suit then in India, the order was made absolute, without prejudice to the rights and interests of all parties interested, and a gentleman, a Calcutta merchant, was appointed receiver to take charge of the rice, and sell it and pay the proceeds into Court, and the defendants were restrained from dealing with it in any way.

The rice was accordingly sold, and the net proceeds, amounting to Rs. 54,186, paid into Court, where they still remain.

On the 14th April 1882 the Official Assignee filed his written statement, putting the plaintiff Bank to proof of its case. On the 15th January 1883 Lebeaud filed his written statement. He denied the specific appropriation, and stated, further, that the joint venture was not between himself and Robert and Charriol, [644] but between Lebeaud *pere et fils* and Robert and Charriol, and that in the firm of Lebeaud *pere et fils* besides himself, his son Alphonse Lebeaud and one Buroleau were partners.

In the meantime, on the 26th June 1882, the Banque de la Reunion filed a suit in the High Court against the plaintiff Bank, in which it alleged that before the institution of the present suit, bills of lading had been signed in respect of the rice shipped, and had been transmitted to Lebeaud *pere et fils* at Reunion; and that on the 9th February 1882 those bills had been endorsed to the Banque de la Reunion for value without notice of any equity in favour of the plaintiff Bank; and claimed damages from the plaintiff Bank in respect of the sale of the rice, treating it as a conversion. On the 1st of December 1882, that suit was dismissed by

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Mr. Justice Cunningham; and on the 9th March 1883 the decree dismissing it was affirmed on appeal, on the ground that upon the facts alleged the plaintiff Bank was not liable in tort, but without deciding anything as to the respective titles of the parties.

On the 7th May 1883 the plaintiff Bank amended this suit, by adding as defendants Alphonse Lebeaud and Buroleau, who with the elder Lebeaud were partners in Lebeaud *pere et fils*. On the 1st May 1885 Buroleau filed his written statement, in which he alleged that he had endorsed the bills of lading to the Banque de la Reunion; and that he had done this without notice of any claim on behalf of the plaintiff Bank in respect of the rice, and he set up their title against that of the plaintiff Bank.

In the meantime Lebeaud *pere et fils*, as well as Lebeaud, had become insolvent, and the plaintiff Bank had gone into liquidation. The suit languished, the steps taken were few and far between, but in all that was done it was sufficiently plain that Buroleau supported the title of the Banque de la Reunion and defended in its interest.

In September 1885, a commission was issued at the instance of the plaintiff Bank for the examination of witnesses in England. During the execution of that commission, on the 29th October 1885, an agreement was entered into between the three liquidators, of Lebeaud, of Lebeaud *pere et fils*, and of the plaintiff Bank, by which, in consideration of certain terms, all opposition [645] to the plaintiff Bank's claim was to be withdrawn, and the plaintiff Bank was to be allowed to take the money, the proceeds of the rice, out of Court.

Under these circumstances the Banque de la Reunion applied to be made a defendant to the suit, on the ground that its presence before the Courts was necessary, in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

Preliminary to the question as to the propriety of making the Banque a party, it was contended by the plaintiff Bank that s. 32 of the Code did not expressly provide that persons not parties to the suit might apply for the purpose, and the case of *Mohindrobhoosun Biswas* v. *Shosheebhoosun Biswas* (1) was cited as an authority on this point.

Mr. Justice Pigot was of opinion that it was not in that case laid down that such an application could not be made; remarking that in the case of *Vavasseur* v. *Krupp* (2), Sir George Jessel, M. R., had, upon the application of the Mikado of Japan, made that Sovereign a party to the suit under the English rule which corresponded to s. 32, and that in the cases of *Khadar Saheb* v. *Chotibibi* (3), and *Vydianadayyan* v. *Sitaramayyan* (4), orders had been made making persons defendants on thier own application, and that in *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (5), a similar order had been made by Bayley, J., in which he referred to *Campbell* v. *Holyland* (6), where, after decree in a foreclosure suit, Jessel, M. R. had made the purchasers after decree of the mortgagor's interest parties defendants upon their application made *ex parte*, and also upon the same application made a purchaser of the mortgagee's interest also a party defendant.

On the other point, the learned Judge considered that the order applied for by the Banque was a proper one, and directed

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(1) 5 C. 882. (2) L. R. 9 Ch. D. 351. (3) 8 B. 616.
(4) 5 M. 52. (5) 8 B. 323. (6) L. R. 7 Ch. D. 166.

that the Banque should be made a party defendant upon the terms that, if the Court should see fit at the hearing, the onus of proving in the first instance the validity of its title as assignee **[646]** of pledgee of the bills of lading, should be thrown upon the Banque as between itself and the plaintiff Bank and the Official Assignee; and that if the plaintiff Bank should desire to appeal against such order, the Banque should afford them every facility for the appeal being heard by the appeal Court which was then sitting.

Against this order the plaintiff Bank appealed.

Mr. *Bonnerjee*, for the appellants.—I contend that the application was one under s. 32 of the Code, and that it is barred by limitation. [WILSON, J.—The Court has acted on its own motion on certain information brought to the notice of the Court by a third party; there is no provision of limitation against a Court acting on its own motion.] Section 32 must be read with ss. 26 to 32. [WILSON, J.—In the *Honduras Inter-Oceanic Railway Co.* v. *Lefevere* (1), the whole discussion was as to the propriety of making Tucker a party in the first instance, although the matter turned on the rule of the Judicature Act answering to s. 32 of our Code.] The principle is not applicable to cases of this description. Here what is asked for would change the entire nature of the suit. The Banque de la Reunion raised all sorts of claims inconsistent with our suit. [GARTH, C.J.—Has the Banque any right to hang back for five years, and then come in and unrip the whole suit in order to open up the question which it might have raised in 1882; and if it could do so, would it not be barred?] The case of *Mohindrobhoosun Biswas* v. *Shosheebhoosun Biswas* (2) decides that s. 32 does not contemplate any application to the Court by the person proposed to be added. [WILSON, J.—I did not intend to lay down that a third party could not come in and apply, but I intended to say that the Court could act on the information of a third party.] I say that the Court ought only to act on the information of a person a party to the suit; person claiming adversely to both sides have never been allowed to come in. [WILSON, J.—How do you deal with cases in which tenants have applied to have their landlords made parties? The only section under which that could be done is s. 32.] Yes, but the Courts discourage third parties coming in; it is in the discretion of the Court, and there must be some limit **[647]** to such discretion. Assuming the Banque de la Reunion to be able to make the application, it is barred: the Banque ought to have come in within three years from the time when its right to apply accrued; and that was when it obtained a right to sell the rice, when its case was dismissed by Cunningham, J., in 1882. Art. 178 of the Limitation applies and bars the application.

[WILSON, J.—The effect of your construction of s. 32 is to limit the words "at any time."] Under s. 32 is the Court to give to a person not expressly named a larger right than is to be given to a person who is named? To an application such as this no special article applies. The general art. 178 is applicable; that article has been applied in the cases of *Bhoyrub Dass Johurry* v. *Doman Thakoor* (3), and in *Benode Mohini Choudhrain* v. *Sharat Chunder Dey Chowdhry* (4), and in *Fulvahu* v. *Goculdas Valabdas* (5). There would have been no necessity to follow the

(1) L.R. 2 Ex. D. 301. (2) 5 C. 882. (3) 5 C. 139.
(4) 8 C. 837. (5) 9 B. 275.

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from laid down in this latter case had the Court power *at any time* to add parties.

[WILSON, J.—Section 32 relates to the case of persons who might have been made parties *ab initio*, and, if so, it does not apply to the case · the case might possibly fall under s. 372.] In that case the three years limitation applies. The Banque says in its petition that it was not aware of the proceedings mentioned in the suit until April 1882.

The case of *Naraini Kuar* v. *Durjan Kuar* (1) lays down the rule as to the addition of parties under s. 32. *Norris* v. *Beazley* (2) is also in point.

The Advocate-General (Mr. *Paul*) on the same side.—The question is, has a sound and proper discretion been exercised by the Judge in the Court below? The question as to the title of the goods under the bill of lading was not raised. We are clear of the bill of lading, and do not require any adjudication as to the bill of lading. Now was it necessary for the purposes and questions of the suit to add the Banque de la Reunion as a party? [WILSON, J.—The Banque took a title after the suit was filed.] *Lis pendens* does not apply to moveable property; **[648]** there are no cases showing that it is applicable; and moreover would it apply to a person outside the jurisdiction? *Srimiti Anand Mayi Dasi* v. *Dharandra Chundra Mookerjee* (3).

We have the goods; we do not want the bill of lading; the suit could have been decided without endangering the right of the Banque de la Reunion, aud there was no need therefore to add it as a party. It took no proceedings for five years and then starts up and wishes to appear in the case. The bills of lading are not produced but only copies of them, and there is nothing to show that they are not parted with. The admission to the suit of the Banque de la Reunion will put great difficulties in the way of the suit; the Banque filed no proper written statement and can delay the suit, nor have we any hold on it for costs. I submit (1) that if the Banque made the application it is barred; (2) if the Court made it a party, it is not a necessary party; (3) that in the way it has intervened there is not sufficient before the Court to adjudicate on; it says nothing about the bills of lading, and does not show that it is the party entitled to claim, as it may have assigned the bills of lading.

Mr. *Evans*, for the Banque de la Reunion.—Buroleau has been defending the suit and setting up the title of the Banque. He filed his written statement on the 1st May 1885. The suit as first constituted did not contain Lebeaud *pere et fils*. Lebeaud alone was a party. The plaint was amended on 13th May 1885 by adding Lebeaud *pere et fils*; this was immediately after the dismissal of the Banque's suit. The Banque having advanced money on the bills of lading is a necessary party. The Banque produces the original bills of lading. [The bills of lading were here for the first time produced in Court.] The plaintiff Bank after clearest notice of the Banque's claim agrees with the defendant to take the money out of Court. Has not the Banque right to come in and object to this? The case is somewhat similar to that of a beneficiary applying to be added as well as his trustee. Under s. 437 of the Code a beneficiary has no *right* to apply to be added, but can ask the Court to use its discretion in so doing. If the application be held to be one within the Limitation Act, the Court would not hold **[649]** that the Banque's right was barred, inasmuch as it says that it has only just discovered about the agreement. I submit

(1) 2 A. 738. (2) L.R. 2 C.P.D. 80. (3) 8 B.L R. 122.

the application is not one under s. 437 or 32; it is merely an application calling the attention of the Court to the terms of the agreement which is detrimental to the Banque.

If it is to be treated as an application, when does the right to apply accrue? As long as Lebeaud *pere et fils* were defending the suit for the Banque was it necessary that the Banque should be added as a party? Now it is necessary, as the Banque's money is about to be taken out of Court. It cannot be an application under s. 32 in the first suit to which Lebeaud *pere et fils* were no parties; it may be in the suit after they were made so. [GARTH, C.J.—Does it make any difference that Lebeaud *pere et fils* were not parties; the suit is one to recover a claim against goods or for a declaration that the goods are charged.] There has been here no assignment pending the suit under s. 372 *by a party to the suit.*

Mr. *Pugh* on the same side.—Article 178 is limited to applications under the Code. The Banque has a *locus standi*; as soon as it discovered the agreement it brought the matter to the attention of the Court. *Hossein Ali Khan* v. *Syud Burkut Ali* (1); there the application was treated as one by Burkut Ali. *Penney* v. *Todd* (2) is also in point.

JUDGMENT.

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

WILSON, J., who, after stating the facts, continued as follows: In the Court below it was contended on behalf of the plaintiff Bank that there is no power under any circumstances to add a party defendant on his own application. This contention was not pressed before us, and we entertain no doubt that the view taken by the learned Judge on this point is correct.

And, the Court having this power, the present case is one in which it is especially desirable to exercise it. The fund is in Court, and by the act of the Court in its order of the 8th February 1882. There is some reason to suspect that at the time when the order of the 8th February 1882 was obtained those who were in charge of the plaintiff Bank knew that bills of lading had been, or were likely to have been, issued in respect **[650]** of the rice. If so, the suppression of the fact was a very grave matter indeed, and the plaintiff Bank which is trying to get the money out of Court is in liquidation.

But it was contended before us that the Limitation Act precludes the making of this order at the present stage. This point was not taken before the learned Judge of the Court below, but it was strenuously pressed upon us. It was said that the application of the Banque de la Reunion to be made a party was an application within the meaning of the Limitation Act; and an application not expressly provided for in the Act; and that therefore under art. 178 of the second schedule it must be made within three years of the time when the right to make the application accrued.

It was said further that the right to make this application accrued when the Banque de la Reunion acquired title by endorsement of the bills of lading; or at latest, when by the dismissal of its own suit the true state of the case became known to it. But assuming that the article referred to applies to such a case, still we think this application was not barred. We think that the right of an outsider to claim to be made a party to a suit accrues when the necessity for his so claiming arises. In the present case we think that, however it may have been

(1) 10 W.R. 372. (2) 26 W.N. (1878) 502.

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before, a right to make this application accrued to the Banque de la Reunion in October last, when the person who had up to that time represented its interest and defended for its benefit ceased to have any voice in the suit, and the other parties proceeded to dispose by arrangement of the funds in Court behind its back.

Speaking for myself, I must say further that in my opinion there can arise no question of limitation with respect to the Court's power to make such an order as that in question. There are two classes of provisions in the Procedure Code with regard to parties. One class of provisions confers rights upon plaintiffs and others, chiefly as to the original selection of parties—by chap. III, as to the addition or substitution of parties by reason of subsequent events in chap. XXI. For applications to be made to the Court in exercise of such rights, periods of limitation are frequently provided. In most of such cases if the [651] rights given are not exercised within the time limited the ordinary consequence is that the suit comes to an untimely end. Thus, if a sole plaintiff or defendant die, and the representatives are not brought in within the time limited, the suit fails, and the Court has nothing more to do with it unless it can be and is revived. The second class of provisions does not give rights to parties, but confers powers and imposes duties upon the Court. The object of these provisions is not so much to prevent the abatement of suits, as to secure that if a suit does proceed and is adjudicated upon, that shall only be done in the presence of the proper parties, lest the Court should be made an instrument of injustice or fraud by determining rights, and even, as here, handing over property, without hearing the persons interested. The difference between these two classes of provisions is well illustrated by ss. 363 and 364. By s. 363 if one of several plaintiffs dies, and the cause of action survives to his representatives, together with the surviving plaintiffs, the representatives may come in and get themselves joined as plaintiffs; and a time is limited for their doing so. If they do not apply within that time their right is gone. It may be that in such an event the suit will not proceed, in which case the Court has nothing to do with the matter. But by s. 364 the suit may proceed at the instance of the surviving plaintiffs; and if it does, the Court has power to do, and is bound to do the thing which the representatives have lost the right to claim; "the legal representative of the deceased plaintiff shall be made a party." The second paragraph of s. 32 belongs to this class of provisions. It says: "The Court may at any time, either upon or without such application (that is the application of either party), and on such terms as the Court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added."

For the exercise of these powers and those conferred by other sections upon Courts no period of limitation is provided; and [652] they are to be exercised in my opinion whenever the necessity for doing so is made apparent, so long as the case is *sub judice*. Any other view would, I think, lead to disastrous consequences. It was suggested in the present case that, though the Court might act at any time of its own motion, it could not act on the application on any person if the right of that person to claim relief were barred. I do not think that is so. I do not see how

the fact of any person's making an application, whether in time or out of time, can take away from the Court a power given to it to act at any time, either upon or without application.

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Lastly, it was argued that the Banque de la Reunion had been guilty of such laches that its petition ought to be rejected. But we see no laches. The practical necessity for its intervention arose when it became aware of the agreement of last October.

The appeal is dismissed with costs.

Appeal dismissed.

Attorneys for appellants: Messrs. *Barrow and Orr.*

Attorneys for the second defendant: Messrs. *Sanderson & Co.*

T. A. P.

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12 C. 652.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

SECRETARY OF STATE FOR INDIA IN COUNCIL (*Execution-creditor*) v. JUDAH (*Judgment-debtor*). [1st April, 1886.]

Arrest-Escape-Release on recognizance—Surrender under recognizance—Recognizance, Expiry of—Arrest, Fresh application for—Civil Procedure Code (*Act XIV of* 1882), ss. 239, 241, 341, 349, 357—*Writ of attachment—Criminal Procedure Code* (*Act X of* 1882), *s.* 491.

A judgment-debtor once arrested and imprisoned in execution of a decree cannot, under the Civil Procedure Code, be again arrested under a fresh writ of attachment on the same decree.

[Diss., 8 Ind. Cas. 743 (744 = 8 A.L.J. 40 = 33 A. 279; F., 20 C. 874 (878); D., 23 C. 120 (129); 26 B. 652 (655).]

THIS was an application for a second warrant of arrest against A. N. E. Judah, the previous warrant being taken for the purposes of this application as expired.

The facts were as follows:—

In execution of a decree obtained by the Secretary of State for India in Council against A. N. E. Judah, a writ of attachment was [653] issued against the person of the defendant on the 20th January 1886. On the 11th February 1886 the defendant surrendered himself into the custody of the Sheriff, and was brought up before the Court under arrest and applied to be declared an insolvent under chapter XX of the Civil Procedure Code. The Court thereupon fixed March 3rd for the hearing of the application, and directed the defendant to issue notices to his creditors under s. 350 of the Code, and ordered that on the defendant giving security he should be released, or otherwise should be committed to jail. The defendant being unable to find security was committed to jail, and on the 3rd March was brought up before the Court in custody, apparently under the powers given by cl. (*a*) of s. 491 of the Criminal Procedure Code; on that day Counsel for the plaintiff applied for a postponement of the hearing of the defendant's application, and the Court allowed the postponement, but directed that the defendant should be released on his own recognizance of Rs. 500 on his undertaking to come up again before the Court on the 10th March.

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The defendant surrendered himself on the 10th March, and his application was in part gone into and the further hearing adjourned until March 24th; the Court again directing the defendant to be released, and enlarged on his own recognizance of Rs. 500 and to come up again on the 24th March. On the 24th March the defendant appeared, and his application under chapter XX of the Code of Civil Procedure was dismissed. It appeared from the affidavit made use of on behalf of Judah in this present application that the jailor was not in attendance at Court on the 24th March, and the Advocate-General (Mr. *Paul*) on behalf of the plaintiff, therefore, applied to the Court for an order for the re-commitment of the judgment-debtor, but the Court refused to make such an order, and the judgment-debtor without further interference took his departure from Court; in giving judgment on the judgment-debtor's application under chapter XX of the Code, the learned Commissioner made the following remarks: "It is with regret that I refuse the defendant's application under chapter XX of the Code. What the effect of my order will be, it is not for me to say. I can only venture to express a hope that the Advocate-General and the learned Counsel, who represent the Government, [654] will see their way to advise the Government not to pursue these proceedings to a dire extremity, and not to allow them to go beyond what they may think a just and legitimate length. It is not as if this gentleman had introduced this system (referring to the practice in vogue at the Government opium sales) himself. He has only followed a system adopted by the Government themselves for years. It has turned out unfortunately for him, and I think I may safely express a hope that Government will exercise a righteous and legitimate clemency."

On the 25th March 1886 notice was served upon the attorney of A.N.E. Judah, the latter having been at large since the 24th March, that a fresh application would be made on the 26th instant for the arrest of the defendant (judgment-debtor). This application was not actually made until the 27th, when A. N. E. Judah appeared by Counsel to oppose the application, and succeeded in doing so on the ground that no "tabular statement" had been filed by the plaintiff in accordance with the provisions of the Civil Procedure Code. On the 1st April the application was made in due form.

The Standing Counsel (Mr. *Bonnerjee*), appearing for the Crown, contended that he was entitled to the issue of a fresh warrant of arrest; that s. 254 allowed two executions to issue at once, one against the person of the judgment-debtor, and the other against his property; that there was no express provision against such an application; that s. 341 did not apply, as the judgment-debtor has never been discharged from jail under the circumstances required in that section; that it was under that section alone that a discharge could be obtained.

Mr. *Pugh* for A. N. E. Judah.—There is no provision in the Code for such an application as the present. Section 241 of the Code cannot be construed as giving a power to issue a new writ; the section merely intends that if a person is discharged under s. 239, he can be re-arrested, but if discharged under any circumstances, or in a way which cannot be said to fall under s. 341, there is no provision made for re-arrest. As to s. 357, it merely shows that it was not the intention of the Legislature to interfere in any way with the liberty of the subject, and were it not for that section, other creditors might [655] come in and arrest an insolvent. [PETHERAM, C.J.—In England where there is an escape there may be another

arrest.] Yes, but is not that in the case where there is an escap before a man is taken to jail? 1886 APRIL 1.

The nearest case to this is *In the matter of Dwarkaloll Mitter* (1), where it was held that a prisoner once discharged on non-payment of diet-money could not be re-arrested. ORIGINAL CIVIL.

The case of *Blackburn* v. *Stupart* (2) lays down that a man cannot be taken in execution twice on the same judgment. 12 C. 652.

Mr. *Bonnerjee* in reply.—The release was not with the consent of the judgment-creditor, but even if it be so considered, s. 241 would apply. The release was obtained under s. 349, and cannot be said to have been obtained with consent. None of the circumstances mentioned in s. 341 have arisen; he was out on bail, and he cannot be said to have been discharged from jail under that section. Granting for the sake of argument that the old writ came to an end, there is nothing in the Code to show that where a judgment-debtor gets out of jail, under other circumstances than those mentioned in s. 341, he cannot be re-arrested afresh. The case of *Blackburn* v. *Stupart* (2) was a release under an arrangement come to by the parties, and under those circumstances a re-arrest was not allowed; here there was no such arrangement.

ORDER.

PETHERAM, C. J.—I think this application must be refused. It is an application made under these circumstances. The plaintiff obtained a decree on the Original Side of this Court as long ago as the beginning of the year for the recovery of a sum of Rs. 1,14,500 from the defendant, and in execution of that decree obtained an order for the arrest of the defendant, and issued a warrant to the Sheriff for his arrest, and by the terms of the warrant, the defendant was directed to be arrested or imprisoned on or before the 20th of February. In accordance with that warrant the Sheriff of Calcutta arrested the defendant on the 11th of February and lodged him in prison. Having done that the Sheriff had done his duty, and the defendant was in the custody of the jailor under the jurisdiction of the Court. That being the state of things, proceedings were taken at the [656] instance of the defendant to obtain his discharge from imprisonment by the machinery provided for in the insolvency sections of the Civil Procedure Code. These proceedings were instituted by him on the day on which he was arrested, that is, on the 11th of February. They came before the Judge, who had jurisdiction in that matter, on the 3rd of March, after several adjournments. On the 13th of March, under s. 349, pending the proceedings under the insolvency sections of the Civil Procedure Code, the Judge having jurisdiction in that matter ordered him to be released on bail; the defendant giving the bail which he was required to do, accordingly was released. These proceedings went on from time to time, and defendant from time to time surrendered to his bail when he was required to do so. Bail was renewed, and he was released on bail until the proceedings ultimately came to an end. Eventually they came to an end by the Judge rejecting the defendant's application, declaring he was not entitled to the protection of the sections of the Civil Procedure Code relating to insolvents. The defendant at that time had surrendered to his bail and was in Court, and was to all intents and purposes in custody then under the warrant which had been originally issued, which had been

(1) Bourke, Pt. I, 109. (2) 2 East 242.

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executed by the Sheriff; and if the plaintiff then intended that the imprisonment should continue, his business and duty was to have had the proper officer from the jail there who should take him into custody, his bail having expired, and reconvey him to the place from whence he had been released when he was released on bail. He did not do so for some reason or other. What that reason was I do not know; at all events, he did not do so, and the defendant remained at large, and is at large at this time. Now what the rights of the plaintiff are with reference to the existing warrant is not for me to say. Having regard to the provisions of s. 341 and subsequent sections, I am clearly of opinion that the Code only contemplates one arrest; and if the defendant is to be remitted to jail, or if he is in custody now, he is in custody under the original arrest, and can be in custody under no other. Section 254 is the section which provides that the decree or order which directs the payment of the money may be enforced in two ways: it may be [657] enforced by the imprisonment of the judgment-debtor, or the attachment and sale of his property, and then the imprisonment which is directed under s. 254 is governed by the provisions of s. 341. Section 341 provides that if a man has been imprisoned, he shall be discharged in various ways, that is to say, upon the money being paid, the decree being satisfied, the creditor consenting to his release, the non-payment of the allowance by the creditor, the insolvency of the judgment-debtor, and the term of his imprisonment having expired. Now all these things obviously deal with one imprisonment only, and one arrest under s. 254, which is the arrest to enforce payment of the money. With that provision must be taken the insolvency section, which provides that, pending the enquiry as to whether the man shall be declared an insolvent, he is to be released on bail. The meaning of a man being released on bail, in theory at all events, is that he still remains in custody under the original warrant. The consequence is that, during the whole of the time that the defendant was out on bail, he was, in theory, in custody under the original warrant; his imprisonment still continued; and if he was not remitted to jail at the end of his bail, it was the fault of the person who had to deal with the matter. Then comes s. 241, which provides that, where a man has been discharged under certain circumstances, he may be re-arrested, but this is a provision applying to a case where execution has been stayed for a limited time, and the man released under that stay. That is a totally different state of things, it stays the execution and release of the man, because there is no execution under which he should be in custody, and the provisions in the subsequent sections merely provide that, where proceedings have been stayed, and consequently the arrest has been inoperative, there may be another imprisonment, which shall be the one imprisonment under the section. I am of opinion, therefore, that the defendant having been once arrested there can be no other writ which can issue from this Court. Whether the party has the right to re-arrest him under the original writ, or what are those rights, or what his liabilities may be, is a totally different matter. As I said before, I think, that this Court having once granted an order for the defendant's arrest, and he having been arrested under that [658] order, it is not open to it to grant another order, and therefore this application must be refused.

Application refused.

Attorney for the plaintiff: Mr. *R. L. Upton*.

Attorneys for the defendant: Messrs. *Gregory and Moses*.

T. A. P.

12 C. 658.

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APPELLATE CIVIL.

12 C. 658.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

MOORAJEE POONJA (*Plaintiff*), *Opposite Party* v. VISRANJEE VISENJEE AND OTHERS (*Defendants*) *Applicants.**
[14th April, 1886.]

Appeal to Privy Council—Practice—Appeal struk off for want of prosecution—Civil Procedure Code (*Act XIV of* 1882), *ss.* 598, 599, 600.

A on the 8th September 1885 filed his petition of appeal to Her Majesty in Council against a decree obtained against him by *B* on the 19th May 1885. On the 11th September 1885 *A's* attorney received for approval from the Registrar the usual draft notice calling upon *B* to show cause why the case was not a fit and proper one for appeal to Her Majesty in Council. This draft notice was never returned as approved or otherwise to the Registrar and no further steps were taken to prosecute the appeal.

On the 1st April 1886, *B* applied to have the appeal struck off for want of prosecution,—*held* that he was entitled to the order.

THIS was an application to make absolute a rule obtained by the defendants calling upon the plaintiff to show cause why a petition of appeal, filed by the plaintiff to Her Majesty in Council, should not be struk off the file for want of prosecution.

It appeared that on the 14th March 1884 the plaintiff obtained a decree against the defendants on certain bottomry bonds, and that on the 19th May 1885 this decree was in part reversed by the Appellate Court.

The plaintiff on the 8th September 1885 filed his petition of appeal to Her Majesty in Council against the decree of the 19th May 1885, and on the 11th May, in accordance with the usual practice, a draft notice to show cause why a certificate, that the case as regards amount or value and nature [659] fulfilled the requirements of s. 596 of Act XIV of 1882, and that it was otherwise a fit case for appeal to Her Majesty in Council, should not be granted, was sent by the Registrar of the Court to the plaintiff's attorney for approval.

No steps were, however, taken by the plaintiff after receiving the draft notice to prosecute the appeal.

On the 31st March 1886 the defendants obtained a certificate from the Registrar showing that no steps had been taken by the plaintiff in the matter, and on the 1st April 1886 they obtained the rule *nisi* set out above.

Mr. *Allen* showed cause on behalf of the plaintiff, and said that he had been instructed that the plaintiff had already verbally informed the other side that the appeal would not be proceeded with ; but contended that they were not entitled to the order asked for, inasmuch as the draft notice had not been served upon the defendants as yet, and it was only when that had been done that the defendants would be entitled to come in and show cause why the certificate mentioned in s. 600 should not be granted ; that the other side were not placed in any jeopardy by the action of the plaintiff, as the plaintiff could not advance a step in furtherance of the appeal without notice being served on the other side.

Mr. *Stokoe* in support of the rule contended that he was perfectly justified in the application, as at any time the other side might call upon the Registrar to issue the notice, and the Registrar would be bound to do so ; and it was therefore right that they should be allowed to come in and

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* Application in Appeal No. 8 of 1884.

1886 APRIL 14. — APPELLATE CIVIL. — 12 C. 658.

ask to be freed from the possibly impending appeal, seeing that no steps had been taken since the 8th September 1885; that the case of *Thakoor Kapilnath Sahai* v. *The Government* (1) was an authority for such an application where no steps were being taken to prosecute an appeal.

Mr. *Allen* in reply contended that the case cited was no authority for such an application being made at the stage which the present proceedings had reached; but merely authorized such an application after the certificate mentioned in s. 600 had been granted.

ORDER.

[660] PETHERAM, C.J.—Held that as no formal notice of abandonment of the appeal had been given, and that as at any time the Registrar might be called upon to issue the notice upon the opposite party, the application was a proper one; and therefore ordered the petition of appeal to be struck off the file for want of prosecution, allowing costs to the applicant.

Rule absolute.

Attorney for applicant: Mr. *Carruthers.*

Attorneys for opposite party: Messrs. *Watkins & Co.*

T. A. P.

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12 C. 660.

CRIMINAL REVISION.

Before Mr. Justice Wilson and Mr. Justice Porter.

DHARMA DASS GHOSE (*Petitioner*) *v.* NUSSERUDDIN (*Opposite party*).*
[14th April, 1886.]

Mischief—Penal Code (Act XLV of 1860), *s.* 425—*Revenue sale—Damage done between date of sale and grant of certificate—Wrongful loss to property held under incomplete title.*

The damage contemplated in s. 425 of the Penal Code need not, necessarily, consist in the infringement of an existing, present, and complete right, but it may be caused by an act done *now* with the intention of defeating and rendering infructuous a right *about to come into existence.*

Any person who contracts to purchase property, and pays in portion of the purchase-money, has such an interest in that property, although his title may not be complete, or his right final and conclusive, that the destruction of such property may cause to him wrongful loss or damage within the meaning of s. 425.

ONE Dharma Das Ghose was charged before the Deputy Magistrate of Sealdah with having committed mischief under the following circumstances:—

On the 14th December 1885 a small holding held by the accused from Government was sold by the Collector of the 24-Pergunnahs for arrears of revenue, and was purchased by the complainant who, in accordance with the sale law, on the day of sale, had deposited a portion of the purchase-money. The accused [661] was present at the sale, and knew that the holding had been purchased by the complainant. Previously, however, to the completion of this sale and prior to the expiry of the 60th

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* Criminal Motion No. 140 of 1886 against the order of Maulvi Syed Ameer Hossein, Deputy Magistrate of Sealdah, dated the 8th of February 1886.

(1) 1 C. 142.

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day from the sale on which a certificate would have been granted to the complainant, the accused cut down certain fruit trees on this holding, and was thereupon charged with committing the offence abovementioned. The Deputy Magistrate found the above facts proved against the accused, and found that the accused had the intention to cause wrongful loss to the complainant, who at the time had a prospective proprietary right in the holding, and convicted him under s. 425 of the Penal Code, sentencing him to a fine of Rs. 100, or in default two months' rigorous imprisonment.

On the 29th March 1886 the prisoner obtained a rule from Prinsep and Grant, JJ., calling upon the complainant to show cause why the conviction and sentence should not be set aside, on the ground that the act committed by the petitioner did not amount to mischief.

This rule came up for hearing on the 14th April 1886 before Wilson and Porter, JJ.

Baboo *Umbica Churn Bose*, in support of the rule, contended that the offence was not committed, because at the time when the trees were cut down the legal title to the holding was still in the hands of the accused, the title of the complainant not having become complete, inasmuch as under the sale law the sale could not become complete and final until the expiry of 60 days from the date of sale, and that until the purchaser obtained his certificate of sale, he had not the rights of a proprietor, and could not have suffered any wrongful loss by the action of the accused.

Baboo *Rajendro Nath Bose* showed cause.

The order of the Court (WILSON and PORTER, JJ.) was as follows :—

ORDER.

The question raised in this rule is, whether on the facts found the offence of mischief was committed. [Here followed the facts and the intention with which the act was done, as found by the Deputy Magistrate.]

The offence of mischief is defined in s. 425 of the Indian Penal Code : "Whoever with intent to cause, or knowing that**[662]** he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits mischief." The first explanation to that section is that " it is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed." " It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property whether it belongs to that person or not." And the second explanation is that, "mischief may be committed by an act affecting property belonging to the person who commits the act." A person therefore who destroys property which at the time belongs to himself with the intention of causing, or knowing that it is likely to cause, wrongful loss or damage to anybody else, is guilty of the offence of mischief.

Under Act XI of 1859, after a sale has taken place and the money is paid, and thirty days have elapsed, and no appeal has been filed, the sale becomes final and conclusive.

The time is now altered by s. 4 of Beng. Act VII of 1868 from thirty to sixty days. Under s. 28 of Act XI of 1859, upon the sale becoming final and conclusive, the sale certificate is to be given, which sale certificate is evidence of title from the date specified in it.

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The contention before us is that the offence of mischief was not committed in this case, because at the time when the trees were cut down, the legal title was still in the accused person, and the title of the complainant had not then become final and conclusive. No doubt the complainant's title had not become complete, nor had become final and conclusive, but it appears to us that it would be a great fallacy to say that therefore he had no such interest in the land that an interference with it might cause wrongful loss or damage. Any man who contracts to purchase property and pays in portion of the purchase-money has an interest in such property, though his title may not be complete and his right final and conclusive; and we think it clear that he has such an interest that the destruction of the property may cause wrongful loss or damage to him. On this ground, therefore, we think that mischief has been committed in this case.

[663] But there is another ground also for holding that the accused is guilty of mischief. The damage contemplated in s. 425 of the Indian Penal Code need not, necessarily, consist in the infringement of an existing, present, and complete right, but it may be caused by an act done now with the intention of defeating and rendering infructuous a right about to come into existence. This is clearly shown by illustration (*d*) to s. 425 itself.

That illustration says:

"*A*, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to *Z*, destroys those effects, with the intention of thereby preventing *Z* from obtaining satisfaction of the debt, and of thus causing damage to *Z*. *A* has committed mischief." A very little alteration in the words makes the case fit the present. *A*, knowing that his property has been sold in satisfaction of a public demand, in order to satisfy that public demand, and that the purchaser's title will, after the lapse of sixty days, become final and conclusive, destroys the fruit trees upon the land with the intention of thereby preventing the purchaser from obtaining the benefit of the purchase he has made, under which his title, now inchoate, will become final, and conclusive after sixty days: *A* has committed mischief.

We think, therefore, that this rule should be discharged.

T. A. P. *Rule discharged.*

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12 C. 663.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

RAM LAL SETT AND ANOTHER (*Defendants*) *v.* KANAI LAL SETT AND ANOTHER (*Plaintiff*).* [10th March, 1886.]

Hindu Law, Gift—Settlement—Gift to a class--Construction of family settlement—Rule for gift to unborn grandsons.

Where the intention of a donor is to give a gift to two named persons capable of taking that gift, although it is also his intention that other persons unborn at the date of the gift should afterwards come in and share therein, the part of the gift which is capable of taking effect should **[664]** be given effect to,

*Original Civil Appeal No. 31 of 1885, against the decision of Mr. Justice Pigot, dated 8th September, 1885.

notwithstanding that the intention of the donor cannot be carried out in its entirety.

Principle in *Rai Bishen Chand* v. *Asmaida Koer* (1) followed.

Semble.—As a general rule, where there is a gift to a class, some of whom are or may be, incapacitated from taking because not born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking. *Soudaminey Dassee* v. *Jogesh Chundra Dutt* (2) and *Kherodemoney Dassee* v. *Doorgamoney Dassee* (3) questioned.

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[F., 12 M. 393 ; 29 M. 412 (418) = 1 M.L.T. 427 ; 15 B. 652 (655) ; R., 10 M. 196 (198) ; 15 B. 543 (548) ; 15 B. 326 (334) ; 18 B. 7 (12) ; 22 B. 533 (538) ; 26 B. 449 = 3 Bom. L. R. 857 ; 24 C. 646 (660) ; 1 C.L.J. 482 = 9 C.W.N. 749 = 32 C. 992 ; 15 C.W.N. 393 (P.C.) = 9 M.L T. 411 = 21 M.L.J. 387 = 8 A.L.J. 433 = 13 C.L.J. 434 = 3 Bom. L. R. 375 = 10 Ind. Cas. 641 = (1911) M.W.N. 295 ; 13 C.L.J. 85 = 15 C.W.N. 66 = 7 Ind. Cas. 921 (923) ; 13 Ind. Cas. 882 (894) = 14 O.C. 356 ; **Rel.**, 39 C. 87 (94) = 14 C.L.J. 20 = 15 C W.N. 945 = 11 Ind. Cas. 67 (69) ; **Appr.**, 38 C. 468 = 21 M.L.J. 387.]

THIS was a suit brought on the 4th January 1883 by two of the grandsons and heirs of one Radha Krishto Sett, who died on the 21st February 1875, seeking to recover from the defendants a share of two pieces of land on the ground that these formed part of the estate of the deceased at the time of his death.

The facts were as follows : On the 27th January 1871, Radha Krishto Sett executed a deed by which he purported to convey these plots of land to the defendants Ram Lall Sett and Sham Lall Sett, who were two of his grandsons, and to any brothers of those two who might subsequently be born. The material part of that deed was as follows : " I make a gift of the said two parcels of land to Sriman Ram Lal and Sriman Sham Lal Sett, the two now existing infant sons of my youngest son, Sriman Madhub Kissen Sett, and to the sons to be born unto him in future by the blessing of Issur (God), and I give this instrument of gift in writing that the two now existing brothers, and their uterine brothers who shall be born in future, will divide the same amongst themselves in equal shares according to the terms of this *Danputtro*. At present the two now existing brothers will take possession of the said two parcels of land, and cause their own names to be substituted for that of mine in the Collector's office and in the Tax Office in respect thereof, and continue with their sons and grandsons in succession to be in felicitous possession and enjoyment thereof with the right of sale or gift therein by payment of the fixed rent and taxes. But the rights and interests of the uterine brothers who shall **[665]** be born in future will in no way be extinguished by reason of the now existing two brothers obtaining possession thereof, and all the uterine brothers, whatever their number may be, will divide the same equally amongst themselves (no brother will be competent to claim mesne profits from his brothers in possession for any period anterior to his birth) and during the minority of the two now existing brothers, Sriman Ram Lal and Sriman Sham Lal Sett, their mother Sreemutty Saroda Soondery Dasee will herself spend the surplus of the income of the said two parcels of land. After payment of the Government rent and taxes these minors, upon their attaining majority, and the sons who shall be born in future, will not be competent to make any claim against their mother in respect of the income of the properties during their respective periods of minority, and after the attainment of majority by these two brothers, their mother will cease to have any concern with their share of the income. Upon these terms I gave this instrument of gift in writing, so that neither

(1) 11 I. A. 164 = 6 A. 560. (2) 2 C. 262. (3) 4 C. 455.

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I nor my heirs, executors, administrators nor future assigns will ever be competent to make any claim or demand in respect of the land hereby given away by me."

Possession was taken by Ram Lal and Sham Lal under the deed, and the usual mutation of names in the Municipal Register took place, and up to the time of this present suit both Ram Lal and Sham Lal remained in possession of the land given them by this deed.

On the 4th January the plaintiffs above mentioned filed their suit seeking to recover from the defendants Ram Lal and Sham Lal a share in the two plots mentioned in the deed, alleging that the deed of 1871 was an attempted gift to a class, some of whom were incapable of taking, and as such was totally void; that the property therefore remained in Radha Krishto till his death and passed to his heirs. So far as is necessary for the purposes of this report the defence was that the gift to the two defendants was a valid one.

Mr. Justice Pigot, feeling bound by the decisions in *Soudaminey Dassee* v. *Jogesh Chundra Dutt* (1) and in *Kherodemoney Dassee* v. *Doorgamoney Dassee* (2) held that the gift in favor of the sons [666] of Madhub Kissen Sett was inoperative and void, as being a gift to a class of persons some of whom were not in existence at the time the gift took effect.

The defendants appealed.

Mr. *Woodroffe*, for the appellants.—The case of *Rai Bishen Chand* v. *Asmaida Koer* (3) is direct authority for holding that the gift should be given effect to as far as it can be. The question as to whether this could be done first arose in *Bramamayi Dassi* v. *Jogesh Chundra Dutt* (4); the attention of the Court was not called to the difference between a gift to A and a gift to a class; it is therefore distinguishable from the present case. The Privy Council have laid down that s. 102 of the Succession Act does not reproduce the rule in *Leake* v. *Robinson* (4). The decision in *Soudaminey Dassee* v. *Jogesh Chundra Dutt* (1) was on the same will as came before the Court in *Bramamayi's* case, and it was there argued that Norman, J.'s decision on the same will was conclusive. The Court cannot overlook the difference between a deed and a will, and the difference between a present gift and a gift in remainder. The case of *Kherodemoney Dassee* v. *Doorgamoney Dassee* (2) follows these cases. The case of *Cally Nath Naugh Choudhry* v. *Chunder Nath Naugh Choudhry* (6) is the case of a will, but the Court held that the persons there were sufficiently designated, but I submit that these cases cannot be followed since the ruling in *Rai Bishen Chund's* case has been delivered.

On what view is the effect of the transfer made by this will to be got rid of? Is it a resulting trust?

[WILSON, J.—This is how I suppose it will be put by the other side; either it is a gift to all beneficiaries, or intended to those capable of taking for the benefit of the group; in the latter case it would be a resulting trust in favour of the donor; in the other case it would be void.] Another view of the case is, supposing the deed is void, did not the donor validly, by absolute relinquishment and acceptance on the part of the donees, part with his interest?; for a Hindu can verbally give a good title by relinquishment [667] and acceptance; this has been found as a fact and there is no cross appeal as to this.

Mr. *Pugh*, on the same side, contended that it was not a gift to a class at all; that it did not fall under the definition of a gift to a class as

(1) 2 C. 262. (2) 4 C. 455. (3) 11 I.A. 164 = 6 A. 560. (4) 8 B.L.R. 400. (5) 2 Mer. 363. (6) 8 C. 378.

laid down in Jarman on Wills ; the question cannot arise where there is a gift *in præsenti*, but it almost always refers to future gifts, or to gifts where some prior interest is given.

Mr. *Evans* (with him Mr. *Kennedy*) for the respondents.—What I would ask the Court to hold with regard to *Rai Bishen Chand's* case is that the decision, so far as it concerns a person designated with others who cannot take, is that, though there may be doubt whether it was not a gift to a class, yet the Court is free from the English construction, and is governed by the doctrine of paramount intention. If the gift cannot take effect *modo et forma*, it may be reformed, as is laid down in the *Tagore case* and in *Pitt* v. *Jackson* (1). If the construction is that it is a gift to the two grandsons together with a future gift to grandsons unborn, then the question of reformation would not arise at all. I submit that such a construction cannot be put upon it—see *Rai Bishen Chund's case*, pp. 176-178. Wills and gifts have a strong analogy. The Privy Council in that case make no distinction between them, but merely in getting rid of the argument that there is a distinction they allude to the point ; their Lordships further clear away the hard and fast rule which obtains in England, as to the doctrine of gifts to a class being possibly void if the class cannot be ascertained. As to what a gift to a class, is see 2nd Ed. Jarman, 216, and *Pearks* v. *Mosley* (2). If the paramount object is to benefit this class, then it is a gift to the class, and the Court might disregard the wording of the deed as the Court is not prevented from applying in this country the doctrine of approximation ; and that is the view that is taken by the Privy Council on p. 177 of *Rai Bishen Chund's case*. The *Tagore case* (3) shows that the rule in *Rai Bishen Chund's case* should not be applied. I submit it is not an absolute gift to the two grandsons, but it is a gift to the born and unborn grandsons, and inasmuch as the unborn can't take, it is void. Does [668] *Rai Bishen Chund's* case go so far as to lay down what is the real question in this case, *viz.*, whether, supposing there is a gift to a person and to others in the future, that person is in all cases necessarily to take the whole ?

Mr. *Dunne*, for the infant respondents.

The following judgments were delivered :—

JUDGMENTS.

WILSON, J. (after setting out the facts) continued.—The only question before us is, whether the contention set up by the plaintiffs is a sound one. Before considering the question in detail it may be convenient to point out very briefly certain propositions of law about which there is no dispute.

Gifts are of three kinds—those which convey a present title and interest, and a present right of enjoyment ; those which are vested, that is, present in interest, but in which the enjoyment is deferred ; and those which are contingent, that is to say, in which neither title nor right of enjoyment is given at present, but both depend upon future uncertain events. All these kinds of gifts are admissible among Hindus, all are recognized by the Succession Act, the Hindu Wills Act, and the Transfer of Property Act.

All these kinds of gifts may among Hindus be given subject to various restrictions, either *inter vivos* or by will, and, speaking generally, the same

(1) 2 B. C. C. 51. (2) L. R. 5 App. Cas. 714 (723). (3) 9 B. L. R. 409.

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law applies in either case. This is explained by the Privy Council in the *Tagore* case.

It was argued indeed for the appellants that the Privy Council in a case which I shall have to consider fully laid down that there was or might be a difference between deeds and wills on the very point now before us. The passage referred to is on p. 177 of *Rai Bishen Chand's* case.

On the best consideration I have been able to give to the matter, I do not think this is what their Lordships intended. I think in that passage they were only dealing with an argument which had been addressed to them, based upon the Succession Act. However, if I am wrong in this, and if there is a distinction between deeds and wills, that would only strengthen the conclusion to which I have come upon this case.

[669] Whether a gift be given by act *inter vivos* or by will, no one can take under the gift who is not in existence, and thus capable of taking at the date from which the gift speaks, that is to say, the date of the gift if *inter vivos*, the death of the testator in the case of a will.

If the gift be intended to operate partly in favour of living persons, and partly in favour of persons yet unborn, it is impossible that the intention of the donor can take effect to full extent. The principle on which Courts should act in such cases has given rise to much difficulty: and this is the question to be considered in the present case.

There is no statutory provision affecting the present case. The only sections, I think, expressly mentioning gifts to a class, some of whom cannot take, are s. 102 of the Succession Act, which is embodied in the Hindu Wills Act, and s. 15 of the Transfer of Property Act. Obviously neither of the enactments applies to the present deed; and the Privy Council has warned us, in the case thus referred to, against drawing any conclusion from the adoption of a rule by the legislature in a particular instance in favour of its general applicability. Moreover, it seems to be settled by the decision of this Court in *Alangamonjori Dabee* v. *Sonamoni Dabee* (1) that, by reason of the saving clause in the Hindu Wills Act, neither s. 100 nor s. 101 of the Succession Act, though embodied in the Hindu Wills Act, has any application to Hindu wills; and it would seem to follow that s. 102 has none either. The saving clause in the Transfer of Property Act is at least as wide in its terms as that in the Hindu Wills Act.

Before considering the cases in this Court directly bearing upon the question, it may be well to mention two which were cited in argument, namely, *Krishnaramani Dassi* v. *Ananda Krishna Bose* (2) and *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry* (3). In each of these cases the gift in question was construed, and was found to be a gift wholly to persons alive and capable of taking, so that the present difficulty did not arise. Several cases, however, have arisen in this Court bearing **[670]** directly upon the question before us. The first is *Bramamayi Dassi* v. *Joges Chandra Dutt* (4). In that case a testator directed his property to be divided into five shares, of which each of his four sons should take one and his two grandsons the other for life, with a gift over. It became necessary to ascertain the devolution of the shares of two of the sons, Wooma Churn and Shib Dass. As to the share of Wooma Churn the matter stood thus. The will declared that if any son died leaving lawful male issue, such male issue should succeed to the capital or principal of the share. There was a gift over which, for reasons not

(1) 8 C. 637. (2) 4 B.L.R.O.C. 231. (3) 8 C. 378. (4) 8 B.L.R. 400.

bearing upon this case, was decided to be void. Norman, C. J., held that under the words I have cited, on the death of Wooma Churn his share vested absolutely in his son; apparently Ainslie, J., concurred in this view.

The fate of Shib Dass' share depended upon a clause which said that "on the death of any son without leaving male issue his share should go to the survivors of my said sons and my said two grandsons for life, and their respective male issue absolutely after their death in the same manner and proportions as hereinbefore described respecting their original shares." The Court held that this gift was void, and Norman, C.J., said that on the death of Shib Dass, without issue his share went to his heir. He construed the gift as one "to the surviving and the living male issue of the deceased sons as a class, the surviving sons to take for their lives, the issue of the deceased sons absolutely." He pointed out that male issue might include persons born after the testator's death; he referred to the *Tagore* case and said :—

"The gift therefore, so far as it is a gift to the unborn male issue of the sons and grandsons of the testator, must fail. Now it is a well-settled rule in construing wills founded upon excellent reasons, and which has been adopted in the 102nd section of the Indian Succession Act, that where there is a gift to a class and some persons constituting such class cannot take in consequence of the remoteness of the gift or otherwise, the whole must fail. Upon that principle I think we are bound to say that the gift over on the death of Shib Dass wholly fails." The learned Judge **[671]** then shows that there were other sufficient reasons why that part of the claim must fail.

This case is one that I find very difficult to follow. The rule just cited is laid down broadly; yet I cannot think that the learned Judge meant to lay down a universal rule; for the rule would then have applied just as much to the gift which he held good as to the one he held bad. Moreover, the learned Judge had before him the Privy Council decision in *Soorjeemoney's case* (1), for he cited it without distinguishing it in this respect, yet the gift in that case seems to fall within the rule. And my difficulty in understanding the judgment is increased by the ruling that on the termination of Shib Dass' life estate his share went to his mother. I cannot see how it should go to her and not to the heirs of her father.

Soudaminey's case (2) related to the same will as *Bramamayi's* case. The plaintiff was the widow of Sreenath, who, in the former case, was held by Norman, C.J., to have taken the share of his father Wooma Churn absolutely, and she claimed that share as his heir. The defendant claimed under the subsequent limitations over which they contended were valid, and operated to defeat the estate which would otherwise have passed to the plaintiff as Sreenath's heir. None of the parties to the suit questioned the validity of Sreenath's title. But Pontifex, J., raised the question whether Sreenath took anything at all under the gift. He adopted to the full extent the rule as laid down by Norman, C.J., in the previous case, adding expressly that the rule applies as well in the case of a class that may, as of a class that must, include incapacitated persons; he applied it to the gift to which in the earlier case it had not been applied, and held the gift bad which had then been thought good.

In *Kherodemoney's case* (3) the testator gave the residue of his estate "to the son lately born to my sister's husband, Sreejoot Woodoy Mullick,

(1) 6 M.I.A. 526=9 M. I. A. 123. (2) 2 C. 262. (3) 4 C. 455,

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and to the son or sons that may hereafter be born to him." The Chief Justice and Markby, J., followed the [672] ruling in *Soudaminey's* case, applied it to the case before them and held the gift to be wholly void.

The result of these decisions was that a gift, whether vested or contingent to a class which included, or might include, persons unborn at the date of the gift was wholly void.

Judges sitting on the Original Side of this Court have in several cases followed these rulings, as they were bound to do. But they have certainly in some instances done so reluctantly, as did the learned Judge whose judgment is now under appeal. I have endeavoured to ascertain whether the law so laid down has been applied in the Mofussil; but I have not been able to hear of any case arising outside Calcutta, except *Bramamayi's* case already referred to, in which the subject has been considered. It does not appear to have come before any of the other High Courts in India; nor have the rulings in question received the sanction of the Privy Council. However, if nothing more had occurred, I should probably have felt bound to follow them, however little I might have agreed with them.

But the case seems to me materially altered by a recent decision of the Privy Council in *Rai Bishenchand* v. *Mussamut Asmaida Koer* (1). That case was decided shortly before the judgment which is now under appeal was delivered, but the decision was not received in this country till afterwards.

In that case Matta Doyal, Woodoy Narain, and Satrujit Narain were grandfather, father, and son, and formed a joint Mitakshara family. Udey was a man of extravagant habits, and an arrangement was entered into, embodied in a deed, by which the grandfather and the father conveyed certain property, declaring that the son "Satrujit himself and his own brothers who may be born hereafter are and will be the permanent and rightful owners." Their Lordships held that the transfer was not void, but took effect as a valid transfer to Satrujit. The nature of the grant, the special circumstances taken into account in construing it, and the principle of the decision, appear from the judgment, which, so far as this point is concerned, is at pages 176 to 179.

[673] "There remains a question of some difficulty whether the deed, which contemplates benefits to after-born sons of Udey Narain as well as to Satrujit, can have any operation in his favour. This question, though raised in the plaint, is not dealt with by either of the lower Courts. It depends entirely on the view which may be taken of the meaning of the parties to the transaction, for the rule of law on which the plaintiff relies, *viz.*, that gifts cannot be made to persons unborn at the time, is well settled.

"It is said then that the gift is made to a class, and that, inasmuch as some of the class are unable to take, none can take, and certain sections of the Indian Succession Act of 1865 are invoked to give weight to this contention, the Legislature having thought fit to apply those sections to Hindu wills.

"Independently, however, of the distinction which may be taken between wills, the operation of which is suspended during the testator's life, and deeds which operate immediately, especially such deeds as confer a present interest upon a present person, the sections cited have no bearing on such a gift as that under consideration. Section 102

(1) 11 I. A. 164 = 6 A. 560.

lays down the rule that a bequest inoperative as to some of a class shall be wholly void, not in all cases, but only when the bequest offends against the rules contained in ss. 100 and 101 ; and the gift under consideration does not fall within either of these two sections. It may be that illustration (*b*) to s. 102 imports into India an English rule of construction which usually defeats the intention of the testator. But whatever force the illustration may have (and it seems out of place as attached to a section intended not to define the word 'class', but only to establish a special incident of gifts to classes), it is not made applicable beyond the two cases contemplated by ss. 100 and 101.

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"Assuming that the deed is intended to express a gift to the brothers of Satrujit which cannot take effect as such, what is the whole scheme of the parties? We find them bent on saving the ancestral estate from the consequences of the continued extravagance of one of its members. The plan they adopt, probably the only plan open to them, except a complete partition, is a transfer by the head of the family, with the consent of his son, to the lower generation. The only member of [674] that generation was the grandson Satrujit. He therefore is made to take by name and immediately, and the possession and ownership are transferred to him. Is then the gift indisputably designed for him wholly to fail, because the parties supposed that they could join with him possibly after-born sons, who, if any had happened to be born, could not legally claim under a gift? Is Udey Narain, whose interests were bought out for valuable consideration, to re-enter upon his son, in whose favour they were bought out? No doubt that, on the present assumption, some portion of the intention must fail, but that is no reason why the whole should fail.

"The paramount intention was to get rid of Udey Narain by passing the property to his sons.

"That intention is much more readily effectuated by giving the property to Satrujit, the only then son of Udey Narain, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of Asmaida did not operate any change at all. Cases are not rare in which a Court of construction, finding that the whole plan of a donor of property cannot be carried into effect will yet give effect to part of it rather than hold that it shall fail entirely. In the present case, there is every reason for holding that if Satrujit's possible brothers are not able to take by virtue of the gift, he shall take the whole. He is there present, and able to receive the gift. He is an individual designated in the deed. If the deed stood alone, it is a question in each case whether a designated person, who is coupled with a class described in general terms, is merged into that class or not. But the deed does not stand alone. It is followed by actions of a kind which, even without a deed, may work a transfer of property in India. Satrujit is entered in the Collector's books as the sole possessor of the property, and his guardian takes possession, first in his name and afterwards as his successor. Their Lordships hold that the circumstance that the parties wished to do something beyond their legal power, and that they have used unskilful language in the deed of gift, ought not to invalidate that important part of their plan, which is consistent with one construction of the deed, and is clearly proved from the [675] transfer of the property in fact. But their Lordships conceive that it is not necessary to view this transaction as though it were to be determined by rules of construction drawn from English law and applicable to

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English deeds of gift. The High Court viewed it in the light of a partition. It cannot be strictly a partition, for, according to Mitakshara (chap. I, section 5, verse 3), there can be no partition directly between grandfather and grandson while the father is alive. But it is a family arrangement, partaking so far of the nature of a partition that Udey Narain receives a portion, and is thenceforth totally excluded, and *quoad ultra*, Mata Doyal surrenders his interest to his grandson, who, on a complete partition among the whole family, would be entitled to one-fourth.

"Now in such an arrangement it would be quite consistent with Hindu ideas of ancestral property to express a desire that the whole generation into which the property was transferred should benefit by it. Indeed, in the case of a partition between father and sons, it is laid down in the books that if a son born after the partition of ancestral estate does not, out of the residue of his father's estate, get a share equal to what his brothers had obtained, the other brothers must contribute to a share out of their portions. This rule is to be found in the Dayabhaga, chap. VII, ss. 10, 11, and 12, which is a Bengal authority, but it refers to Vishnu and Yajnyavalkya—authorities on which the Mitakshara is founded. Indeed, the principle of the joint family is not less closely but more closely insisted on by the Benares school than by the Bengal school of law. But their Lordships are not now affirming the law on this point, nor are they deciding or prejudicing any question which may arise between Satrujit's heirs on the one hand, and his brothers, if any should be born, on the other. They are only showing that the notions present to the mind of the head of a joint Hindu family who is making a family arrangement are something very different from the notions present to the mind of an English testator when he makes a gift to a class."

There were circumstances in that case which are wanting in this. The parties to the transaction were members of a Mitakshara family, so the property was already vested in each one of [676] them as much as in any other. It was argued before us that what happened in that case should be regarded merely as the withdrawal of one member from the family, or the surrender of his interest to his co-sharers. But that is not the ground of the decision, and that is what we are bound to ascertain, and to follow it where it is applicable.

Again, in that case there was consideration for the grant, and that fact is undoubtedly dwelt upon by their Lordships. But I do not understand them as holding that the existence of consideration could give validity to any disposition of property not sanctioned by law. They seem to me to use the fact of the consideration passing as an important circumstance bearing upon the construction of the instrument, because it tended to show that a present gift was contemplated.

The true ground of decision in that case appears to me to be that in construing family settlements of this nature, Courts are to ascertain the real meaning of the parties to the transaction; that when that meaning has been ascertained, if it appears that the whole plan cannot be carried out, but that a part of it can, effect is to be given to that part. And that, accordingly, if the plan be to give a present gift to persons capable of taking, that gift is effectual, although it was also intended that other persons incapable of taking should afterwards come in and share in the gift.

I think we are bound to apply this method of construction in the case of before us.

There seems to me no great difficulty in ascertaining what the donor intended. I shall first try to state what that intention seems to me to be, without the use of technical words, and in popular language—a course which seems to me the safer course in dealing with the intention of a Hindu gentleman. He intended, I think, that he should at once cease to have himself any interest in the property given; that the two living grandsons should at once enter upon the possession and enjoyment of it, and acquire the right to dispose of it; that if brothers should afterwards be born, each of such brothers should at his birth step into an equal share of the property, but without any retrospective effect; and that no act of the living grandsons [677] should prejudice this right of their after-born brothers, and that during the minority of the living grandsons their mother should manage the property for their benefit without being liable to account to them. Expressing this in more technical language, I think he meant to give the two living grandsons a present title to, and the present possession and enjoyment of, the property, but that their title was liable to be partially divested in favour of after-born brothers. This intention seems to me to be sufficiently expressed in the instrument of gift, and in this case, as in that before the Privy Council, the conduct of parties makes the intention.

The result is, that in my opinion there was a good gift to the two living grandsons, Ram Lal and Sham Lal, and that the plaintiffs are not entitled to recover.

I have so far given my reasons for thinking that this case is governed by the case I have been considering. It is right, I think, to consider further how far our decision is inconsistent with the earlier cases in this Court.

If *Kerodemoney's case* was (as I think it was) a case of a gift intended to vest on the death of the testator, then it seems to me that it is overruled by the late Privy Council decision, unless there be some material difference between a gift present both in interest and enjoyment, and a gift vested in interest, but deferred in enjoyment; and I cannot myself see any such distinction. *Soudaminey's case*, however, related to a gift, contingent at the testator's death, to a class of persons to be ascertained at a future date. It was a gift to such lawful male issue as might be living at the death of any of the testator's sons or grandsons who took life estates.

There is, undoubtedly, a difference between a present gift to persons capable of taking, which is intended afterwards to open and let in others not capable of taking, and a future gift to a class, which may or must include both classes, all of whom are intended to take at the same time. The late decision of the Privy Council has not, therefore, I think, necessarily overruled *Soudaminey's case*. But it does seem to me to overrule so much of the law which has been based upon that case, and to proceed upon principles of interpretation so inconsistent with those [678] acted upon in that case that we are at liberty, sitting in a Court of appeal, to examine the decision, in order to see how far it can be supported.

I refer not only to those parts of the judgment of the Privy Council in which they state the grounds on which they are deciding, but also to those in which they state what is to be avoided.

They say that it is not necessary to view the transactions "as though it were to be determined by rules of construction drawn from English law

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and applicable to English deeds of gift;" and that "the notions present to the mind of the head of a joint Hindu family, who is making a family arrangement, are something very different from the notions present to the mind of an English testator when he makes a gift to a class."

It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention; and the applicability of many of such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question. Even in England no one thinks of construing a mercantile contract by the same canons as a marriage settlement. There are in some points different rules for interpreting deeds and wills—wills of realty and wills of personalty, conveyances on sales, and family arrangements.

As to India the Privy Council expressly laid down in *Hunooman* [679] *Prosad Panday* v. *Mussamat Babooee Munraj Koonweree* (1); "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

In *Sreemutty Rabutty Dossee* v. *Sibchunder Mullick* (2) the same tribunal refused to construe a gift to a widow "for her sole absolute use and benefit" as an English Court would construe it. In *Gokuldoss Gopaldoss* v. *Rambux Seochand* (3) they refused to apply the rule in *Toulmin* v. *Steere* (4) to an Indian transaction. It is worthy of note that in the very case of *Leake* v. *Robinson* (5), so much relied on, one of the rules of construction acted upon is, that in a gift by will to one for life with remainder to his children, children must include children born after, as well as those born before, the death of the testator. In *Krishnakumari's case* (6), Peacock, C.J., and Macpherson, J., followed a very different course. The 3rd and 4th clauses of the will in that case each gave an annuity to one for life, "such payment to be continued after his decease to his children and descendants *per stirpes*."

That was held to apply to children living at the death of the testator. Then what was the ground of the rule laid down in *Soudaminey's case* and *Kherodemoney's case*? That rule, as I understand it, was adopted as being either in accordance with or analogous to the rules of English law. I speak of course with diffidence, but I must say that I think it is neither the one nor the other. The result of the English decisions may, I think, be shortly stated, so far as is material for this purpose. In dealing with

(1) 6 M. I. A. 411. (2) 6 M. I. A. 1. (3) 11 I. A. 126.
(4) 3 Mer. 210. (5) 2 Mer. 363. (6) 4 B. L. R. 231 (279).

a gift to a class you enquire first, at what period the class is to be ascertained—it may in the case of a will be on the death of the testator or at a later period.

If the class is to be ascertained on the death of the testator, no question of remoteness can arise, and the general rule is that the gift takes effect in favour of such of the class as are then capable of taking. If the ascertainment of the class is [680] deferred to a later date, those who become members of the class within the extended period are admitted; and subject to any question of remoteness those who are thus capable of taking, take. In either case, if any members of the class are incapable of taking because born after the date of ascertainment, they are simply excluded, and the rest take the whole; and this is so, even if the gift be to persons born and to be born—*Sprackling* v. *Ranier* (1), *Ayton* v. *Ayton* (2), *Whitbread* v. *Lord St. John* (3), *Mann* v. *Thompson* (4). If any die in the testator's lifetime, they are simply excluded, and the rest take the whole—*Stewart* v. *Sheffield* (5), *Re Coleman* (6). If the gift to one is revoked by codicil, he is simply excluded, and the rest take the whole—*Shaw* v. *McMahan* (7). If one is incapacitated from taking because he has attested the will, he is simply excluded, and the rest take the whole—*Young* v. *Davies* (8), *Fell* v. *Biddolph* (9).

In many of the cases the decision was based upon the special doctrines of English law applicable to joint tenancy. But *Fell* v. *Biddolph* and *In re Coleman* show that the rule is the same where no joint tenancy comes in.

The Indian Succession Act in s. 98 declares the law applicable to wills governed by that Act in accordance substantially with the view I have explained.

I am of course aware that there are cases in England relating to real property in which somewhat different rules have been applied. But rules connected with the English law of real property could hardly with reason be applied to the wills and deeds of Hindus, and in *Kherodemoney's case* the Court refused to apply them, and I think rightly. Nor are they embodied in the Succession Act. There are other exceptional cases in England, but I do not think it necessary to refer to them in detail; they are not adopted in the Succession Act, and none of these special rules, whether relating to real property or not, would, if referred to, afford any support to the rule laid down in *Soudaminey's case*.

[681] But in England there are rules of law guarding against remoteness. A gift cannot be given which is to vest more than twenty-one years after the close of a life or lives in being; and it is at this point and with reference to this law that the rule in *Leake* v. *Robinson* comes in. That rule is to the effect that when a gift is given to a class in such terms that the ascertaining of the class and the vesting of the gift are or may be deferred beyond the period allowed by law, the gift is wholly void, and cannot be made effectual for such members of the class as might be ascertainable earlier. Sir William Grant says at page 286: " It is the period of vesting, and not the description of the legatees " that produces the incapacity. Lord Selborne in *Pearks* v. *Moseley* (10) states the rule thus: " The rule is that the vice of remoteness affects the class as a whole, if it may affect an unascertained number of the members." That is the whole of the rule. It is a rider upon the law of remoteness, and has never, so far as I can

(1) 1 Dick 344. (2) 1 Cox 327. (3) 10 Ves. 152. (4) Kay 638.
(5) 13 East 526. (6) L.R., 4 Ch.D. 167. (7) 4 Dr. & W. 431.
(8) 2 Dr. & S. 167. (9) L. R. 10 C. P. 701. (10) L. R. 5 App. Cas. 714,

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learn, been applied to any case except that of a gift to a class tainted with the vice of remoteness.

And so the Indian Succession Act, s. 102, which alone adopts such a rule as that in *Leake* v. *Robinson* (1) in express terms limits it to the cases of gifts to a class affected with remoteness by s. 101, or the case by analogous defect mentioned in s. 100. Section 15 of the Transfer of Property Act is similar. The Privy Council in the case to which I have so often referred have pointed this out with respect to the Succession Act.

In *Soudaminey's* and *Kherodemoney's case* the primary rule that gave rise to the difficulty was not against perpetuity. It was not one affecting the period of vesting.

Soorjeemoney's case (2) explained in the *Tagore case*, shows that there is no objection to a gift which is to take effect after a prior life estate, provided it be to a person capable of taking. The difficulty was, that a person not born at the death of a testator cannot take a gift under his will. The rule daid down is that "where there is a gift to a class, and some persons constituting such class cannot take in consequence of the [682] remoteness of the gift or otherwise, the whole bequest must fail." This rule, so far as it refers to remoteness, is no doubt the rule in *Leake* v. *Robinson*. But so far it did not apply to the cases before the Court, and could probably hardly apply to any case among Hindus.

The words "or otherwise" made the rule apply to those cases, but they also made the rule not the rule of *Leake* v. *Robinson*. I have shown that in my judgment the rule so extended is not in accordance with English law. I do not think it can be derived by legitimate analogy from that law. I think we should be following the true analogy of the law of England by holding in such cases that a gift to a class enures to the benefit of such members of the class as are capable of taking at the time when the class is to be ascertained, that is to say, those who fall within the definition of the class and were living at the death of the testator, or the date of the deed, as the case may be.

But whether or not the ruling in *Soudaminey's case* and *Kherodemoney's case* is in accordance with English law, and whether or not it be derived by fair analogy from that law, it ought not, I think, to be applied to the transactions of Hindus in India, unless it be a rule which assist the Court in getting at the substance of the intention of the parties, and in giving effect to that intention so far as the law allows ; for that I conceive to be our paramount duty in such matters.

In order to see whether this is so in the present case we must look at the reasons upon which the English rule was grounded, and see how far they apply in this country. The reason for the rule in England is very clearly stated in *Leake* v. *Robinson* by Sir William Grant in a passage often cited and adopted by Selborne, L.C., in *Pearks* v *Moseley* (3): "I must make a new will for the testator, if I split into portions his general bequest to a class, and say that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequest what he never intended them to be, *viz.*, a series of particular legacies to particular individuals, or (what he had as little in his contemplation) distinct bequests [683] in each instance, to two different classes, namely, to grandchildren living at his death, and to grandchildren born after his death."

(1) 2 Mer. 363. (2) 9 M.I.A. 123 = 6 M.I.A. 526. (3) L.R. 5 App. Cas. 714.

These words were used in England,—a country in which the nearest relatives are separate in property, in residence, and in all the details of life; one brother is no more affected by a gift to another brother than by a gift to a stranger, and there is all the difference in the world between a gift to all the members of a class and a gift to some of them. But with Hindus the joint family state is the normal state; separate property is the exception. Even where individual members of a family have separate property, they may and generally do continue to live together joint in food and worship, and joint as to their inherited property. Moreover, there are also ordinarily in or attached to the family a number of dependant members, and even dependants not strictly members of the family. This is the state of things which every Hindu settlor and testator contemplates as existing and desires to perpetuate.

To people living in such family communities, the language of Sir William Grant seems to me by no means appropriate. It may make, and perhaps generally does make, comparatively little difference, whether the title to property is vested in a large or smaller number of the members of the family.

The difference would certainly not be such as to warrant the use of the expression, "a new will," in the same sense as in England.

Jessel, M. R., in the case of *Re Coleman* (1) already cited, at p. 169, speaking of gifts to a class says. "The testator may be considered to have a primary and a secondary intention. His primary intention is that all the members of the class shall take, and his secondary intention is, that if all cannot take, those who can, shall do so." This expresses, I think, the same view as that stated by the Privy Council in the case I have so much relied upon. They say at p. 178: "The paramount intention was to get rid of Udey Narain by passing the property to his sons. That intention is much more readily effectuated by giving the property to Satrujit, the only then son of Udey Narain, than by holding that the deed and all that followed upon it, the mutation of names, the possession and management of [684] Asmaida, did not operate any change at all." I think this applies in all these cases of gifts to family groups; that the governing intention is to provide for the group, and that that intention is best effectuated by vesting the property in those members of the group who are capable of taking it.

Further, I am unable myself (of course I speak with diffidence) to reconcile the rulings in *Soudaminey's* case and *Kherodemoney's* case with the previous decision of the Privy Council in *Soorjeemoney's* case. That case turned upon a will by which the testator gave his property to his five sons in equal shares. By a later clause he provided that "should peradventure any among my said five sons die not having any son from his loins, nor any son's son, in that event neither his widow nor his daughter, nor his daughter's son, nor any of them will get any share out of the shares that he has obtained of the immoveables and moveables of my said estate. In that event of the said property such of my sons and my sons' sons as shall then be alive, they will receive that wealth according to their respective shares."

That is apparently a gift open to the same objection as that in *Soudaminey's* and *Kherodemoney's* cases; atleast I am myself unable to see any difference, for the purpose of the rule in question, between a gift over after a life *to such of my sons and sons' sons as shall then be living*, and a

(1) L. R. 4 Ch. D. 167.

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gift over to the *lawful male issue* of the person dying as in *Soudaminey's* case.

Soorjeemoney's case came before the Supreme Court on demurrer, and on appeal from the decision of that Court before the Privy Council (1). It came again before this Court in the usual course, and was again appealed to the Privy Council (2).

On all these occasions the construction and effect of the gift over were fully considered; and in the result it was held to be a good gift, and to operate in favour of the surviving sons of the testator.

This case was again considered and explained in the *Tagore* case, where it is pointed out that the gift in *Soorjeemoney's* case was held valid as a gift to those sons, and therefore no question as to a gift to unborn persons arose.

[685] Now if at the time of *Soorjemoney's case*, it had been supposed that any rule such as that of *Soudaminey's case* and *Kheerodemoney's case* existed, it must have been at once evident that the gift then under consideration either did fall, or at least might be thought to fall, within it. How is it, then, that no rule of the kind is ever referred to by any of the Courts? I think the inference is irresistable, that down to 1862 the Supreme Court, the High Court and the Privy Council knew nothing of the doctrine which has since been accepted in this Court. I think the mode in which that case is dealt with in the *Tagore case* tends to show that down to 1872 such a rule was not known to the Privy Council. And as far as I can judge, *Soorjeemoney's case* could not have been decided as it was, if the rule had been accepted. *Soorjeemoney's case* has been followed without any expression of doubt or qualification in *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (3), and in *Ram Lall Mookerjee* v. *Secretary of State* (4).

The only attempt, I think, that has been made to reconcile the cases in this Court with *Soorjeemoney's case* is by Markby, J., in *Kherodemoney's case*. And I must say with all difference that he does not appear to me to have succeeded in doing so.

Lastly, as I have already said, the principles of construction adopted by the Privy Council in the recent case are inconsistent with those acted upon in *Soudaminey's* and *Kherodemoney's cases*.

For these reasons I should be prepared, if necessary, to dissent wholly from the doctrine laid down in those cases, and to hold, as the general rule, that where there is a gift to a class, some of whom are or may be incapacitated from taking, because not born at the date of gift or the death of the testator, as the case may be, and where there is no other objection to the gift, is should enure for the benefit of those members of the class who are capable of taking.

I think the late decision of the Privy Council is a direct authority for so holding, where the intention is, as I think it was in this case, to give a present gift to those of the class who are capable of taking.

[686] I would, therefore, reverse the decision of the learned Judge and dismiss the suit with costs in both Courts.

WILSON, J., then read the judgment of the Chief Justice, which was as follows:—

GARTH, C.J.—I entirely agree in the conclusions at which my brother Wilson has arrived.

(1) 6 M. I. A. 526.
(2) 9 M. I. A. 123.
(3) 5 I. A. 138.
(4) 8 I. A. 46.

I think it very probable that the recent decision of the Privy Council in *Rai Bishen Chand's case* (1) may be the means of introducing a very material and salutary change of the law in cases of this kind; but whether that is so or not, I think there can be no doubt that the principle upon which that case was decided is directly applicable to the present.

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Appeal allowed.

Attorney for appellants: Baboo *D. N. Dutt.*

Attorneys for respondent: Mr. *Carruthers* and Baboo *M. D. Sen.*

T.A.P.

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Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

DOORGA SUNDARI DOSSEE (*Defendant*) *v.* SURENDRA KESHAV RAI AND ANOTHER (*Plaintiff*).* [19th March, 1886.]

Hindu law, Adoption—Adoption by two widows simultaneously--Invalidity of gift made to a person as being the adopted son of donor, where the adoption fails—Persona designata.

A testator gave by will to each of his two wives a power to adopt, and gave his property to his *sons so to be adopted*, but did not provide, nor did he know who the adopted sons were to be. The adoption which subsequently took place was found to have been a simultaneous adoption by the two widows; *held* that such an adoption was invalid, and that the persons purporting to be the adopted sons did not answer the description in the will of adopted sons, and that therefore there was not a sufficient designation of their persons as to enable them to take under the will.

Monemothonath Dey v. *Onathnath Dey* (2), distinguished, and *Fanindra Deb Raikat* v. *Rajeswar Das* (3), followed on the question of *persona designata.*

[687] ON the 20th April 1879 one Bejai Keshav Rai died childless, leaving him surviving two widows, Nobo Durga Dossee (the elder), and the defendant Durga Sundari Dossee (the younger); having on the 19th April 1879 made a will whereby he dedicated all his property, ancestral and acquired, moveable and immoveable, to the goddess Sree Sree Unnopoornah Thakoranee; giving power to his two wives to adopt two sons, one by each wife, in the following words: "I have two wives; they shall adopt two sons, one by each Rani. God forbid if the adopted son of any of the Ranis die or be incompetent for business on account of idiocy, &c., then it shall accordingly be competent for them to take a second son in adoption, and successively three sons in adoption one after another." He then made the two adopted sons the *shebaits* of all his dedicated properties under the advice of his amlahs, giving power to his two wives to manage the dedicated properties under the advice of his amlahs, until the said two adopted sons should attain majority, when the dedicated properties were to be made over to the adopted sons in their character as *shebaits.*

On the 20th May 1879 the Ranis performed the first *shrad* ceremony of Bejai Keshav Rai, and on the same day, in exercise of the power given to them to adopt, the elder Rani took in adoption Keshav Lall Dutt (the

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* Original Civil Appeal No. 33 of 1885, against the decree of Mr. Justice Norris, dated the 15th of August 1885.

(1) 11 I.A. 164=6 A. 560. (2) 2 Ind. Jur. N.S. 24. (3) 11 C. 463=12 I.A. 72.

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plaintiff) giving him the name of Kumar Ganendra Keshav Rai, and on the same day but shortly afterwards as was alleged in the plaint, the younger Rani took in adoption (defendant No. 2) the third son of Hari Dass Ghose giving him the name of Unnoda Persad Rai.

On the 5th July 1879 the two Ranis leased out the bulk of the testator's properties to Kaliprosono Ghose (the brother of the elder Rani), and Bhobodyanee Churn Mitter (the father of the younger Rani). And on the same day, the Ranis entered into an *ekrarnamah* with one another, [by] which, after reciting the death of the Raja, and the power given them to adopt, and the adoption "at one and the same time" of the two boys, before mentioned, and recognising their position as adopted sons, it was agreed that the two Ranis should jointly and in equal shares both hold possession of and take charge of all the dedicated properties as **[688]** *shebaits*, and should manage the business appertaining thereto, until the adopted sons should attain majority.

On the 7th July 1879 the two Ranis applied to the District Judge of Hooghly for probate, which was refused, but was subsequently granted on the 31st March 1880 on appeal to the High Court.

On the 28th July the elder Rani died, leaving the plaintiff her heir surviving.

On the 4th August 1884, Surendra Keshav Rai, through his next friend, brought a suit against Doorga Sundari Dossee and Unnoda Persad Rai, who was then still a minor, alleging the above facts, and alleging that shortly before the death of the elder Rani quarrels had arisen between the Ranis, and that the estate through mismanagement on the part of the Ranis had fallen into the hands of Kaliprosono Ghose and Bhobodyanee Churn Mitter, who managed it solely with regard to their own interests; and that the leases granted to them were disadvantageous to the estate; that since the elder Rani's death Bhobodyanee Churn Mitter had obtained uncontrolled management of the estate and was endeavouring to obtain possession of the elder Rani's jewels, and praying (*a*) that the will of the testator might be construed, and the rights of all parties declared thereunder ; (*b*) that it might be declared that both under the will and under the *ekrarnamah* the plaintiff as adopted son was interested in the estate ; (*c*) that, if necessary, it might be declared that the dedication to the Thakoranee was not *bona fide*, and was invalid; (*d*) that the plaintiff's interest in the estate might be ascertained and declared; (*e*) for an account and a Receiver.

The defendants put in written statements admitting the Rajah's death, his will, and the performance of the *shrad* ceremony, but denying that the plaintiff was adopted before the defendant No. 2, and alleging the adoption to have been simultaneous, admitting the leases to Kaliprosono Ghose and Bhobodyanee Churn Mitter, but alleging that they were fair and proper leases; admitting the *ekrarnamah* and the application for probate and its result ; and denying all the allegations upon which the plaintiff based his claim to the interference of the Court in the **[689]** administration of the estate, and denying his right to an account and to the appointment of a Receiver.

At the hearing it was contended that the plaintiff could not maintain the suit as he was not a validly adopted son, a simultaneous adoption being bad. For the plaintiff it was contended that the authority to adopt given by the will was distributive ; that it did not contemplate an adoption unless both adopted ; that the evidence to be given would prove that the

plaintiff was adopted first; that the case of *Monemothonath Dey* v. *Onathnath Dey* (1) was not in reality an authority for the proposition that a simultaneous adoption was bad; and that the case of *Gyanendra Chunder Lahiri* v. *Kallapahar Hajee* (2), was founded on a misapprehension of the judgment of Phear, J., in the former case; that even if the adoption was bad the plaintiff would take as a *persona designata*; that under the *ekrarnamah* the Ranis had constituted themselves trustees for the two adopted sons; and that defendant No. 1 was therefore estopped from denying the plaintiff's rights as an adopted son or as a *persona designata.*

It was agreed by consent that the evidence taken should be confined to the subject of adoption (though on appeal some difference arose as to the scope of the evidence, the subject of this agreement), and that the decision of the Court should be limited to the question of the validity of the plaintiff's adoption and upon his rights under the will and *ekrarnamah.*

The learned Judge (Mr. Justice Norris), on the evidence given before him, decided that the authority to adopt given by the will was an authority to adopt simultaneously, and that it could not be construed as distributive, and that on the authority of *Gyanendro Chunder Lahiri* v. *Kallapahar Hajee* (2), such an adoption was invalid; and further was of opinion that a simple adoption by either of the Ranis would not have been good under the power contained in the will. As regards the position of the plaintiff under the will, he held that the plaintiff took a moiety of the testator's property as *persona designata*, *Monemothonath Dey* v. *Onathonath Dey* (1); and as regards the [690] question of estoppel, he considered it to be unnecessary to express an opinion.

From this decision Doorga Sundari Dossee appealed.

Mr. *Woodroffe*, Mr. *Pugh* and Mr. *J. G. Apcar*, for the appellant.

Mr. *Woodroffe*.—A simultaneous adoption is bad—see *Monemothonath Dey* v. *Onathnath Dey* (1); *Siddessory Dossee* v. *Doorga Churn Dutt* (3); *Dossmony Dossee* v. *Prosonomoyee Dossee* (4); *Gyanendra Chunder Lahiri* v. *Kallapahar Hajee* (2). This point has been decided in my favour in the Court below. In order that these persons can take as *personæ designatæ* it must be shown that there was an intention to give property to a person named or indicated in the will; and in the case of a person who is described as an "adopted son" this is a condition precedent to taking the property, however clearly he may be designated. But here two things are wanting: (1) No one is indicated by name. (2) These are persons who could not satisfy the condition of being adopted sons. *Monemothonath Dey* v. *Onathnath Dey* (1) is not an authority on this question. [WILSON, J.—Was anything decided in that case, except that the plaintiff was not entitled to Surathnath's share?] As to estoppel, there is none: the Ranis assume that they are adopted sons. There is no estoppel in such a case as this. See *Gopee Lall* v. *Sree Chundraolee Buhojee* (5); *Oodey Koower* v. *Mussamut Ladoo* (6).

Mr. *Pugh* on the same side.—With regard to the bearing of the *Tagore* case (7) on a case of this sort, no gift can be given to a person who is not in being, unless (1) he is a child in *ventre sa mere*, or (2) unless afterwards adopted by the mother in accordance with a power; it would be dangerous to admit any further exception. There being no provision in the will limiting the persons to be adopted thereunder to persons in existence at

(1) 2 Ind. Jur. N. S. 24. (2) 9 C. 50. (3) 2 Ind. Jur. N.S. 22.
(4) 2 Ind. Jur. N.S. 18. (5) 11 B.L.R. 391. (6) 13 M.I.A. 585 (599).
(7) 9 B.L.R. 377 = I.A. Sup. Vol. 47.

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the date of the death of the testator, the plaintiff and infant defendant, if not validly adopted, could not become entitled as *personæ designatæ*. There is no designation of any particular individual, as the testator could not tell who was to be adopted ; [691] see on this subject the judgment of Fry, J., in *Boddington* v. *Clariat* (1) and on appeal (2).

Mr. *Kennedy* for Unnoda Persad Rai.—The ground of estoppel is stronger in my case than in the plaintiff's. I am a person who by act of the appellant have had my position formed. If I am not adopted, I have lost my position in my own family and I am only entitled to maintenance—*Ayyavu Muppanar* v. *Niladatchi Ammal* (3) and *Monemothonath Dey* v. *Onathnath Dey* (4).

[WILSON, J.—That case only decides that the question of adoption was *res judicata*, and shows what is the right of an adopted son as between himself and sons born after adoption.] The reported cases do not preclude the Court from deciding that a simultaneous adoption is valid ; *viz.*, *Monemothonath Dey* v. *Onathnath Dey* (4) ; *Siddessory Dassee* v. *Doorga Churn Sett* (5) ; *Dossmony Dossee* v. *Prosonomoyee Dossee* (6) ; *Gyanendro Chunder Lahiri* v. *Kallapahar Hajee* (7). The case of *Gopee Lall* v. *Sree Chundraolee Buhojee* (8) is one of a successive adoption. The case of *Monemothonath Dey* v. *Onathnath Dey* (4) holds that a simultaneous adoption is invalid, but it is no authority with respect to the validity of the adoption in this case ; no decision was come to as to this point in the Court of Appeal in that case. The case of *Siddessory Dossee* did not decide the question ; the judgment turned on another point. If the adoption is good I take as adopted son, or I take as *persona designata*.

Mr. *Evans*, Mr. *Bonnerjee* and Mr. *O'Kinealy*, for Surendra Keshav Rai.

Mr. *Evans*.—A testator can give charge of an idol in perpetuity ; the objection in the *Tagore case* (9) rests on other grounds. It is open to a testator to appoint any person *shebait* to an idol, although the idol may have been dedicated by his father, and I submit he can make such an appointment in perpetuity; the rule in the *Tagore case* would not interfere with this, as that was a rule of property. A *shebait* has the right of the custody [692] of property as decided in *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (10). I also submit that the widows would have been entitled to treat the will in the first instance as invalid, supposing the power to adopt simultaneously is bad. It has been decided that such an adoption is bad ; if that is so, then, inasmuch as the two widows are the heirs, if they chose to adopt out of their family, it is impossible for them later on to attack the adoption. There has been no evidence taken on the question of estoppel ; the *ekrarnamah* was put in, but it was agreed by both sides that the evidence should be confined to the adoption. I submit the Ranis are estopped from denying the adoption, and that they have constituted themselves trustees for the children under the *ekrarnamah*, and this they cannot gainsay. In cases in which persons have constituted themselves trustees, they have been clothed with the powers of trustees accordingly as they have acted. Acts and conduct will be enough to fix them with a fiduciary position, but in this case we have something stronger ; the Ranis took up the position and duties of executrices after signing the *ekrarnamah*. The

(1) L.R. 22 Ch. D. 597.
(2) L.R. 25 Ch. D. 685.
(3) 1 M.H.C. 45.
(4) 2 Ind. Jur. N. S. 24.
(5) 2 Ind. Jur. N. S. 22.
(6) 2 Ind. Jur. N. S. 18.
(7) 9 C. 50.
(8) 11 B.L.R. 391.
(9) B.L.R. 377=I. A. Sup. Vol. 47.
(10) 6 I.A. 182.

ekrarnamah divides the estate into halves. Before coming into Court the adoption was not denied, and the covenant in the *ekrarnamah* is a good equitable estoppel; it says in effect: "I will not deny your title in return for a reciprocal covenant from the other widow." 1886 MARCH 19. — APPEAL FROM ORIGINAL CIVIL. — 12 C. 686.

The judgment of the Court (GARTH, C. J., and WILSON, J.) was as follows:—

JUDGMENT.

In this case it appears that Rajah Bejai Keshav Rai died on the 20th April 1879 childless, but leaving two widows, Nobo Durga and the defendant Durgamoni. By his will he gave each of his widows power to adopt a son. He further purported to give all his property to the goddess Unnopoornah, and declared that the two adopted sons should be the *shebaits*, adding various other provisions. The two Ranis accordingly on the 20th May 1879 adopted each a son, Nobo Durga taking the plaintiff and Durgamoni the infant defendant. Nobo Durga died on the 29th July 1884. Quarrels ensued; and on the 4th [693] August 1884 the plaintiff filed his plaint in this suit, in which he claims half of the property of the deceased Rajah under the will.

It was held by the learned Judge who tried the case that the simultaneous adoptions could not be valid, and that therefore the plaintiff could take no title as the adopted son of the testator. And there can be no doubt that he was right in so holding.

But the learned Judge held that the gift took effect in favour of the plaintiff, as a gift to a *persona designata*. In this we cannot agree. There is no indication of an intention to give to the plaintiff or to any other particular person, but only to the persons, whoever they might be, who should be adopted by the Ranis.

The learned Judge in the Court below based his decision upon the authority of a case of *Monemothonath Dey* v. *Onathnath Dey* (1), but that case appears to us to be very distinguishable from the present. In that case one Promothonath Dey, having no male issue, adopted two sons, Monmothonath and Surathnath, at one and the same time, and he gave one of his sons so adopted to each of his two wives.

He afterwards made a will in favour of these two sons, whom he described in his will *as his adopted sons*, and he provided that if either of them should die, the adoptive mother of that son should be at liberty to adopt another son.

A suit being brought after the testator's death to determine the rights of the parties under this will, it was held that the simultaneous adoption of the two sons was invalid; and then the question arose, whether there was such a *designatio* of the two persons known and described as the testator's adopted sons in the will, as to enable them to take under the will, though the adoption was in fact invalid; and it was held that there was.

They had been always considered and known as the testator's adopted sons, and therefore their description in the will was a sufficient *designatio personarum* to make it clear that they were the persons whom the testator intended to benefit.

Then one of these sons, Surathnath, having died, his adoptive mother, by virtue of the power contained in the will, adopted another son, Onathnath; and that adoption being valid, it was [694] held that his description also

(1) 2 Ind. Jur. N.S. 24.

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in the will as the adopted son of the testator was sufficient to make the devise in his case valid.

There were therefore in this case three instances in which the rule of *designatio personæ* properly applied ; in the case of the first two devisees, because they were both described and generally known as adopted sons of the testator, although their adoption was in fact invalid ; and in the case of the last, Onathnath, because he was *actually* adopted in the way provided by the will.

But in the present case the facts were quite different. The testator had no doubt provided in his will that each of his wives should adopt a son ; and he gave his property to the sons *so to be adopted* ; but he did not provide, nor did he know, who the adopted sons were to be ; and, therefore, as the adoption which took place was invalid, the persons purporting to be adopted did not answer the description in the will of adopted sons, or, in other words, there was not a sufficient *designatio* of their persons to enable them to take under the will.

The decision, therefore, in the *Indian Jurist* appears to us to be no authority in the present case.

Another contention was raised before us. It was said that the whole property was by the will made debutter, and that nothing was given to the sons but a bare trust, the *shebaitship*. We assume this to be so for the sake of argument. It was then said that the rules laid down in the *Tagore* case do not apply to the devolution of the bare trusteeship in the case of a religious endowment. And in this we are disposed to agree. It was said next that the two persons adopted became the sons of their adoptive mothers, though not of the testator ; and that as such they came within the terms of the gifts of the *shebaitship*. But there is nothing in the will showing an intention to give anything to the persons to be adopted, except in the capacity of sons of the testator. The case falls within the authority of *Fanindra Deb Raiket* v. *Rajeswar Das* (1).

But at the trial a further question was raised whether the defendant Doorga Sundari had so acted as to be estopped from denying the plaintiff's title, or to have made herself a trustee for [695] him to the extent of the interest which he claims. Allegations were made in the plaint as originally framed, tending to support such a case ; and the plaint was amended at the hearing so as to raise it specifically. The issue, however, has not been decided, nor, we think, has it been tried. And there is not sufficient evidence on the record to enable us to decide it. The course taken on behalf of the plaintiff at the hearing was neither very clear nor very consistent. But we think it sufficiently appears that the absence of the necessary evidence is probably the consequence of an understanding, or misunderstanding, between the parties. Under these circumstances, as there is clearly no sufficient evidence upon the record to enable us to try the above issue, we think our proper course is to send the case back to the first Court under s. 566 of the Civil Procedure Code, directing it to determine such issue ; to take any additional evidence that may be adduced by either party for that purpose ; and to return its finding upon such issue to this Court, together with the evidence taken.

The former hearing was occupied in trying an issue of fact upon which the plaintiff failed. We think he should pay the costs of that hearing. We also think he should pay costs of this appeal. He might

(1) 11 C. 463.

have insisted on going into the whole of the evidence at once, and we can see no sufficient reason why he did not do so. All other costs should be dealt with by this Court when the case comes back.

Case remanded.

Attorney for the appellant: Baboo *M. D. Sen.*

Attorneys for the respondents: Mr. *H. H. Remfry* and Messrs. *Beeby & Rutter.*

T. A. P.

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[696] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Grant.

LAL MIAH AND ANOTHER (*Complainants*) v. NAZIR KHALASHI AND OTHERS (*Accused*).* [15th March, 1886.]

Criminal Procedure Code, 1882, s. 133—Removal of obstruction in public way—Question of title.

The powers given by s. 133 and the following sections of the Criminal Procedure Code, 1882, as to the removal of obstructions in public ways, are not intended to be exercised when there is a *bona fide* dispute as to the existence of the public right; the procedure under those sections not contemplating an inquiry into disputed questions of title.

[R., 17 C. 562.]

THIS case merely followed the decisions in *Bhasiruddeen Bhuia* v. *Bahar Ali* (1) and *Askar Mea* v. *Sabdar Mea* (2).

J. V. W.

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Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Cunningham.

KISHORI MOHUN RAI AND OTHERS (*Defendants*) v. HURSOOK DASS (*Plaintiff*).† [13th March, 1886.]

Civil Procedure Code (Act XIV of 1882), ss. 278 to 283—Claim case—Attachment—Damages for wrongful attachment.

Suits under s. 283 of the Code, although they are brought for the purpose of establishing rights which have been negatived in execution proceedings are neither described in the Code nor are dealt with in practice as appeals from the orders of lower Courts; they are substantive suits to all intents and purposes, and must be tried like any other suits subject to the ordinary rules of procedure and evidence

There is nothing in the provisions of ss. 278 to 283 of the Code limiting, in a suit under s 283, a plaintiff's right to compensation for his loss, or the defendant's responsibility for his wrongful act; and if the existence of the summary procedure (in ss. 278 to 282) leads to delay, and that delay to further loss, the consequences must fall upon the defendant.

[Affirmed, 17 C. 436 (P.C.)=17 I.A. 17.]

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* Criminal Reference No. 38 of 1886.

† Appeal No. 6 of 1885 against the decree of Mr. Justice Wilson, dated the 20th of December 1884.

(1) 11 C. 8. (2) 12 C. 137.

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[697] THIS was a suit brought by Hursook Dass to recover the sum of Rs. 25,355, the value of certain bales of jute, the property of the plaintiff, which had been wrongfully attached and seized by the defendants Kishori Mohun Rai, Byconto Mohun Rai and Gopee Mohun Rai, on an order before judgment obtained in a suit instituted by them against the defendants Burroda Canto Dey and Wooma Canto Dey in the Court of the Subordinate Judge of the District of the 24-Pergunnahs.

The plaint stated that the bales in question were, on the 25th of November 1883, lying stored in the plaintiff's press house at Chitpore near Calcutta, in the district of the 24-Pergunnahs; that on that day the Nazir of the Court of the Subordinate Judge of that district came to the press house, accompanied by the servants of the Rai defendants; that those servants pointed out the jute bales in question to the Nazir as the bales of the Deys; and that as such the Nazir attached and seized them.

On the 26th of November 1885, the plaintiff presented a petition claiming the attached property. The claim came on for hearing on the 1st of December 1883, when it was dismissed for default of prosecution. The plaintiff had the claim restored to the file, and after various postponements, granted at the instance of the plaintiff, the case came on for hearing before the Subordinate Judge, who, on the 15th of April 1884, disallowed the claim.

On the 28th of April 1884, the plaintiff filed the present suit for a declaration of his right to the bales of jute, and for consequential relief. The material portions of the prayer of the plaint are as follows:

"(*c*) That the defendants, the Rais, and each of them, their and each of their servants and agents may be restrained by and under the order and injunction of this Honourable Court from causing the said property to be sold, pending the final determination of this suit.

"(*d*) That should the property be sold before the issue of the said order and injunction, then the defendants may be decreed to pay to the plaintiff the said sum of Rs. 25,355, which is the market value thereof.

"(*e*) That a Receiver may be appointed to take charge of the said property with power to sell the same in the most [698] advantageous manner, and to hold the net proceeds of sale subject to the further order of this Honourable Court, or until the final determination of this suit."

On the 7th of May 1884, the Subordinate Judge of the 24-Pergunnahs again postponed the sale at the request of the plaintiff on an application for that purpose made by him in the suit of the Rais against the Deys, in which a decree had been obtained by the Rais for Rs. 5,000, on the 8th of January 1884. Eventually the jute was sold with the consent of all parties to that suit by Messrs. Landale, Morgan & Co. of Calcutta, jute brokers, on the 30th of June 1884 for Rs. 12,055-5-3, which sum was deposited in the Court of the Subordinate Judge.

In the present suit the Deys filed no written statement. The Rais' defence was—(1) that the jute was the property of the Deys at the time of the attachment; (2) that subsequently to the attachment of the 26th November 1883, the jute had been attached by other attaching creditors of the Deys; and (3) that the low price obtained for the jute in June 1884 was caused by the great delay in selling the same, which delay was caused by the act of the plaintiff himself in having the sale postponed.

Mr. Justice Wilson held that at the time of the attachment, *viz.*, the 25th November 1883, the plaintiff was the sole owner and absolute proprietor of the jute; that at the time of the attachment the value of the jute

was Rs. 22,894; the learned Judge, therefore, gave the plaintiff a decree for that amount; but inasmuch as the jute had been sold by the District Court of the 24-Pergunnahs during the pendency of the suit, he decreed that if the plaintiff should receive the proceeds of sale from the District Court, he should be only entitled to recover the difference between the sum so received and the market value of the jute.

The defendants appealed.

Mr. *Woodroffe*, Mr. *Evans* and Mr. *O'Kinealy*, for the appellants.—The lower Court has misunderstood the nature of the suit. It is one brought under s. 283 of the Code, and is in the nature of an appeal from the decision of the Subordinate Judge. The judgment of the Sub-Judge, as well as the proceedings in the claim case, were as much the subject of appeal before Mr. Justice Wilson as the judgment of Mr. Justice Wilson, and **[699]** the proceedings in the case are before your Lordships for the purposes of this appeal. The case of *Mitchell* v. *Mathura Das* (1) shows that a suit under s. 283 is in substance a suit brought to reverse the order in the execution proceedings. The judgment in the claim case was not sufficiently considered by Mr. Justice Wilson; on the merits the contract of the 7th November was a fictitious transaction, the bales were not the plaintiff's property.

Mr. *Evans*.—The Code allows a suit to a person whose claim has been disallowed; the right to obtain a statutory declaration is a distinctly different cause of action from a suit under art. 29 of the Limitation Act for wrongful seizure. A claim may be joined with a suit under s. 282, and that has been done in this case. The conversion was not a sale by the defendants; the goods were sold by order of the Court on agreement by both parties, the special damage claimed is only Rs 5,000, but plaintiff has had much more, *viz.*, the market value of the jute at the time of the conversion. Are the defendants liable to pay damages for things which happened after the order in the claim case? See *Mussamut Subjan Bibi* v. *Sheikh Sariatulla* (2). There a person obtained an order for the release of the goods and also for damages for the attachment; in the present case several orders were made pending the attachment. The case last cited was commented on in *Gomamahad Patil* v. *Gokoldass Khiraji* (3); and although the Court did not agree with *Sariatulla's case*, yet the Court was not satisfied that in a claim case any order for safe custody could be made; there was no claim however in that case. I contend that the procedure is laid down in s. 278. As regards the defendants being answerable for depreciation, I say that all their liability ceased at the time when an order was made admitting and trying the claim. Where under *bona fide* procedure property is in the hands of the Court, and the Court for the purposes of adjudication, passes orders regarding the property, then nothing which may happen to the property, when in the hands of the Court, can be turned so as to make the defendants liable. It cannot be said in this case, as it was in *Gomamahad Patil's case* that it did not appear **[700]** that there had been any intervention with regard to the property; this fact distinguishes this case from the Bombay case. The case of *Walker* v. *Olding* (4) shows that where a Court has made an order for the sale of goods, on an interpleader issue, the execution creditor, though he should turn out to be a wrong-doer, is not answerable for any loss occurring to the true owner in consequence of the sale. I contend that, even

(1) 8 A. 6.
(2) 3 B.L.R. 413
(3) 3 B. 74.
(4) 1 H. & C. 621 = 32 L.J. Exch. 142.

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assuming that the defendants were liable in the first instance, they were no longer liable for any depreciation after they had proposed to sell the goods, and the Court, at the instance of the plaintiffs, refused to order a sale; the defendants cannot be held liable if the goods underwent any depreciation between the time when they were first attached and the time when they were sold by the District Court; the utmost that the plaintiff would be entitled to would be the sum for which the goods were then sold.

The Advocate-General (Mr. *Paul*) and the Standing Counsel (Mr. *Bonnerjee*), for the respondents.

The *Advocate-General.*—The attachment was made before judgment, and property four or five times as large as the sum sued for was attached. Section 485 of the Code says that so much of the property as appears necessary to satisfy the decree shall be attached. There are no facts showing that there were any other attachments but the one in question pending at the time of suit. The plaintiff had a lien on the goods for pressing charges, and the attachment should have been made under s. 268 by a prohibitory order. The original seizure was bad and the attachment wrongful. The case of *Gomamahad Patil* v. *Gokoldass Khiraji* (1) is in my favour.

The following judgments were delivered:—

JUDGMENTS.

GARTH, C. J. (after setting out the facts) continued. It was contended by the appellant's Counsel, Mr. Woodroffe, that the learned Judge had altogether misunderstood the nature of this suit; that it was a suit of a peculiar nature brought under s. 283 of the Civil Procedure Code; and that it was in the nature of an appeal from the decision of the Subordinate Judge.

[701] Mr. Woodroffe went so far as to insist that the judgment of the Subordinate Judge, as well as the proceedings in the claim case, were as much the subject of appeal before Mr. Justice Wilson, when he tried this cause, as Mr. Justice Wilson's judgment and the proceedings in this case are now before us for the purposes of this appeal.

In support of this view, Mr. Woodroffe referred us to the case of *Mitchell* v. *Mathura Dass* (2) decided by the Privy Council on the 19th of June 1885.

The judgment in that case certainly does contain a statement to the effect that a suit under s. 283 is in substance a suit brought to reverse the order in the execution proceedings. But we do not understand that their Lordships intended to lay down any such rule as would support Mr. Woodroffe's contention.

The class of suits which are now brought under s. 283 of the Code are no novelty. They were constantly brought under the corresponding section of the Code of 1859; and they are neither described in the Code, nor dealt with in practice, as appeals from the orders of the lower Court. They are brought no doubt for the purpose of establishing rights which have been negatived in the execution proceedings; but they are substantive suits to all intents and purposes; and must be tried like any orher suits, subject to the ordinary rules of procedure and evidence.

In this case Mr. Woodroffe complains that the judgment in the claim case was not duly considered by Mr. Justice Wilson; it was produced no doubt in court before the learned Judge; but we do not find that any

(1) 3 B. 74. (2) 8 A. 6.

attempt was made by the defendants to make that judgment evidence, nor do we see (if there had been such an attempt), how the judgment would have been properly receivable.

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[The learned Chief Justice here went into the merits of the case, stating that he was of opinion that the plaintiff's story was substantially true; and that he was entitled to recover from the Rai defendants the sums which had been awarded him by the Court below.]

As regards the amount awarded to the plaintiff, a point which has been strongly urged upon us, is this: that the defendants [702] are not answerable for any depreciation which the goods may have undergone from the time when they were first attached to the time when they were sold by the Alipore Court on the 30th day of June 1884; and consequently that the utmost which the plaintiff could be entitled to was the sum for which the goods were then sold.

Mr. Evans contended, first, that as the claim made in the Sub-Judge's Court was entirely the act of the plaintiff, the defendants were not answerable for the consequences of any delay which took place in the course of those proceedings.

Secondly, that, even assuming the defendants to have been liable in the first instance, they were no longer liable for any depreciation of the property after they had proposed to sell the goods, and the Court at the instance of the plaintiff had refused to order a sale.

In support of this contention, the case of *Walker* v. *Olding* (1) was relied upon as showing that, when the Court had made an order for the sale of goods on an interpleader issue, the execution creditor, though he should turn out to be a wrong-doer, was not answerable for any loss which might have occurred to the true owner in consequence of the sale.

It seems to me that there is no good ground for either of these contentions. It must be borne in mind, in the first place, that the attachment of the 25th of November was an *attachment before judgment*; and that the value of the goods attached was four or five times as large as the sum for which the Rais were bringing their suit. The judgment was not obtained in that suit until the 7th day of May 1884.

The attachment was clearly a wrongful act on the part of the Rais, which deprived the plaintiff of the possession of the goods and of his power of disposing of them.

Moreover, there was no pretence, so far as I can see, for attaching goods of so large a value; and if in this respect the Rais made a mistake in the first instance, they might have rectified it afterwards by relieving some of the goods from attachment. But this they did not do.

[703] It was suggested by Mr. Evans that there were other attachments also, made by other creditors of the Deys, upon the same goods. But those attachments were subsequent to that of the Rais; and it is by no means improbable that they were made in consequence of the Rais' attachment. At any rate the fact that other wrong-doers had also attached the goods can make no difference whatever in the extent of the Rais' liability.

Then as to the second point it was argued that the plaintiff might have allowed the goods to be sold, when the Rais applied to the Court for that purpose.

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(1) 1 H. & C. 621=32 L.J. Exch. 142.

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But the plaintiff was surely justified in refusing to allow his goods to be sold by the Court at what would obviously have been a forced sale; especially considering how large their value was, as compared with the amount of the Rais' decree.

A wrong-doer, under such circumstances, has no right to dictate to the man whom he has wronged, how the goods, which have been wrongfully seized, should be disposed of. He has no right to say: "Now, unless you consent that these goods of yours, which I have wrongfully attached shall be sold by the Court, you must be answerable for any depreciation which may afterwards occur in the value of them."

If this were the position in which a man, whose goods have been seized in execution, were to be placed by making a claim in the execution proceedings, it would in the generality of cases be the height of folly to make any such claim. The safer course would be to bring a regular suit at once.

No authority was cited to us which gives colour to such a proposition; and it seems to me that the argument is quite untenable. The rule in England, to which Mr. Evans referred, and which is illustrated by the case of *Walker* v. *Olding* (1) does not, in my opinion, assist him.

In that case certain goods of a third party had been taken in execution by an execution-creditor. The third party took out an interpleader summons, which was heard, in due course, before the Judge in Chambers, who ordered (as he had power to do) that the goods should be sold and the question as to the ownership tried by an arbitrator.

[704] The goods having been found to be the property of the claimant, the latter insisted that the execution-creditor ought to pay the loss which he (the claimant) had sustained in consequence of the sale of the goods. But the Court held that he was not entitled to recover that loss up to the time of the sale; the execution creditor would be liable for any depreciation of the goods; but as the sale itself was the act of the Court, the claimant could recover no damage on that account.

Then, lastly, it was insisted by Mr. Evans that in this case the plaintiff did eventually consent to the sale. But there really seems to be nothing in this point. The goods eventually were ordered to be sold by the Alipore Court; and all that the plaintiff proposed and consented to, was that they should be sold by his own brokers, Messrs. Landale and Morgan, instead of by the Court, as they were likely in that way to command a better price.

Lastly, the appellants say that there is a difficulty in obtaining the price of the goods, Rs. 12,703-12, from the Alipore Court. If there is any such difficulty, it is one which has clearly not been caused by the plaintiff. The plaintiff is *prima facie* entitled to be paid by the defendants the sum which has been awarded to him by the Court below. On the other hand, the plaintiff is bound to assist the defendants to obtain the Rs. 12,703-12 from the Alipore Court. If the difficulty in obtaining this money arises from causes over which the plaintiff has no control, the defendants must be sufferers.

The appeal is dismissed with costs.

CUNNINGHAM, J.—I concur with the Chief Justice that the original Court was right in holding that the balance of the evidence is in favour of the truth of the plaintiff's story; also that the Court was right in trying the case on the evidence before it, and in declining to take into

(1) 1 H. & C. 621 = 32 L.J. Exch. 142.

consideration the order in the claim case, or any part of those proceedings not properly proved in the suit. As to the question of damages, Mr. Evans' main contention was that the suit provided for by s. 283 is in its nature distinct from a suit for compensation for irregular seizure, and that in the former suit all that the plaintiff can do is to establish the right which he claims in the property; that the defendant's responsibility ceased [705] either on November 26th when plaintiff made his claim, or on the 28th November when the order for the Nazir to go and make an inventory was passed; that the property being thus in the custody of the Court and the subject of litigation, no subsequent deterioration or loss would give rise to a claim for damages.

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I do not see that any such restriction of the ordinary rule of law as to damages for wrongful attachment can be supposed to have been intended in the provisions as to claims to attached property in ss. 278 to 283 of the Code; or that in the suit to which reference is made in s. 283 the plaintiff is not at liberty, besides establishing his right, to claim damages for any loss occasioned to him by the defendant's wrongful act in invading it. The previous sections provide a summary procedure in the case of such claims, and s. 283 gives a finality to the order passed, unless it is contested in a suit, which the Limitation Act requires to be brought within a specified period. But there is nothing, in my opinion, in such provisions to limit plaintiff's right to compensation for his loss, or the defendant's responsibility for his wrongful act; and if the existence of the summary procedure leads to delay, and that delay to further loss, that seems to me a natural result, the consequences of which must fall on the defendant.

Another point urged was that the delay had arisen, to a large extent, from the plaintiff himself, the defendants throughout having been anxious to sell, and the plaintiff desirous to impede or postpone the sale. But the answer to this is that the plaintiff had a right to take whatever steps the law enabled him to take with a view to preventing the occurrence of a wrong to himself; and if, in so doing, he occasioned delay, that delay is a consequence arising out of the defendants' act, and for which the defendants may fairly be held responsible. I think, therefore, that the original Court has rightly assessed the damages in giving the plaintiff the value of his goods on the date of the attachment, and I concur in dismissing the appeal.

Appeal dismissed.

Attorney for appellants : Baboo *Kedar Nath Mitter.*
Attorneys for respondent : Baboos *Mitter and Mookerjee.*
T. A. P.

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[706] FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Prinsep, Mr. Justice Wilson, Mr. Justice Pigot, and Mr. Justice O'Kinealy.

V. H. LOPEZ *v.* E. J. LOPEZ. [8th September, 1885.]

Restitution of conjugal rights, Suit for—Marriage, Validity of—Prohibited degrees—Roman Catholics—East Indians—Customary Law—Dispensation, Proof of—Presumption—Divorce Act (IV of 1869), s. 19—Deceased wife's sister, Marriage with.

In a suit for restitution of conjugal rights the parties were East Indians, and at the time of the marriage on 22nd July 1877 were domiciled in British India, resident within the limits of Calcutta, and members of the Roman Catholic religion. The defence to the suit was that a previous marriage had, on 6th December 1871, been performed between the respondent and the petitioner's sister, and the respondent prayed that the second marriage might be declared a nullity. The ceremony of 6th December 1871 had taken place while the petitioner's sister was on her death-bed, and *in extremis*, and had been celebrated in accordance with the rites of the Roman Catholic Church, and it was held both by the Original Court and on appeal to be a valid marriage. The first Court (CUNNINGHAM, J.) held that the second marriage was null and void on the ground that the parties were within the prohibited degrees. *Held*, on appeal (by GARTH, C.J., and WILSON, J., while referring to a Full Bench the question "whether the second marriage was a valid marriage, or on the other hand was either void or voidable") that it was competent to the Court in a suit for restitution of conjugal rights to make a declaration of nullity of marriage if the respondent showed himself entitled to such relief.

Held by the Full Bench.—The prohibited degrees mentioned in s. 19 of the Indian Divorce Act do not necessarily mean the degrees prohibited by the law of England.

All that was known in respect of the parties to the marriage being that they were Roman Catholic subjects with Portuguese names, and it not having been found whether they were of English or any other European descent, or of native or mixed parentage: *Held*, that the prohibited degrees for the parties to the marriage were not the degrees prohibited by the law of England, but those prohibited by the customary law of the class to which they belonged, that is to say, the law of the Roman Catholic Church as applied in this country.

Held by the Division Bench (GARTH, C.J., and WILSON, J.) *on the case being returned to it.*—Where a man and a woman intend to become husband and wife and a ceremony of marriage is performed between them by a clergyman competent to perform a valid marriage, the presumption in favour of everything necessary to give validity to such marriage is [707] one of very exceptional strength, and, unless rebutted by evidence, strong, distinct, satisfactory and conclusive, must prevail. *Piers* v. *Piers* (1) followed.

According to the rule of the Church of Rome, a dispensation from the proper ecclesiastical authority is necessary to give validity to a marriage between a man and the sister of his deceased wife.

In this case the parties were Roman Catholics and intended to become husband and wife, and a ceremony of marriage was performed between them by a clergyman competent to perform a valid marriage: *Held*, that the Court was bound to presume that a dispensation necessary to remove the obstacle to the marriage on the ground of affinity had been obtained.

[F., 9 C.W.N. 323 = 1 C.L.J. 55 = 32 C. 187; Appl., 17 C. 324 (325); Disc., 10 M. 218 (221) = 1 Weir 566; R., 17 M. 235 (246); 16 A. 212 (215); U.B.R. (1897)—(1901), Vol. II, 488 (494); 24 C. 216 (230); 9 Bom. L.R. 770 (775).]

THIS was a suit brought by Virginia Harriet Lopez for restitution of conjugal rights. The petitioner and the respondent belonged to a class

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(1) 2 H.L.C. 331.

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which is commonly known as East Indians, and at the time of the marriage were members of the Roman Catholic religion domiciled in British India and resident in Calcutta. The respondent, before his marriage with the petitioner, had formed an illicit connection with her sister, Caroline Rebello, and between them on 6th December 1871, while she was on her death-bed, the ceremony of marriage was performed in accordance with the rites of the Roman Catholic Church.

The respondent resisted the suit *inter alia* on the ground that his marriage with the petitioner was a nullity, inasmuch as she was his deceased wife's sister, and thus came within the prohibited degrees. He also prayed for a declaration of nullity.

The Court of first instance (Cunningham, J.) on the 4th July 1884, delivered the following judgment:—

1. This is a suit for restitution of conjugal rights. Amongst other grounds of defence, the respondent contends that his marriage with the petitioner was a nullity owing to his previous marriage to the petitioner's sister, since deceased. It was settled to try this issue before going on with the rest of the case.

I have now, accordingly, to decide the issue whether a valid marriage took place between Caroline Rebello and the respondent. The material evidence on this point, and the only evidence to which I am able to attach much credit, is that of the priest. He has been examined at length, and speaks to the fact of the marriage, principally on the strength of a diary, which [708] he says he kept up entering the facts at short periods after they occurred. He appeared to speak with great caution and to guard himself against saying anything more than he actually remembered. He does, however, remember the fact of the mother having entreated him to perform the marriage to save the family from disgrace and that the dying woman might receive the last rites of the church. He also recollects seeing the present respondent, and subsequently going to the house. As to what took place there, he limits his recollection by saying that all that he remembers, apart from his diary, is that the dying woman was in very great suffering ; but he has an entry of having administered the *viaticum*, marriage and extreme unction to Mrs. Lopez, and in another part of the diary in which he kept a registry of these death-bed marriages, he has a regular entry of the marriage, names of parties, woman's parents, etc. Looking at the entries he says he is able to say that the woman was consious during the *viaticum* and during the marriage ceremony. This evidence, given by a witness who, as far as I can judge, was conscientiously wishing to tell the truth, carries great weight. It is corroborated by the respondent, who says that the marriage took place, and that the woman was perfectly conscious and made all the responses ; and that after the ceremony was over, she still could notice and speak. There is also the fact that the woman was buried as Mrs. Lopez, and that mortuary cards in that name were sent out.

On the other hand, there is the evidence of the petitioner herself and her parents, and considering they have a very decided interest in establishing no marriage, their evidence must be strictly scrutinised. What does it come to? All that they say is that they cannot remember any marriage. They do not venture to say that there was no marriage. It is impossible to attach serious importance to this evidence. Their demeanour impressed me most unfavourably, and on weighing the evidence as given by them on behalf of the respondent, I must hold that the balance preponderates in favour of the view that the marriage took place, that

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it was duly performed, and that the woman was conscious of what was going on.

2. In the register of the second marriage the respondent is [709] described as a bachelor, and from this it is urged that the proper inference is drawn that Father De Vos, being in possession of all the facts, considered that no valid marriage had taken place. I cannot assent to this. The inference which I draw is that the fact of any former ceremony having taken place, was concealed, and that Father De Vos performed the second marriage in ignorance of what had occurred at the sister's death bed.

3. On the whole I am led to the conclusion that a valid marriage did take place between the respondent and Caroline Rebello, and that Father Harford's evidence yesterday establishes that non-consummation would not render it null.

I find, therefore, that the marriage of the respondent with Caroline Rebello was a valid marriage.

4. I next come to consider the question whether the respondent, having been married to Caroline Rebello on December 6th, 1871, could after her death contract a legal marriage on the 22nd July 1877 with the present petitioner Virginia, who is Caroline Rebello's sister.

The parties are East Indians domiciled in India and are Roman Catholics.

5. By s. 53 of the Indian Divorce Act (IV of 1869) nothing shall be pleaded in answer to a suit for restitution of conjugal rights, which would not be a ground for a suit for judicial separation or for a decree of nullity. One of the grounds on which a decree for nullity can be made (s. 19) is that the parties are within prohibited degrees of consanguinity or affinity.

6. The present defence is therefore one which may be properly raised in this suit.

7. There is no doubt that, as the English law now stands, a marriage by a person subject to that law with a deceased wife's sister is void.

8. Previous to Lord Lyndhurst's Act, 5 and 6 Will. IV, c. 54, such marriages were voidable only by sentence of the Ecclesiastical Court during the lifetime of the parties. By that Act all marriages thereafter contracted by persons within the [710] prohibited degrees of consanguinity or affinity, became absolutely null and void for all intents and purposes whatsoever.

9. This Act does not apply to Scotland, and there is the authority of Lord Cranworth, *Brook* v. *Brook* (1), for considering that it did not extend beyond England and Ireland. It cannot, therefore, I consider, be regarded as extending to India. It is omitted, and I have no doubt rightly, from the list of Statutes applying to British India, 1884, published in the Legislative Department of the Government of India, which, though not authoritative, is important as confirming the view at which I had independently arrived.

10. I have, therefore, to consider whether the English Law, other than as modified by that Statute, is in force in British India, and, if the English law be not in force, what law is in force? In the first place, it is clear that there is *some* law on the subject in force in India. The Christian Marriage Act (XV of 1872) provides that nothing in the Act shall

(1) 9 H.L.C. 214.

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validate any marriage which the present law applicable to either of the parties forbids him or her to enter into; and the Indian Divorce Act (Act IV of 1869) mentions as a ground for a petition for a decree of nullity "that the parties are within the prohibited degrees of consanguinity, whether natural or legal, or affinity." What then are these prohibited degrees? The law as to prohibited degrees in England was thus laid down by Lord Cranworth in *Brook* v. *Brook* (1):—

"It must be taken as clear law that, though the two Statutes of Hen. VIII, *i.e.*, the 25 Hen. VIII, c. 22 and the 28, Hen. VIII, c. 7 (being the only Statutes which in terms prohibited marriage with a wife's sister as being contrary to God's law), are repealed, yet by two subsequent Acts of the same reign, namely, the 28 Hen. VIII, c. 16, and the 32 Hen. VIII, c. 38, which had for their object to make good certain marriages, the prohibition is in substance revived or kept alive. For in both of them there is an exception of marriages prohibited by God's law, and in one of them, 28 Hen. VIII, c. 16, the language of the exception is "which marriages be not prohibited by God's laws limited and declared in the Act made in this present Parliament," that is, the repealed [711] Act of the 28 Hen. VIII, c. 7, s. 11, so that it is to that Act, though repealed, that we are to look in order to see what marriages the Legislature has prohibited as being contrary to God's law. It was, perhaps, unnecessary to advert to this after the decision of the Court of Queen's Bench in *Reg.* v. *Chadwick* (2), but it is fit that the ground on which we proceed should be made perfectly clear."

11. Among the marriages forbidden as prohibited by God's law in 25 Hen. VIII, c. 22, is the marriage of a man with his wife's sister. A portion of 32 Hen. VIII, c. 32, *viz.*, that as to precontracts, was repealed by 2 and 3 Ed. VI, c. 123, but that Act expressly provided (s. 4) that, except as provided, the Act 32 Hen. VIII, c. 38, should remain in full force.

12. The next question is—was the Statute 32 Hen. VIII, c. 38, carried by the English into India, and did it bind Englishmen in India in 1726? It is published in the list of enactments in force in British India, to which I have already referred, and, apart from this, I should have held it to be in force. The question of the extent to which the law of England was carried by the English into India has been frequently considered by high authority, as, for instance, in *Freeman* v. *Fairlie* (3); *The Mayor of Lyons* v. *East India Company* (4); *The Secretary of State* v. *The Administrator-General of Bengal* (5), and other well-known cases. In *The Advocate-General of Bengal* v. *Ranee Surnomoyee Dossee* (6), it was observed by Peacock, C.J., that "in construing the charter of George I, there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place or the inhabitants would admit." The circumstances which have been held to justify the view that some particular portion of the English law, as it existed in 1726, has not been introduced, have been, as a rule, some manifest inapplicability, incongruity, inconvenience, or hardship which the introduction of the English law, owing to the circumstances and position of the British residents in India, would involve; as, for example, the law as to [712] aliens in the *case of the Mayor of*

(1) 9 H.L.C. 214. (2) 11 Q.B. 173. (3) 1 M.I.A. 305.
(4) 1 M.I.A. 175. (5) 1 B.L.R.O.C. 87. (6) 9 M.I.A. 387.

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Lyons, the law as to *felo de se* in the case of Hindus, in *Advocate-General of Bengal* v. *Ranee Surnomoyee Dossee* (1), and the common law rule as to the necessity of the presence of an ordained minister at marriages in *Maclean* v. *Cristall* (2). "The broad fact," says Sir E. Perry in the latter case, "with respect to English law at the present day, is that, however variously introduced in India, and at whatever periods, it is now the dominant law throughout the British possessions for all those inhabitants who belong to the European family of nations." This is, he proceeds to explain, modified by the rule, borrowed from the analogy of colonists, that the British in India are to be deemed to have taken with them "so much of the English law as is applicable to their situation and condition." Can it be said then that there are, in the present case, circumstances which, applying this rule, would justify me in holding that the English law as to prohibited degrees of affinity in marriage was not introduced into India?

13. Much reliance was placed in the argument before me on the ruling of Sir E. Perry, C. J., in *Maclean* v. *Cristall* (2). In that judgment His Lordship considered the question whether that portion of the English Common Law, which since the decision in *R.* v. *Millis* (3) must be held to require the presence of an ordained minister of religion as essential to a valid marriage, had been introduced in India; and His Lordship's decision, that it has not been so introduced, was grounded on the inapplicability of such a rule to the circumstances of the British settlers in India, the fact that in a large number of instances marriages had been solemnised by unordained persons, and the disastrous consequences which would have been entailed by a decision which would have bastardised the offspring of those marriages.

14. But there is nothing in that decision which would justify me in holding that the English Statute law on the subject of prohibited degrees of affinity in marriage was not introduced. The question there was, whether a very obscure portion of the Common law of England, as to which the [713] highest authorities were equally divided, and the decision of which was of recent date, and to a large extent accidental, was to be deemed to have been carried into India by the first settlers, living, as they often did, without any chaplains and in many cases, hundreds of miles from any ordained minister of religion. The question here is as to a statutory law, which prohibited a certain class of marriages as contrary to the law of God, what is there to justify the suggestion that such a law was or could be abandoned by the British on coming to India? It is not, as in the case of *Maclean* v. *Cristall*, a question of ceremonial,—a question whether the person who performed the rite had received Episcopal ordination. The question is as to the very essence of the contract, *viz.*, the competence of the parties to make it. So far from regarding *Maclean* v. *Cristall* as supporting the view that the English law on the subject was not introduced into India, the reasoning of the Chief Justice seems to me to tend strongly in the opposite direction. The law in question was in no sense of that local or municipal order, which a person, leaving the country, might be supposed to abandon, it was a statute which for two hundred years had declared it to be a part of the law of England that such marriages are contrary to the law. It affected not a formal ceremony, which the necessities of the case might be held to dispense with, but the personal competence of certain parties to contract; and such being the

(1) 9 M.I.A. 387. (2) Perry's Or. Cas. 75. (3) 10 Cl. & F. 534.

case, it cannot, I think, be held that it ceased to be part of the English law binding on British subjects, merely because they went to reside in India.

15. Then comes the question whether the personal law of the English became the law of other Christian classes domiciled in India. As to this I understand the law to be that laid down in the case just mentioned, *viz.*, that "the English law, generally, is the law of all Europeans who come within the British dominion in India."

16. If, indeed, it could be shown that the personal law of the English conflicted with that of the generality of Europeans, there might be some ground for the suggestion that the English law would be abandoned. But there is no room for such an argument here, because the religious law of the class concerned [714] in this case happened to correspond to a large extent with the English law on the subject, and was, in fact, stricter, because such marriages in England were only voidable, whereas by the rules of the Catholic Church they were void, unless a dispensation had been granted.

17. It was urged upon me that domiciled Europeans must be deemed to follow the law of their church as to marriage, and as, according to the rule of the Catholic Church, a dispensation for such a marriage might be obtained, that I ought to presume that a dispensation for the second marriage was granted in this case, and that, accordingly, the marriage was valid. The evidence of the plaintiff was to the effect that he told Father De Vos all the circumstances of the case, and "asked him to do the needful." The presumption, accordingly, would, it was urged, be that Father De Vos did everything regularly, and that he would obtain the necessary permission. This contention is, in my opinion, unsustainable for two reasons: In the first place, the facts are against any such presumption. There is the entry in the Marriage Register in which the respondent is described as a "bachelor" which could hardly have been if Father De Vos had been told of his circumstances, and had had his attention specially directed to them by having to obtain a license from the Bishop. In the next place, it would be very strange that, if such license were obtained, Mr. Lopez should hear nothing of it, which he admits to be the case. Nor is Mr. Lopez corroborated by the mother as to his having informed Father De Vos of all his circumstances. Again, such dispensations must be very rare as Father Nieberding says that he never heard of one being granted. On the whole I should doubt very much whether I ought to presume a dispensation. This, however, is immaterial, because even if a dispensation were granted, it would not validate a marriage prohibited by law. Whatever be the effect of the Canon Law of Europe, "it does not" in the words of Tindal, C.J., in *R.* v. *Millis* (1) "and never did, as a body of laws, form part of the law of England;" and it can be recognised in our Courts "only so far as it stands uncorrected either by contrary Acts of Parliament or the Common Law or custom of [715] England;" *per* Lord Hale as quoted in *R.* v. *St. Giles in the Fields* (2).

The decision of the Appellate Court in *Sattomayor* v. *De Barros* (3) is a clear authority "that the Statutes of the English Parliament contain a declaration that no Papal dispensation can sanction a marriage otherwise incestuous." So that, if the law applicable to the parties in the present case, be, as is contended, that marriage with a deceased wife's sister is

(1) 10 Cl. & F. 534. (2) 11 Q.B. 189. (3) 3 P.D. 1.

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incestuous unless sanctioned by a dispensation, I should be bound to hold it incestuous even though a dispensation had been granted. I therefore find that the marriage of the petitioner and respondent was within the prohibited degrees.

18. During the hearing of the case the petitioner prayed to be allowed to amend his written statement by adding a prayer for a declaration of nullity. It appears to be usual in the English Court of Divorce and Matrimonial cases to give relief of this nature to the respondent in cases in which restitution of conjugal rights is sought: *Ricketts* v. *Ricketts* (1); *Owen* v. *Owen* (2). By s. 7 of the Indian Divorce Act, 1869, the Court is directed to give relief on principles and rules which are, in the opinion of the Court, as nearly as may be conformable to the principles and rules on which the Court of Divorce and Matrimonial causes in England for the time being gives relief. I think, therefore, that I am at liberty to make such a declaration in the present proceeding; and I accordingly allowed the amendment, and I now declare the marriage of the petitioner with the respondent to have been null and void, on the ground that the parties were within the prohibited degrees.

From this decision the petitioner appealed. The appeal came on before Garth, C.J., and Wilson, J., who referred it to a Full Bench with the following order:—

"This is a suit brought by the petitioner for the restitution of conjugal rights.

"It has been dismissed by the Court below, and the marriage has been declared null and void. On appeal two main questions have been argued, namely:—

"*1stly.*—Whether a valid marriage took place on the 6th of **[716]** December 1871, between Caroline Rebello, the sister of the petitioner, and the respondent; and

"*2ndly.*—Assuming that marriage to have been a valid one, how far it affects the subsequent marriage, which took place on the 22nd of July 1877, between the petitioner and the respondent.

"The Court below has decided the first of these questions in the affirmative, and we think that decision was right. We see no reason to doubt the evidence of Father Neiberding, who solemnized the marriage; and we think that his evidence is strongly corroborated by what admittedly took place at the time. We have the fact that Caroline, who died shortly after the ceremony, was buried *under the name of Caroline Lopez*, and that mortuary cards were sent out to the friends and relatives of the family *in that name.*

"As to the second question, the learned Judge has held that the subsequent marriage between the petitioner and the respondent was voidable upon the ground that in this country, as in England, a marriage with a deceased wife's sister is contrary to law, as being within the prohibited degrees of affinity.

"This question appears to us to be one of so much difficulty and importance that we think it right to refer it to a Full Bench."

After setting out shortly the facts of the case, so far as they were material to this question, the referring order continued—

"These being the facts, a preliminary point was raised by the appellant with regard to the second question, that in a suit of this kind, for the

(1) 35 L.J.A. and P. 92. (2) 4 Hagg. 261.

restitution of conjugal rights, it was not competent for the respondent to dispute the legality of the marriage, or to ask for a decree of nullity. 1885 Sep. 8.

"By s. 53 of the Indian Divorce Act (Act IV of 1869), nothing can be pleaded in answer to such a suit which would not be a ground for a suit for judicial separation, or for a decree of nullity. Then by s. 19 of the same Act, one of the grounds upon which a decree for nullity can be made, is that the parties are within the prohibited degrees of consanguinity or affinity. By s. 7 of the Indian Divorce Act, this Court is to give relief according to principles and rules as nearly as may be conformable to those of the Divorce Court in England. And it is the practice of the [717] Court in England in a suit for restitution of conjugal right, to give a decree of nullity if the respondent asks for it and shows himself entitled to that relief. Upon the strength of these enactments and reasons, the learned Judge considered that the question whether the marriage was voidable, upon the ground that the parties were within the prohibited degrees of affinity, was one which the respondent was competent to raise, and he made a decree of nullity, and we think he was right.

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"The main question then arises, was the marriage legal? The learned Judge has held it to be voidable, upon the ground that the law of England which forbids marriage with a deceased wife's sister, as being contrary to the law of God, is one of those laws which was introduced into this country by the English, and that it is applicable to all classes of Christians domiciled in British India.

"It has been argued on appeal:—

"1*stly*.—That a law of this nature, although it might affect members of the Church of England, and all Indian subjects of Her Majesty domiciled in England, does not affect Eurasians who are domiciled in India, and who are not members of the Church of England.

"2*ndly*.—That the Statute, 32 Henry VIII, c. 38, which enacts the law upon this subject, applies only to those marriages which have been consummated by carnal knowledge; and that in this case no such consummation took place.

"Section 14 of that Statute says:—

"Provided always that the article in this Act contained concerning prohibitions of marriages within the degrees aforementioned in this Act, shall always be taken, interpreted and expounded of such marriages, where marriages were solemnized and carnal knowledge was had.

"3*rdly*.—That East Indians domiciled in this country and members of the Roman Catholic religion are subject to the Ecclesiastical Law, which regulates the marriages of Roman Catholics, domiciled in India; and that such law must be proved like any other local or special law.

"As to this last point the Reverend Father Harford, who is the [718] Vicar of the Church of the Sacred Heart of Jesus at Dhurrumtollah, was called as a witness in the case, and said as follows:—

"In the Catholic Church we have one table of affinity for all persons. A marriage with a deceased wife's sister is perfectly invalid, unless a dispensation is obtained from the Archbishop of Calcutta. A license from the Archbishop, if a person wished to marry his deceased wife's sister, would not be sufficient. He would require a license to dispense with banns and a dispensation with regard to the affinity as well."

"For the purposes of this question, it may be assumed that Father Harford's evidence in this respect is correct.

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"The question, which we desire to refer to the Full Bench is—

"Whether the marriage between the petitioner and the respondent was a valid marriage, or, on the other hand, was either void or voidable?"

On the hearing before the Full Bench,—

Mr. *Pugh* (with him Mr. *Allen*), for the appellant.—The Marriage Acts of Henry VIII do not apply to the present case. Those statutes are not suitable to the condition of this country. The wording of the statutes clearly shows that they were made applicable to marriages within the Church of England. If 32 Henry VIII, c. 38, be a guide, consummation by carnal knowledge would be necessary to constitute marriage. It is admitted in the present case that the alleged marriage was celebrated while the woman was in *in extremis*. 5 and 6 Will. IV, c. 54, has no general application to this country. The English residents are bound by that statute because they have brought their law with them. The parties to this suit are not descendants of British settlers, nor is there anything to show that they are even of European or Portuguese descent. They may be Native Christians. What is the result of the Native Marriage Act? There is no table of prohibited degrees laid down in that Act. Leviticus does not prohibit marriage with a deceased wife's sister. There are many Christian countries where such a marriage is considered to be lawful. The parties here are Roman Catholics, and if they are bound by the law of their church, dispensation should be presumed in favour of the marriage. In the estimation of the parties the previous alleged marriage was a nullity or the man would not have been [719] described as a bachelor at the time of the marriage in dispute. Custom alone with govern the capacity for marriage in the present case.

The following authorities were referred to and commented upon—32 Henry VIII, c. 38 ; 5 and 6 Will. IV, c. 54 ; The Indian Christian Marriage Act (Act XV of 1872) ; *Das Merces* v. *Cones* (1) ; *Borrodaile* v. *Chainsook Buxyram* (2) ; *Queen* v. *Chadwick* (3) ; *Sherwood* v. *Ray* (4) ; *Maclean* v. *Cristall* (5) ; *Dalrymple* v. *Dalrymple* (6) ; *Ruding* v. *Smith* (7) ; *Goldsmid* v. *Bromer* (8) ; *The Advocate-General of Bengal* v. *Ranee Surnomoyee Dassee* (9) ; *Macqueen's* Husband and Wife ; *In re Kalian Das Narain Das* (10) ; *Sarkies* v. *Prosonomoye Dossee* (11) ; Story's Conflict of Laws, 113 and 114.

Mr. *Hill* (with him Mr. *Sale*), for the respondent.—There is sufficient indication in the Divorce Act that there is a table of prohibited degrees to be found somewhere ; that table must be sought in the English statutes. The Supreme Court as an Ecclesiastical Court was a Christian Court. In its Ecclesiastical Jurisdiction there was no other law than the law administered in the Diocese of London. Any Christian community domiciled in this country before the British acquisition would under British rule be subject to the English law in reference to future marriages. The English law of marriage would override their marriage law. A marriage *in facie ecclesiæ* required no consummation by carnal knowledge. Canon Law does not obtain in England *proprio vigore*, but as confirmed by statute ; even the presence of a dispensation, therefore, cannot render the marriage valid. Marriage with the sister of a person of whom knowledge had been had *sive liciter sive illiciter* is void

(1) 2 Hyde 65. (2) 1 Hyde 51 and 61. (3) 11 Q.B. 173.
(4) 1 Moo P.C.C. 353. (5) Perry's Or. Cas. 75. (6) 2 Hagg. Con. 54—62.
(7) 2 Hagg. Con. 371. (8) 1 Hagg. Con. 324. (9) 9 M.I.A. 387.
(10) 5 B. 165. (11) 6 C. 794.

The words of the statute of Henry VIII are "when marriage was solemnized and carnal intercourse had," the words are not "with *subsequent* carnal knowledge." If the English law of marriage has been [720] introduced into this country, marriage with a deceased wife's sister is incestuous among all Christians. Marriage with a deceased wife's sister is void under the Canon Law, the law of Christendom. Admitting that the parties to this suit are Native Christians, Act V of 1865 (The Indian Marriage Act) applies to all Native Christians of any denomination. English law is the territorial law in British India; any modification of it has to be proved. This marriage, on the assumption that the parties are governed by the Roman Catholic Church, is further invalid because no dispensation has been proved.

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The following authorities were referred to and commented upon—*Sattomayor* v. *De Barros* (1); *Briggs* v. *Briggs* (2); *Brook* v. *Brook* (3); *Moyna Boye* v. *Ootaram* (4); *Abraham* v. *Abraham* (5); *Barlow* v. *Orde* (6); *Lautour* v. *Teesdale* (7); Gibbon's Decline and Fall of the Roman Empire, c. 44; *Butler* v. *Gastrill* (8); *McAdam* v. *Walker* (9); *R.* v. *Millis* (10); Dicey on Domicile, 200; Vaugh, 221—225; Hallam's Constitutional History, Vols. I and II; The Indian Divorce Act (Act IV of 1869).

Mr. *Pugh* in reply.

OPINION.

The opinion of the Full Bench was delivered by

WILSON, J.—The main question we have to answer upon this reference is, whether a marriage between a man and his deceased wife's sister, celebrated in Calcutta in the year 1877, is liable to be declared null and void, under s. 19 of the Indian Divorce Act, on the ground that the parties are within the prohibited degrees, both parties being domiciled in British India and resident in Calcutta, and both being Roman Catholics. It is not found whether either of the parties to this marriage is the descendant of English ancestors, or of European settlers in this country other than English, or of native converts to Christianity, or of mixed race; their names suggest a Portuguese origin. We are bound to presume every matter of fact in favour of the validity [721] of a marriage, and therefore if there be rules as to the prohibited degrees which would invalidate a marriage between persons connected as these were, and if those rules be applicable to any one class of Christians, but not to all Christians, we must presume, in the absence of any proof that they did, that the parties did not belong to that class. In particular, we must presume, so far as that point is material, that they are not of British descent, or British in any other sense than that of being domiciled in British India.

The Divorce Act (IV of 1869) applies to all Christians, and s. 19 enacts that a decree declaring a marriage null and void may be made, amongst other grounds, on the ground "that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity." We have to say what the prohibited degrees applicable to the marriage now in question are whether those prohibited by the law of England or by same other rule.

It will be convenient to divide the inquiry into three parts: First, how would the matter have stood if it depended only upon the history of British acquisitions in India, and the Christians of various classes affected thereby,

(1) 3 P. D. 1. (2) 5 P. D. 163. (3) 9 H. L. 193—214. (4) 8 M.I.A. 400.
(5) 9 M.IA. 195. (6) 13 M. I. A. 277 (307). (7) 8 Taun. 830.
(8) Gilb. R. 156. (9) 1 Dow. 148. (10) 10 Cl. & F. 534—660.

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in the absence of statutory enactment? Secondly, what was the effect of the legislation prior to the Divorce Act, and what was the state of the law when that Act was passed? Thirdly, what is the effect of that Act upon the prohibited degrees?

The first branch of the question may be treated very shortly. The circumstances under which the British power became established in India, and the effect of those circumstances upon the laws applicable to the people of the country, have been often considered. It was authoritatively decided in *The Advocate-General of Bengal* v. *Ranee Surnomoyee Dossee* (1), and in other cases, that these circumstances had not been such as to introduce English law generally into India. And it certainly could not be contended that any of the rules of English law as to capacity to marry have ever become law for the people of India generally. If we limit the inquiry to Christians, we do not think it could be contended that the history of the British acquisitions [722] has been such, as without more, to impose the English law of prohibited degrees upon all Christians in British India. It was held in *Abraham* v. *Abraham* (2) that Hindus adopting Christianity do not necessarily change their laws of property, but may retain their old law, or adopt that of the class to which they attach themselves, or establish a customary law. And we think the same rule must be the correct one as to laws of marriage. But their Lordships lay down the rule only as to "matters with which Christianity has no concern." And we do not suppose the law could permit native converts (if one can imagine their desiring such a thing) to choose for themselves some marriage law wholly repugnant to Christian ideas—converts from Hinduism, for instance, to retain their former right to marry more wives than one, or converts from Mahomedanism their former freedom of divorce. With regard to the English men and women who settled here and their descendants, other consideration would apply. With them we have nothing to do in the present case.

In examining the second branch of the inquiry, as to the effect of the legislation prior to the Divorce Act, it will be convenient to begin with the Charter under which the Supreme Court was constituted in 1774. By the 22nd section of that Charter the Court "shall be a Court of Ecclesiastical Jurisdiction, and shall have full power to administer and execute within and throughout the said provinces districts, or countries called Bengal, Behar, and Orissa, and towards and upon our British subjects there residing, the Ecclesiastical law, as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasions of the said provinces and people shall admit or require," with power to entertain all suits belonging to the Ecclesiastical Courts. Like powers were given to the Bombay and Madras Courts by their Charters. These Courts had power to entertain suits for nullity of marriage and (subject to the qualification contained in the above section) they were to decide them according to the law of England. The persons subject to the jurisdiction were British subjects residing in Bengal, Behar, and Orissa. There has been at various times much discussion as to the meaning of "British subject" in the [723] legislation of a hundred years ago. The general result may be stated with sufficient accuracy by saying that "British subject" meant, not subject of the British Crown, but British subject of the Crown, as distinguished from natives of India

(1) 9 M.I.A. 387. (2) 9 M.I.A. 195.

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whether subjects of the King of England or not, a class which would certainly not have included the parties to the present case. With their marriages the Supreme Court would deal under its Charter; its jurisdiction was personal, on the one hand it extended to the whole province, on the other hand it was everywhere limited to British subjects.

To ascertain the marriage law for Christians not falling within the description of British subjects, and the tribunals to administer it, we must look in another direction. Side by side with the Supreme Court sitting in Calcutta, there were the Company's Courts in the Mofussil, and they also had jurisdiction in questions of marriage. Here in Bengal it is not necessary to go further back than 1793, and the group of Regulations of that year dealing with various classes of Mofussil Courts. Regulation III of that year, dealing with Zillah and City Courts, says in s. 7: "All natives and other persons, not British subjects, are amenable to the jurisdiction of the Zillah and City Courts;" and s. 8 empowers those Courts to take cognizance of "all suits and complaints respecting the succession or right to real or personal property, land-rents, revenues, debts, accounts, contracts, partnerships, marriage, caste, claims to damages for injuries, and generally of all suits of a civil nature in which the defendant may come within any of the description of persons mentioned in s. 7." Similar provisions were made by other Regulations as to Courts of other grades. Many changes were from time to time made in the organisation of the Civil Courts of the Company; but nothing was ever done, so far as we can learn, which narrowed the matrimonial jurisdiction of the Mofussil Courts generally, in respect either of persons or subject matter. How carefully the Regulations were framed with respect to persons is very apparent from s. 17 of the Regulation, already mentioned, III of 1793. That section, in general terms, forbids the Zillah Court of the 24-Pergunnahs to entertain suits relating to land in Calcutta or against persons resident in Calcutta. If **[724]** this had stood alone, there would have been no express provision for dealing with questions as to marriages between persons other than British subjects residing in Calcutta. Not being British subjects they would not be within the terms of the clause in the Supreme Court's Charter, which gave ecclesiastical jurisdiction; being resident in Calcutta they would not be subject to the Zillah Court. Accordingly s. 17 concludes with a proviso that "the provisions contained in this section are not to be construed to extend to preclude the Court of Dewany Adawlut of the Zillah of the 24-Pergunnahs entertaining any suit concerning marriage or caste in which no money or other valuable thing may be demanded or decreed, although the cause of action shall have arisen, or the defendant may reside, or shall have resided at the time the suit commenced, within the limits of the town of Calcutta."

The precise nature of the matrimonial jurisdiction conferred upon these Courts, whether it was co-entensive with that of the Ecclesiastical Court in England, or wider or narrower, we do not think it necessary to examine. What is essential is that they had authority to hear and decide suits relating to marriage, including of course questions as to the validity of marriage and therefore questions as to the capacity of persons to marry. The law to be applied by those Courts to cases of marriage not specifically provided for was "justice, equity, and good concience" (s. 21). In the case of *Abraham* v. *Abraham* already cited, the Privy Council, speaking of the law of property to be applied to converts from Hinduism to Christianity, say that they think—"This case fell to be decided according to the Regulation which prescribes

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that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems to their Lordships that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring the decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience." We think the same principle applies equally to questions of marriage amongst Christians other than British; and that equity [725] and good conscience prescribed the referring of the decision to the usages of the class to which the parties belonged.

A series of Acts, beginning with Act XI of 1836 and ending with Act VI of 1843, put an end to the exemption of British subjects from the jurisdiction of the Mofussil Courts in all civil matters. The effect would seem to have been to give the Mofussil Courts a jurisdiction, in one sense concurrent with that of the Supreme Court, over questions of marriage between British Christian subjects in the Mofussil; but, be this as it may, it could not alter the law applicable to either class of Christians.

The next legislation bearing upon the question is in 1851, the Act 14 and 15 Vict., c. 40. That Act provided a new method of marrying in India for any Christians who chose to adopt it, marriage before a Marriage Registrar. The Registrar might by s. 2 issue the necessary certificate, "provided no lawful impediment according to the law of England" were shown to his satisfaction; and one of the parties had under s. 6 to make a declaration that there was no impediment of kindred or affinity. This is the first express reference to impediments of kindred or affinity in connection with Indian marriages, and the first mention of the English law in connection with Christian marriages, between any but British subjects in the narrower sense of the term.

Then came the Charter Act of 1861, 24 and 25 Vict., c. 104, under which the High Courts were formed. By s. 9 of that Act each High Court was to have, amongst other things, such "matrimonial jurisdiction" as might be granted by Letters Patent; and subject to the Letters Patent, and to the legislative powers of the Governor-General in Council, each High Court was to "have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act." The Supreme Courts were amongst the Courts abolished. The first Charter of this Court in 1862, by s. 35, gave the Court "jurisdiction in matters matrimonial between our subjects professing the Christian religion," and such jurisdiction was to "extend to the local limits within which the Supreme Court now has ecclesiastical jurisdiction," that is to say, Bengal, [726] Behar, and Orissa. The present Charter of 1865 is substantially to the same effect; the Charters of the other High Courts are similar. The jurisdiction of the High Court in matters matrimonial was thus expressly extended to all Christian subjects of the Crown within the province; nothing is said about the matrimonial law to be administered

It was strongly contended before us that the effect of this extension of the matrimonial jurisdiction of the High Courts, over all Christian subjects, was to make all Christian marriages thenceforth subject to the law administered by the Supreme Court, from which the jurisdiction was transferred, that is to say, the law of England "so far as the circumstances and occasions of the said provinces and people shall admit or require;" and that the only further question to be considered was, whether

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the English law of prohibited degrees was such as those circumstances admitted or required, a question which might have been one of much difficulty. And if this had been the case of a new and exclusive jurisdiction established over persons not previously provided with a definite law and with tribunals to administer it, there would have been much force in the contention. But, as has been shown, the Regulations determined the law to be applied to non-British Christian marriages, and provided tribunals to administer it, just as the Charter of the Supreme Court did for British Christians. In the High Court Charter the same section, s. 35, which gives this Court its matrimonial jurisdiction, contains a proviso, "that nothing herein contained shall be held to interfere with the exercise of any jurisdiction in matters matrimonial by any Court not established by Royal Charter" within the Presidency; and the words which occurred in the Supreme Court Charter, requiring the Court to administer the English ecclesiastical law, are omitted from our Charter. The conclusion seems clear that, in extending the matrimonial jurisdiction over new persons, it was not intended to alter the matrimonial law by which those persons were governed.

The next Act is one of the Indian Legislature, Act XXV of 1864. That Act dealt exhaustively with the modes in which Christian marriages could take place. These were: Marriages before a Registrar under 14 and 15 Vict., c. 40; by a clergyman of the [727] Church of England according to the rites, rules, ceremonies, and customs of that church; by a clergyman of the Church of Scotland, according to the rites, rules, ceremonies, and customs of that church; by a licensed minister under the Act itself; and by a person authorised to certify Native Christian marriages under Part V of the Act. As to marriage by licensed ministers, the Act contained provisions as to legal impediments according to the law of England, exactly similar to those enforced by 14 and 15 Vict., c. 42, in the case of marriage before a Registrar. As to marriages of Native Christians the certificate was only to be granted, provided "the man and the woman shall not stand to each other within the prohibited degrees of consaguinity or affinity."

Great stress was laid upon this Act and the 14 and 15 Vict., c. 40, during the argument, as showing that both the Imperial Parliament and the Indian Legislature intended that the English rules as to the prohibited degrees should be the law for all Christians in India. We agree in thinking that those Acts were almost certainly passed under the supposition that such was the law, and that this is probably why the rules of procedure in the case of certain modes of marriage were framed as they were. And any one who has studied the history of this subject outside the statute book will know that at that period this opinion was entertained and expressed by persons of high authority. But we can find nothing in those Acts which can be said, either expressly or by reasonable inference, to enact or declare the law in this sense. On the contrary, s. 21 of 14 and 15 Vict., c. 40, expressly declares that the Act is not to invalidate any marriage which "under the laws for the time being in force in India might have been there solemnized in case this Act had not been passed." And, however strongly these Acts may seem to show an opinion that the English law as to the prohibited degrees was in force for all Christians in India, subsequent legislation may, with equal correctness, be said to indicate another view of the question.

Under the Act of 1864 obviously a clergyman of the Church of Rome could only celebrate a marriage either as a licensed minister, or as a person

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licensed to certify under Part V. The Roman Catholic clergy objected to this Act, as we learn from the objects [728] and reasons of the amending Act, upon certain points connected with registration, and the hours for celebrating marriages. We learn from the speech of the member who had charge of the amending Bill that they objected also to their clergy having to be licensed by the State, and to the provisions as to prohibited degrees. On the latter point it was urged that there were classes of Christians in Southern India who were compelled by social circumstances to marry within the degrees prohibited by English law ; to remove the latter grievance was one of the objects of the fresh legislation. Act V of 1865 was accordingly passed, and it made two material changes. It put all Episcopally ordained clergymen, including of course those of the Church of Rome, on the same footing with the clergy of the Churches of England and Scotland, and it excluded Roman Catholics from Part V. The effect was to allow Roman Catholics to have their marriages solemnized by their own clergy, according to the rites of their church, nothing being said one way or the other about prohibited degrees ; and to prevent Native Roman Catholics from marrying under Part V. This Act had certainly no tendency to impose the English law on persons not previously subject to it ; the object was to avoid doing so.

This was the state of legislation bearing upon the question prior to the passing of the Divorce Act in 1869. And we think that up to that time the English prohibited degrees had never become law for Christians in India generally.

The Divorce Act applies to all Christians, whether Native or European. Section 4 says that "The jurisdiction now exercised by the High Courts in respect of divorce *a mensa et thoro*, and in all other causes, suits, and matters matrimonial, shall be exercised by such Courts and by the District Courts subject to the provisions in this Act contained and not otherwise except so far as relates to the granting of marriage licenses, which may be granted as if this Act had not been passed." Section 7 says that "Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings thereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for divorce and matrimonial [729] causes in England for the time being acts and gives relief." The act then proceeds to deal with a number of subjects, of which the most important are dissolution of marriage, nullity of marriage, judicial separation, protection orders, restitution of conjugal rights, settlements, and the custody of children. Dealing with nullity of marriage, s. 18 says that "any husband or wife may present a petition to the District Court or to the High Court, praying that his or her marriage may be declared null and void;" and s. 19 says that—"such a decree may be made," amongst other grounds, on the ground "that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity." The words in brackets, "whether natural or legal," qualifying the word "consaguinity" point, apparently, to consanguinity by adoption, so as to prevent a Native Christian, who has been adopted, on the one hand from marrying, say, the daughter of his adoptive father, and, on the other hand, from marrying a woman too nearly related to him by birth.

It seems convenient here, before considering the construction of the Divorce Act, to refer to the subsequent Act of 1872. That Act repeals both the 14 and 15 Vict., c. 40, and Act V of 1865. It re-enacts the

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provisions of these Acts about marriages before registrars and marriages before licensed ministers, with this exception: Under the earlier Acts the registrar or the minister had to satisfy himself that there was no "lawful impediment according to the law of England," and one of the parties had to declare that there was no "impediment of kindred or affinity;" under the new Act the words "according to the law of England" are left out, the minister or registrar is to be satisfied that there is no "lawful impediment," and the same declaration as before is required. In Part VI the Act of 1872 re-enacts the former provisions about marriages of Native Christians, omitting all reference to the prohibited degrees. But s. 88 says: "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into." There can be no doubt as to the object of the changes made by this Act; the object clearly was to secure that there should be nothing in the rules as to the [730] celebration of Christian marriage tending to indicate, or suggest, that any particular rule as to prohibited degrees applied to any particular marriage.

We now come to the third branch of the enquiry—what the prohibited degrees mentioned in s. 19 of the Divorce Act are. Those words, or similar words, were, as has been seen, used in the 14 and 15 Vict., c. 40, and in the Acts of 1864 and 1865; and there are no doubt strong reasons for saying that, in the Acts prior to the Divorce Act, the words "the prohibited degrees" meant those prohibited by the law of England. And the consideration then arises that if certain words are used in a certain sense in a series of Acts the same sense ought ordinarily to be given to the same words in a subsequent Act dealing with the same subject. This is rule of construction not lightly to be departed from; and it must be admitted that s.7 of the Divorce Act, referring to English law, adds some force to the contention that the language of the Divorce Act is the language of the English law.

But there are reasons on the other side of much greater weight tending to show that, whatever may have been the meaning of the prohibited degrees in the earlier Acts, they mean, in the Divorce Act, not the degrees prohibited by the law of England, but the degrees prohibited by the law applicable to the parties to the marriage. The Divorce Act and the Acts of 1864 and 1865 are in *parimateria* in the sense that they both deal with marriage; but they deal with it from different points of view, and for different purposes, the earlier Acts treating primarily of the form of marriage, the Divorce Act of its dissolution and kindred subjects. And in s. 19 of the Divorce Act itself we find the words "consanguinity, whether natural or legal." These words seem to refer to relationship by adoption, an idea unknown to the law of England; they therefore tend to negative the view that the language of the section is the language of English law.

There are two reasons of a broader kind and of much greater importance. The English law of prohibited degrees, as has been shown, was not applicable to Christians generally when the Divorce Act was passed; the application of the English rules to all Christians would be a most momentous change in the [731] marriage law of the large majority of Christians in India, such as we ought not to hold to have been made, unless the intention of the Legislature to make the change has been expressed in unmistakable language; and that has certainly not been done.

And the Acts of 1865 and 1872 show clearly that during the period between those two dates, it was the settled purpose and policy of the legislature

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not to extend the English rules as to prohibited degrees, by legislation, to persons not already governed by them, but to leave them under the law to which on other grounds they might be found subject. The Divorce Act was passed in the middle of this period, and we know, as matter of history, that it was under discussion in and before 1865. To construe the Divorce Act as applying the English law to all Christians in India would, therefore, be to attribute to the Legislature an intention, directly in conflict with what we know to have been their settled purpose, at the time when the Act was prepared and passed.

The result is that in our opinion the prohibited degrees for the parties to this marriage were not the degrees prohibited by the law of England, but those prohibited by the customary law of the class to which they belong, that is to say, the law of the Roman Catholic Church as applied in this country.

There is one other point to which we think it right to refer. Section 5 of the Act of 1872 enacts, as did the Act of 1865, that "marriage may be solemnized in India (1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies, and customs of the Church of which he is a minister." It was argued that the words, "rites, rules, ceremonies and customs," here used include rules as to capacity to marry, and make those rules in each case depend upon the law of the Church whose minister performs the marriage. That argument would lead by a short process to the same conclusion at which we have arrived upon this reference. The construction of those words is difficult; we are not prepared to express an unanimous opinion upon it; and it is unnecessary that we should deal with it.

With this statement of our opinion the case must go back to the Division Bench to be considered.

[732] On the case being returned to the Division Bench (GARTH, C.J. and WILSON, J.) the following judgment was delivered by :—

JUDGMENT.

WILSON, J.—We have now to decide this appeal in accordance with the law laid down by the Full Bench that the validity of the marriage in question is to be determined by the law of the Church of Rome.

It is clear in this case that the parties intended to become husband and wife, and that a ceremony of marriage was performed between them by a clergyman competent to perform a valid marriage. But the woman being the sister of the deceased wife of the man, it is clear upon the evidence that, according to the rule of the Church of Rome, a dispensation from the proper Ecclesiastical authority was necessary to its validity, while without such dispensation it would be invalid.

If in such a case the burden of proving a dispensation lay upon the appellant who supports the marriage, we should have no hesitation in saying it was not proved. If the burden of proof was the other way, and the point was one to be decided upon the balance of evidence, we might probably have come to the same conclusion. But the presumption in favour of everything necessary to give validity to a marriage is one of very exceptional strength. The law of the subject was fully considered by the House of Lords in the case of *Piers* v. *Piers* (1). The question in that case was as to the validity of a marriage. The parties had intended

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(1) 2 H.L.C. 331.

to become husband and wife, and a ceremony of marriage had been performed between them by a clergyman qualified to marry them. The validity of the marriage in the place where it was performed depended upon whether a special licene had been previously obtained from the Bishop of the diocese. The evidence against the issue of any such license was at least as strong as in the present case; but it was held that the presumption must prevail. The Lord Chancellor, Lord Cottenham, cites and adopts the language of Lord Lyndhurst in an earlier case, that the evidence to rebut the presumption must be, "strong, distinct, satisfactory and conclusive." Lord Brougham says that it must be "clear, distinct and satisfactory." Lord Campbell used similar expressions and added, as his opinion, [733] "that a presumption of this sort, in favour of a marriage, can only be negatived by disproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must show that this is most highly improbable and that it is not reasonably possible."

Following the principle laid down in that case, we think we are bound to presume in the present case, that the dispensation had been obtained which was necessary to remove the obstacle to this marriage on the ground of affinity.

We accordingly hold that the marriage was not liable to be annulled on the ground that the parties to it were within the prohibited degrees.

The decree of the Court of first instance will be set aside, and the case will go back for the trial of the other issues arising in it.

The appellant wiil have her costs of this appeal and also her costs in the Court below of the trial of the issues which have been tried.

Appeal allowed and case remanded.

Mr. *Hart*, for the petitioner.
Mr. *Wilson*, for the respondent.

K. M. C.

13 C. 1.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

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APPELLATE CIVIL.

13 C. 1.

GOBIND NATH SHAHA CHOWDHURI, TRUSTEE TO THE ESTATE OF PARSHADANGA CHOWDHURI (*Plaintiff*) *v.* G. M. REILY (*Defendant*).* [12th February, 1886.]

Onus probandi—*Landlord and tenant—Ejectment—Under-tenures—Sale for arrears of rent—Avoidance of under-tenures—Incumbrances—Rent law—Bengal Act VIII of* 1869, *ss.* 59, 60, 66.

In a suit by the purchaser of an under-tenure, under ss. 59 and 60 of the Rent Act (Beng. Act VIII of 1869), to obtain possession of lands held by the defendant, on the ground that the holdings are incumbrances which have accrued thereon by an authorized act of the previous holder of the under-tenure, it lies upon the plaintiff to show that the defendant's holdings are such incumbrances as the plaintiff is entitled to avoid under s. 66 of the Rent Act.

[R., 9 C.L.J. 490 (492) = 13 C.W.N. 720 = 1 Ind. Cas. 896; D., 7 Ind. Cas. 919; 15 C. 555 (557).]

IN this case the material portion of the judgment appealed from is as follows :—

"These were suits by the purchaser of a putni and dur-putni to avoid under-tenures under the provisions of s. 66 of the Rent Law. The main point for decision is, if plaintiff is bound to prove that the under-tenures were created by the putnidar or dur-putnidar. I think it is clear that the plaintiff must show [2] that his case comes under the section, and that, therefore, he must show that the under-tenures alleged to be incumbrances are really such, that is, that the putnidar, &c., made them. He has not shown this, even in a *prima facie* manner, and therefore it follows that the Munsif was right in dismissing the suits."

The plaintiff appealed to the High Court.

Mr. *Bell* (Baboo *Kishori Lal Sarkar* with him), for the appellant, contended that the *onus* was wrongly placed on the plaintiff, the matters to be proved being peculiarly within the knowledge of the defendant.

Baboo *Kashi Kant Sen* and Baboo *Basant Coomar Bose*, for the respondent.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

On the first point raised in second appeal, that is, regarding the nature of these suits, we agree with the District Judge. They are on behalf of the purchaser of an under-tenure under ss. 59, 60 of the Rent Act, to obtain possession of lands held by the defendant, on the ground that

* Appeals from Appellate Decrees, Nos. 784, 796 of 1885, against the decrees of H. Beveridge, Esq., Judge of Furridpore, dated the 2nd of February 1885, affirming the decrees of Baboo Durga Charan Ghose, Munsif of Furridpore, dated 26th of January 1884.

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the holdings were incumbrances which have accrued thereon by an authorized act of a previous holder of that under-tenure. The plaintiff's case is not, as now contended before us, that the defendants were trespassers without any title, but that the title under which they held was voidable by the auction sale, and the object of the suits is to enforce the rights obtained by that sale.

It therefore becomes necessary to determine the next and main objection raised, that the burden of proof lies on the defendants to prove their title to remain on the lands.

It seems to us that a purchaser of an under-tenure who seeks to enforce his rights under s. 66 of the Rent Act is bound to show that the person whom he seeks to eject holds under an incumbrance of the nature therein specified—an incumbrance that he is entitled to avoid. The law does not provide that he shall obtain the under-tenure free of all incumbrances, but only "of incumbrances which may have accrued thereon by any holder of the said under-tenure," without special authority from his landlord. Consequently the plaintiff must start his case by showing that the title of the defendant so accrued.

[3] The only case quoted to us which is exactly in point is the case of *Durga Prasanna Ghose* v. *Kali Das Dutt* (1). The same point was raised in that case, and the opinion expressed is that which we now entertain. The other case quoted, namely, *Batai Ahir* v. *Bhuggobutty Koer* (2), and the two cases *Ram Monee Mohurer* v. *Aleemoodeen* (3) and *Raj Kishen Mookerjee* v. *Pearee Mohun Mookerjee* (4) cited therein, and followed by that decision, proceed on entirely different grounds. The plaintiffs in these cases were admittedly proprietors of the lands and, as such, were entitled to exercise all the ordinary rights of ownership; and it was held in all these cases that the defendants who disputed the landlord's right to collect rents from the tenants directly, on the ground that they held intermediately, were bound to establish their title. As the plaintiff has failed to prove that the defendant holds under an incumbrance voidable under s. 66 of the Rent Act, the suits have been properly dismissed. We accordingly dismissed these appeals with costs.

P. O'K. *Appeals dismissed.*

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13 C. 3.

APPELLATE CIVIL.

Before Mr. Justice Field and Mr. Justice Macpherson.

KALI KISHEN TAGORE (*Plaintiff*) *v.* GOLAM ALI (*Defendant*).*
[19th March, 1886.]

Landlord and tenant—Notice to quit—Declaratory decree—Specific Relief Act, s. 42—Discretion of Court to give a declaratory decree—Tenant setting up larger interest than he is entitled to.

A plaintiff, admitting a defendant's right to a *kursa-jama* tenure in certain lands but denying a permanent *malguzari* tenure set up by him, sought to eject the defendant from the *kursa-jama* holding, and for a declaration that the defendant

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* Appeal from Appellate Decree No. 329 of 1885, against the decree of H. Beveridge, Esq., Judge of Furridpore, dated the 19th of December 1884, reversing the decree of Baboo Jagat Durlubh Mozoomdar, Subordinate Judge of Furridpore, dated the 22nd of December 1883.

(1) 9 C.L.R. 449. (2) 11 C.L.R. 476. (3) 20 W.R. 374. (4) 20 W.R. 421.

was not entitled to the permanent *malguzari* tenure. *Held*, that the plaintiff was entitled to the declaration asked for, notwithstanding that in consequence of his failure to prove a reasonable notice to quit he was unable to obtain a decree for ejectment

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A Judge interfering with the discretion exercised by a lower Court in granting a declaratory decree, should state his reasons for so doing.

The principle laid down in *Vivian* v. *Moat* (1) is not applicable to this country.

[F., 24 P.L.R. 1900; 26 C. 761 (764); Appl., 15 B. 407 (413); R., 76 P.L.R. 1904; 17 B. 631 (635).]

[4] THE plaintiff in this case alleged that the defendant was in occupation of two plots of land under a *kursa-jama* or ordinary *ryati-jama* from which he, as tenant thereof, could be ejected at will; that while in such occupation he had built huts upon the land and had committed various other acts of encroachment inconsistent with the rights of a tenant holding a *kursa-jama*; that moreover the defendant, in a previous suit No. 23 of 1878, had put in a written statement setting up as against him (the plaintiff) a permanent *malguzari-jama*, including therein the two disputed plots, and alleged that such *jama* had been in possession of him and his predecessors from a time previous to the Permanent Settlement (but that most of the documents put in to support the defendant's statement had been proved to be forgeries); that he had served on the defendant, on the 1st October 1881, a notice calling upon him to quit by the 14th November 1881.

On these allegations the plaintiff on 8th August 1882 brought this suit, praying (1) that the defendant's allegation of a permanent *malguzari-jama* might be set aside; (2) that the defendant might be ejected from the two plots of land, and that he, the plaintiff, might be put into possession thereof.

The defendant admitted the notice to quit, but objected that it was an unreasonable one, and stated that his predecessors, and subsequently he himself, had possessed and enjoyed the disputed lands in right of a permanent fixed *malguzari-jama* and claimed a right of occupancy therin.

The Subordinate Judge amongst others fixed the following issues: (1) Is the notice good? (2) Whether the disputed land was the permanent *malguzari* right alleged by the defendant? (3) Whether or not the defendant had a right of occupancy? And in determining these issues held, that the defendant was entitled to a six months' notice expiring at the end of the year, this being in his opinion a reasonable notice; that the defendant not having been served with such a notice, the plaintiff was not entitled to a decree for possession; that the defendant had no permanent *malguzari-jama* in the disputed lands, and that he had no right of [5] occupancy therein; he therefore gave the plaintiff a decree declaring that the defendant was a tenant from year to year liable to be ejected by a six months' notice to quit expiring at the end of the year.

The defendant appealed to the District Judge, and the plaintiff cross-appealed as to the question of notice.

The District Judge held that the notice to quit was not a reasonable one, on the ground "that it was utterly unreasonable to ask the defendant to give up in a month and twenty-four days land which he had held for so long a time, and which, with permission of the plaintiff's agents, he had covered with buildings," and set aside the declaratory decree made by the lower Court, on the ground that a suit would not lie to set aside

(1) L.R. 16 Ch. D. 730.

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an allegation, holding that even if such suit would lie, this was not a case in which a Court in exercising its discretion should grant such relief.

The plaintiff appealed to the High Court.

Mr. *Woodroffe* (with him Baboo *Kali Mohun Das* and Baboo *Durga Mohun Das*), for the appellant, contended that no notice to quit was necessary, as the defendant has repudiated the true position of his landlord, setting up a larger interest than he was entitled to, *viz.*, a permanent *malguzari-jama*, he being entitled merely to a *kursa-jama*—*Vivian* v. *Moat* (1), *Baba* v. *Vishvanath Joshi* (2); and further contended that a declaratory decree could be made in the case—*Nilmony Singh* v. *Kally Churn Bhattacharjee* (3), and *Kathama Natchiar* v. *Dora Singa Tevar* (4); and that the District Judge was not justified in interfering with the discretion exercised by the lower Court granting such relief, no reasons having been given in his judgment for so doing.

Mr. *Bell* [with him the *Advocate-General* (Mr. *Paul*) and Baboo *Rash Behary Ghose*], for the respondent.

Mr. *Bell*.—The notice being insufficient, the case ought to have been dismissed without any decision on the other issue. See Field's Rent Digest, art. 89, p. 62, and *Bissesuri Dabcea* v. *Baroda Kant* **[6]** *Roy Chowdhry* (5). A declaratory decree to set aside an allegation will not lie—*Nilmony Singh* v. *Kally Churn Bhattacharjee* (3), *Kathama Natchiar* v. *Dora Singa Tevar* (4), *Sreenarain Mitter* v. *Kishen Soondery Dassee* (6), *Sheo Singh Rai* v. *Dakho* (7).

JUDGMENT.

The judgment of the Court (FIELD and MACPHERSON, JJ.) was delivered by

FIELD, J., who after setting out the facts, continued.—The first point pressed upon us in appeal is that no notice was necessary, because the defendant being entitled merely to *kursa-jama* had set up a larger interest in himself, *viz.*, a permanent *malguzari-jama* had repudiated the true position of his landlord, and might therefore be ejected at once without notice. In support of this contention the case of *Vivian* v. *Moat* (1) was relied upon. In that case the tenant defendant had disputed his landlord's right to raise the rent. Fry, J., said: "Every landlord, in the ordinary sense of the word, has in popular language a right to raise the rent," and he considered that the denial of the landlord's right to raise the rent being a suggestion that the landlord was not an ordinary landlord of the estate, but either a lord of the manor or an owner of some other right which gave him a title to a customary rent merely, was in fact a renunciation or disclaimer of the landlord's title. We think that the ground of this decision rests mainly upon the relation of landlord and tenant, as it exists in England, where such relation depends upon contract, and that the principle of this case is not applicable to this country, where a different state of things prevails. In this country there are numerous tenures the rent of which cannot be raised, and the denial of the landlord's right to raise the rent is not necessarily a renunciation or disclaimer of his title as landlord.

(1) L.R. 16 Ch. D. 730. (2) 8 B. 228. (3) 2 I.A. 83=14 B.L.R. 382.
(4) 2 I.A. 169=15 B.L.R. 83. (5) 10 C. 1076. (6) 11 B.L.R. 171. (7) 1 A. 688.

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The next question argued before us is concerned with the reasonableness of the notice. Whether a notice is or is not reasonable is a question of fact, and therefore ordinarily the decision of this question is not open to second appeal. But if the finding of the Court below is based upon no evidence, or [7] upon reasons, all of which are untenable, no doubt the propriety of such finding might be questioned upon second appeal. The Judge in the Court of first instance thought the notice unreasonable, because it did not expire at the end of the year, and further, because it was not a six months' notice which he thought would under the circumstances be a reasonable notice. The first ground is absolutely untenable. There is no law in this country which requires a notice to quit in a case of this kind to expire at the end of the year. The second ground is also bad, because there is no law which requires a six months' notice to be given. What the Judge ought to have found was, not what notice would have been reasonable, but whether the notice actually given in this case was or was not reasonable. If the Judge in the lower appellate Court had merely adopted the reasons given by the Subordinate Judge, it might fairly be contended that his finding was open to question in second appeal. We think, however, that although he has adopted the Subordinate Judge's finding, he has not adopted his reasons, but has exercised his own judgment upon the evidence in the case. He says at page 31: "The defendant urges that this notice is unreasonable, and the Subordinate Judge holds that it is so. So far I quite agree with the Subordinate Judge." Here he agrees in what the Subordinate Judge holds, but he does not express his concurrence in the reasons given by the Subordinate Judge for his finding; and from his observations at page 33 it appears that he did not concur in the view taken by the Subordinate Judge that there should be a six months' notice. At page 32 the District Judge says: "Under any circumstances it was utterly unreasonable to ask defendant to give up in a month and twenty-four days land which he had held for so long and which with the permission of plaintiff's agents he had covered with buildings." We think that this is a finding of fact that the notice of one month and twenty-four days given to the defendant was not a reasonable notice. The District Judge then proceeds to give his reasons, and it has been pressed upon us that in giving these reasons he has omitted to consider many facts and circumstances in the case which should have weighed with him in forming his opinion upon the question which he had to decide. It may [8] be quite possible that the Judge has not dealt with this question as fully and satisfactorily as could be wished; but nevertheless we are of opinion that we cannot enter upon an examination of the evidence upon second appeal, and that we are precluded from interfering with the finding of fact arrived at by the Judge.

The next question with which we have to deal resolves itself into two parts: *first*, was the District Judge right in thinking that no declaratory decree could according to law be made in this case; and, *secondly*, was he justified in interfering with the exercise of discretion by the Court of first instance in making such a decree.

As to the first point we think that the Judge was in error in holding that a declaratory decree could not, according to law, be made in the present case. In the two cases in *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1) and *Kathama Natchiar* v. *Dora Singa Tevar* (2), their

(1) 2 I.A. 83=14 B.L.R. 382.

(2) 2 I.A. 169=15 B.L.R. 83.

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Lordships of the Privy Council deal with the provisions of s. 15 of Act VIII of 1859. This section has been repealed, and the provisions of the present law, s. 42 of the Specific Relief Act, are materially different. The provisions of s. 42 are as follows: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." Now, what the plaintiff asks in this case is that the defendant's declaration as to having a permanent *malguzari-jama* be set aside. We must not in this country tie up parties too strictly to the language of their pleadings, and we must look, not at this language merely, but at the substance of the thing. The plaintiff admits that the defendant has a *kursa-jama*, but he denies that the defendant has the much larger interest asserted by him, *viz.*, a permanent *malguzari-jama*. In other words, he alleges that the interest which is vested in himself is the whole proprietary right less a *kursa-jama* belonging to the defendant, and that it is not a much smaller interest, *viz.*, the proprietary right less a permanent [9] protected tenure, that is, a permanent *malguzari-jama*. Let us now see what the pleadings were. In the sixth paragraph of his written statement the defendant alleged that for more than twelve years before the service of the notice, he and his predecessor had been possessing and enjoying the disputed lands in right of a permanent fixed *malguzari-jama*, and exercising the aforesaid permanent *malguzari* right over the same; and in the nineteenth paragraph he alleged as follows: "From before the Decennial Settlement, from the time of the plaintiff's predecessors, I have been from the time of my forefathers enjoying and possessing the disputed lands together with some other lands of mouzah Ghatakhal and Turbhunaia at a rent formerly of Sicca Rs. 7-12-4-1-2 kag, and then of Company's Rs. 8-4-6 pie as permanent *mokurrari* transferable *malguzari-jama* held and possessed from generation to generation, first by clearing the jungles and preparing gardens on the same, and then by settling tenants here and there from time to time, and preparing gardens and excavating tanks, &c., on the same. My right of occupancy is of course involved in that superior right of mine." The Subordinate Judge fixed among other issues the following, namely, the tenth, "whether or not the disputed land is the permanent right alleged by the defendant in the nineteenth paragraph of his written statement," and the fifteenth, "whether or not the defendant has a right of occupancy in the land." Finding these two issues against the defendant, he made a declaration that the defendant has no permanent or protected holding in the land, not even a right of occupancy; thst he is a tenant from year to year, and is liable under the circumstances to be ejected on a six months' notice to quit expiring at the end of the year. Now, there can be no doubt that this declaration is too wide, and that so far as regards the statement that the defendant is a tenant from year to year, and is liable under the circumstances to be ejected on a six months' notice to quit, expiring at the end of the year, it should not have been made. But it is contended that the plaintiff is entitled to a declaration upon the finding upon the tenth and fifteenth issues, that the defendant is not entitled to such a permanent [10] right as that alleged in the nineteenth paragraph of his written statement, and that he has not a right of occupancy in the land. It appears to us that as a matter of law such a declaration can be made under the provisions of s. 42 of the

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Specific Relief Act. This view is in conformity with the case of *Rajundar Kishwar Singh* v. *Sheopursun Misser* (1), see the remarks of their Lordships of the Privy Council at pages 449 and 450. This case, it is to be observed, was decided before s. 15 of Act VIII of 1859 was enacted. Then the case of *Bissesuri Dabeea* v. *Baroda Kant Roy Chowdry* (2), decided after the passing of the Specific Relief Act, though not exactly in point, lends a certain support to the view which we take. It has been contended that, inasmuch as the plaintiff sued for ejectment, and the declaration which he asks for is merely ancillary to this ejectment, the declaration should not be made. This is no doubt a good argument, as regards that portion of the declaration made by the Court of first instance, which we have above intimated, cannot be sustained. It has also some force, as regards the portion of the declaration, based on the finding upon the fifteenth issue; and as regards this issue we may further observe that the plaintiff has not asked that it be declared that the defendant has not a right of occupancy. It appears to us that the whole of the pleadings fairly construed show that the plaintiff sought two things: *first*, to have it declared that the defendant had not a permanent *malguzari* tenure, or, in other words, that the interest in him, the plaintiff was the whole zemindari interest less a *kursa-jama*; and *secondly*, to have the defendant evicted from this *kursa-jama* upon service of notice to quit. We think that these two things are separate, and that the plaintiff may well have the declaration which he asks for, even though in consequence of his failure to prove a reasonable notice he is unable to proceed to the ejectment of the defendant. Having regard to the proviso of s. 42, it may be observed that in respect of the interest as to which the plaintiff seeks a declaratory decree no further relief is possible, and that the further relief which would have been possible, if a proper notice had been served, is sought not in respect of the interest which [11] the plaintiff claims to have and which in substance he asks to have declared, but in respect of the interest which he admits the defendant to have, *viz.*, a *kursa-jama*. We think, therefore, that under the present law, s. 42 of the Specific Relief Act (and see the illustrations to this section), such a decree as that which is now asked can be made. Then it is said that the plaintiff seeks merely to set aside an allegation. There can be no doubt that a declaratory decree ought not to be made to set aside a mere allegation; but in the present case the defendant's conduct amounts to something more. In the previous case, No. 23 of 1878, he set up this permanent *malguzari-jama* and he produced documentary evidence to prove it. He is found to have since been exercising rights in the land inconsistent with a *kursa-jama* interest, though consistent with the permanent *malguzari-jama* which he alleges, and in the present case he has repeated this allegation of a permanent *malguzari-jama*, and has again brought forward documentary evidence to prove it (a large portion of which evidence has been found to be forged).

The next question with which we are concerned is that of discretion. The Judge in the Court of first instance in the exercise of his discretion made a declaratory decree. The District Judge set aside the decree, because in his view it cannot be made under the present law, and then at the end of his judgment he says: "Finally I must remark with special advertence to *Nilmony Singh* v. *Kally Churn Bhattacharjee* (3), that the granting of a declaratory decree is discretionary with the

(1) 10 M. I. A. 438. (2) 10 C. 1076. (3) 2 I. A. 83=14 B. L. R. 382.

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Court, and that even if there was no rule of law against making the declaration asked for by the plaintiff, this is not a case in which such relief should be granted." Now, if the second portion of this sentence be construed as referring to the case of *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), the reasons which may be assumed to have influenced the Judge have no existence, because that case was governed by s. 15 of Act VIII of 1859, which has no application in the present case, and the Lords of the Privy Council, after expressing their opinion at the bottom of page 85 that that was not [12] a case in which, in the proper exercise of discretion, a declaration of title should be made, proceeded to state what the facts were; that the real object of the suit was to obtain a general declaration against a number of persons holding different rights. The facts of the present case are not analogous, and, therefore, the same reasons do not apply. If, on the other hand, the second part of the sentence above quoted is to be construed as having no reference to the case of *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), then the Judge reverses the exercise of discretion by the Court of first instance without assigning any reason for so doing, and such a judgment cannot stand. In the case of *Sreenarain Mitter* v. *Kishen Soondery Dasee* (2), their Lordships of the Privy Council said: "It is not a matter of absolute right to obtain a declaratory decree. It is discretionary to the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." The Lords of the Privy Council heard that case as a second appeal, and putting themselves in the position of the High Court hearing a second appeal they made it a ground of their decision, that it would not be exercising a sound discretion, even if it could be done, to make the declaratory decree asked. In the case now before us the Judge has exercised no judgment, he has given no reasons for interfering with the exercise of discretion by the Court of first instance.

We must, therefore, set aside his reversal of the Subordinate Judge's exercise of discretion as to the granting of a declaratory decree, and the case must go back in order that the Judge, in the Court below, may determine the question of fact raised by the tenth issue. If this issue is found against the defendant and in favour of the plaintiff, the plaintiff will be entitled to a decree declaring that the defendant has not the rights put in issue thereby.

T. A. P. *Case remanded.*

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(1) 2 I. A. 83=14 B. L. R. 382.

(2) 11 B. L. R. 171 (190).

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[13] APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

NOOR ALI CHOWDHURI (*Judgment-debtor*) *v.* KONI MEAH AND OTHERS (*Decree-holders*).* [5th March, 1886.]

Bengal Act VIII of 1869, *s.* 52—*Decree for rent, Execution of—Appellate Decree, Effect of—Liability to Ejectment.*

A decree under s. 52, Bengal Act VIII of 1869 (*a*), provided that unless the amount due was paid within 15 days from the date thereof, the tenant (judgment-debtor) would be liable to ejectment. That decree was confirmed in appeal, *no steps to execute it having been taken in the meantime.* The tenant paid the decretal amount into Court within 15 days of the appellate decree:

Held, that inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree, and was the only decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within 15 days of that decree was protected from ejectment.

[**F.**, 11 A. 346 (348) = 9 A.W.N. 127; 22 C. 467 (472); 11 B. 172 (173); **Cons.**, 15 M. 170 (172); 48 P.R. 1906 = 104 P.L.R. 1906 (**F.B.**); 31 M. 28 (30) = 3 M.L.T. 26 = 17 M.L.J. 495; **Re', on**, 20 Ind. Cas. 499 (500); 13 C.W.N. 1060 = 4 Ind. Cas. 12; **R.**, 11 A. 267 (277) (**F.B.**); 13 A. 189; 13 A. 376 (**F.B.**); 15 B. 370 (375); 16 B. 243 (248); 18 A. 223 (226); 22 B. 500 (506); 18 M. 214 (216) (**F.B.**); 18 A. 455 (458); 11 C P.L.R. 115 (116); L.B.R. (1893—1900) 420 (422); 16 C.W.N. 658 = 39 C. 925 = 14 Ind. Cas. 299; **D.**, 25 C. 311 (313) = 1 C.W.N. 671; 17 C.W N. 457 (458) = 17 C.L.J. 120 (122) = 18 Ind. Cas. 747 (748); 6 A. L. J. 493 (495) = 2 Ind. Cas. 364 = 31 A. 379.]

THIS was a proceeding in execution. The decree which was one under s. 52 of the Rent Act, (Bengal Act VIII of 1869) provided that unless the arrears of rent with costs and interest were paid within 15 days of the date thereof, the tenant should be liable to ejectment from his holding. It was confirmed in appeal some six months afterwards, and within 15 days of the appellate decree, the judgment-debtor deposited the necessary amount in Court. The decree-holder who had taken no steps to execute the original decree now made an application to be put in possession of the holding. The question arose whether the period of 15 days should be computed from the date of the original or the appellate decree. The Munsif, referring to *Puresh Nath Ghose* v. *Kristo Lal Dutt* (1), decided the point in favour of the decree-holder, and granted the application. On appeal the District Judge confirmed the order of the lower Court. The judgment-debtor then appealed to the High Court.

Munshi *Serajul Islam*, for the appellant.

[14] Mr. *C. Gregory*, for the respondents.

The following was the judgment of the Court (MCDONELL and BEVERLEY, JJ.)

JUDGMENT.

In this case a decree for arrears of rent was passed against the appellant on the 27th December 1882, and coupled with it an order that if the arrears so decreed were not paid within 15 days from the date of the decree, the appellant should by liable to ejectment from his holding.

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* Appeal from Order No. 103 of 1885, against the order of R. H. Greaves, Esq., Officiating Judge of Chittagong, dated the 5th of January 1885, affirming the order of Baboo Nritya Gopal Sarkar, Officiating Munsif of North Roojan, dated the 8th of March 1884.

(*a*) Section 66, Cl. 2, Bengal Act VIII of 1885.

(1) 23 W.R. 50.

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Against this decree the appellant preferred an appeal which was dismissed on the 17th of July 1883, and within 15 days from that date the appellant paid into Court the amount of the arrears decreed; no execution of the original decree having been taken out in the meantime.

The sole question that arises now is whether the appellant, not having paid the arrears within 15 days from the date of the original decree is still liable to ejectment under the terms of that decree, notwithstanding the fact that the arrears were paid within 15 days from the date of the decree in appeal.

Both the lower Courts have found against the appellant on this point; but after taking time to consider the question, we are of opinion that this finding ought not to be upheld.

In arriving at his decision the Munsif has relied on the case of *Puresh Nath Ghose* v. *Kristo Lal Dutt* (1), but that decision, we think, does not conclude the point in question, and we are not aware of any other direct authority in the matter.

In the case cited there would seem to have been no appeal and consequently no appellate decree. According to the judgment, "the Munsif had attempted to modify his decree in review; but it is now finally held that the order of the Munsif granting the review was illegal, and it is finally declared that his proceedings in that respect were void. The original decree, therefore, as made by the Munsif stands, and that is the decree which is now to be carried out." It is clear, therefore, that that decision has no applicability to the circumstances of the present case in which the question is whether the appellant is liable to ejectment notwithstanding that he paid up the arrears within 15 days from the date of the appellate decree.

[15] We have been unable to find any express authority on the precise point now before us, but we think that there is direct authority, not only, in reported cases, but in the Code of Civil Procedure itself, for holding that the appellate decree, even where the appeal is merely dismissed, supersedes the original decree, and is the only decree that can be executed if execution has not already been had upon the original decree.

In the Full Bench case of *Luchman Persad Singh* v. *Kishen Persad Singh* (2), it was decided that even though the appellate decree did nothing more than confirm the decree of the lower Court, it was the paramount decision in the case, and that execution should be taken out of that appellate decree and not of the decree which it confirmed; and the question of limitation which was in issue in that case was decided upon this ground.

In the case of *Kristo Kinkur Roy* v. *Raja Baroda Kant Roy* (3), decided by the Privy Council in 1872, the following observations occur: "The state of the Indian authorities upon the general question seems to be this. In the case before us the High Court obviously proceeded upon the principle that a simple decree of affirmance did not so incorporate the mandatory part of the original decree as to make for all purposes the decree of the appellate Court the sole decree to be executed. And this ruling appears to have been followed in the case of *Chowdhry Wahed Ali* v. *Mullick Inayet Ali* (4), in which it was ruled that in order to make the decree of the appellate Court the final decree in the suit for all the purposes of execution, it was necessary that it should have decreed a material modification of the original decree. The rule so expressed seems open

(1) 23 W.R. 50.
(2) 8 C. 218.
(3) 14 M.I.A. 465=10 B.L.R. 101.
(4) 6 B.L.R. 52.

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to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in *Ram Charan Bysack* v. *Lakhi Kant Bunnik* (1), has ruled that whether the decree of the lower Court is reversed or modified or affirmed, the decree passed by the appellate Court is the final decree in the suit; and in the words of Mr. Justice Mitter 'as such the only decree which is capable of being enforced by execution.' And that is in accordance with the Madras decision in *Aruna Chella Thudayan* v. [16] *Veludayan* (2). Chief Justice Scotland's words are: 'Whether that decree be in affirmance or reversal or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution.'

Section 579 of the Code provides that the decree of the appellate Court "shall specify clearly the relief granted or other determination of the appeal," and "shall also state the amount of costs incurred in the appeal and by what parties and in what proportions such costs, *and the costs in the suit*, are to be paid." We think that these words clearly show that the appellate decree is intended to supersede the original decree. Then s. 583 goes on to say: "When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall *proceed to execute the decree passed in appeal* according to the rules hereinbefore prescribed for the execution, of decrees in suits."

It seems to us clear, therefore, that the decree, and the only decree, of which execution could be taken out was the appellate decree. That decree must be presumed to have incorporated the terms of the original decree, and if the arrears were paid within 15 days from its date the appellant was not liable to be ejected.

The words of s. 52 of Bengal Act VIII of 1869, are: "In all cases of such suits for the ejectment of a raiyat or the cancelment of a lease the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit, be paid into Court within 15 days from the date of the decree, execution shall be stayed."

It was of course open to the decree-holder to take out execution of the original decree at any time before it was superseded by the decree in appeal. Not having done so, we are unable to see that he has any real grievance because the terms of the appellate decree have been complied with by the appellant.

The order of the lower appellate Court is accordingly reversed and the appellant is declared to be not liable to ejectment. The appellant will also have his costs in all the Courts.

K.M.C. *Appeal allowed.*

(1) 7 B.L.R. 704 = 16 W.R. F.B. 1.

(2) 4 M. H. C. 215.

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13 C. 17.

[17] APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Macpherson.

NUNDO LALL BHUTTACHARJEE AND OTHERS (*Plaintiffs*) *v.* BIDHOO MOOKHY DEBEE (*Defendant*).*

[9th March, 1886.]

Res judicata—Landlord and tenant—Suit in ejectment—Issue previously heard and determined—Estoppel—Civil Procedure Code, s. 13.

In a suit by a landlord against his tenant for ejectment, the defences were (1) no notice to quit had been served, and (2) the tenure, was a permanent one. The suit was dismissed on the first ground, the Court holding at the same time that the tenure was not a permanent one. In a subsequent suit for ejectment from the same holding, brought by the same plaintiff against the same defendant, the defences were, (1) the tenure was permanent, and (2) the plaintiff was estopped by the conduct of his predecessor in title from asserting as against the defendant that the tenure was not a permanent one. The lower appellate Court found the question of estoppel in favour of the defendant, and dismissed the suit.

On appeal to the High Court—

Held, that the decision was right, and must be affirmed.

Semble, that where a former suit between the same parties in respect of the same subject-matter has been dismissed on a preliminary point, a finding in that suit on the merits in the plaintiff's favour will not bar the defendant from putting forward the same defence on the merits in a subsequent suit by the same plaintiff against the same defendant.

Semble, that the case of *Niamut* v. *Khan Phadu Buldia* (1) has been impliedly overruled by the case of *Run Bahadoor Singh* v. *Lucho Koer* (2),

[Rel. on, 18 C. 647 (651) ; R., 18 B. 597 (602) ; 7 C.P.L.R. 139 (140) ; 17 A. 174 = 15 A.W.N. 47 ; 24 C. 900 (905) ; 25 B. 115 (125) ; 9 C.W.N. 60 (65) ; 5 C.L.J. 611 (628) = 36 C. 193 (213) ; 16 O.C. 178 (180) = 20 Ind. Cas. 266 (267).]

THIS was a suit for possession of certain land. The plaint stated that the land in question was the auction-purchased paternal *jama* lands of the plaintiffs ; that the defendant's predecessors in title had held the land under the plaintiffs as tenants-at-will ; that the defendant's predecessors in title had sold their interest therein to the defendant, wrongly describing it as a *mourasi mokurari* right ; that the plaintiffs had duly served the defendant with a notice to quit and deliver up possession of the land ; and that in a former suit between the plaintiffs and the defendant it [18] had been decided by a competent Court that the defendant had no permanent interest in the land. The plaintiffs prayed "that the Court will be pleased to remove the houses, &c., belonging to the defendant which are on the disputed land, and to decree that direct possession be delivered to the plaintiffs," and for further relief.

The defence was that the defendant's tenure was a permanent tenure ; that no notice to quit had been served by the plaintiffs ; and that, whether the tenure was permanent or not, the plaintiffs' father and predecessor in title, Lall Mohun Bhuttacharjee, had induced the defendant to buy the tenure from the defendant's predecessor in title on the representation that the tenure was a permanent one.

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* Appeal from Appellate Decree No. 1398, of 1885 against the decree of Baboo Saroda Prosad Chatterji, Officiating Third Subordinate Judge of Hooghly, dated the 9th of April, 1885, reversing the decree of Baboo Tara Prosunno Banerj, First Munsif of Howrah, dated the 31st of January 1884.

(1) 6 C. 319. (2) 12 I.A. 23 = 11 C. 301.

As to the previous suit relied on by the plaintiffs, it appeared that in 1879, the plaintiffs had brought a previous suit for ejectment from the same land. In the first appellate Court that suit was dismissed, on the ground that service of the notice to quit had not been proved; but the Court held at the same time that the tenure was not a permanent one. The defendant appealed to the High Court against this finding of the first appellate Court, but the appeal was dismissed, on the ground that the only decree passed by the first appellate Court was a decree dismissing the suit; that the finding appealed against formed no part of that decree, but was only to be found in the judgment of the first appellate Court, from which judgment no appeal lay under the Civil Procedure Code.

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In the present suit the Court of first instance found in favour of the plaintiffs, but this decision was reversed on appeal, the lower appellate Court finding in favour of the defendant on the question of estoppel. The plaintiffs appealed to the High Court.

Baboo *Hem Chunder Banerjee* and Baboo *Umakali Mookerjee*, for the appellants, contended that the former decision was *res-judicata*—*Niamut Khan* v. *Phadu Buldia* (1), and that the facts relied on by the Judge did not constitute an estoppel.

Baboo *Rash Behary Ghose*, for the respondent.

[19] The judgment of the Court (O'KINEALY and MACPHERSON, JJ.) was as follows :—

JUDGMENT.

It appears that, previous to the present suit, there was a suit between the same parties in which the plaintiffs sought to eject the defendant.

That suit was dismissed, but in the course of the trial, the Court came to a decision upon the nature of the defendant's holding.

In the present suit the plaintiffs seek anew to recover possession of the land after notice to quit, and the lower Court has held that the decision arrived at by the Court in the previous suit is binding between the parties; but that as in the previous suit no issue regarding the question of estoppel by conduct was raised, the defendant is not precluded from raising it in the present suit; and on that ground judgment has been given in favour of the defendant.

The plaintiffs have appealed, and they urge that the previous decision is, as has been held by the Court below, *res judicata*, and being *res judicata* that Court was precluded from going behind the previous decision, and taking notice of the question of estoppel. They further contend that the inducement was too remote to affect the conduct of the defendant, and that the Subordinate Judge was wrong in holding that there was an estoppel by conduct.

This last is a question of fact with which we are not competent to deal. The Judge has declared that " it is clear that Lall Mohan by his words and conduct induced the appellant to believe that Panchcowri's interest in the property was of a permanent character and to part with a large sum of her money in consequence of that belief for purchase of the land."

In regard to the first question raised by the appellant, namely, whether the decision arrived at in the previous case is *res judicata* and binding between the parties, we have come to the conclusion that it is not.

(1) 6 C. 319.

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No doubt it has been held by a Full Bench of this Court that even where the defendant does not get the issue decided against him inserted in the decree, it is binding between the parties in a subsequent litigation. But this procedure was not followed in [20] the case of *Run Bahadoor Singh* v. *Lucho Koer* (1), and in regard to that their Lordships state as follows:—

"The widow has not appealed against the decree, nor could she, because it is in her favour. But she has appealed against the finding that the brothers were joint in estate. It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her. This could not be so inasmuch as the decree was not based upon it, but was made in spite of it."

Here, in the former suit between the present parties, the decree dismissing the suit was not based on the finding adverse to the defendant in that case, but in spite of it. We think, therefore, after looking at the decision of their Lordships in the Privy Council, that the previous decision is not binding between the parties in this suit.

Further, we are of opinion that, even if we come to an opposite conclusion, the respondent is correct in saying that the issue then decided was not an issue regarding any estoppel by conduct.

What was decided there was, what was the right to the property, not whether the plaintiffs are estopped by their conduct from asserting their right, if it existed.

From this point of view also we think the decision of the lower Court was correct

The appeal is therefore dismissed with costs.

P. O'K. *Appeal dismissed.*

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13 C. 21 (P. C.) = 13 I. A. 1 = 10 Ind. Jur. 151 = 4 Sar. P.C.J. 682.

[21] PRIVY COUNCIL.

PRESENT:

Lord Monkswell, Lord Hobhouse, Sir B. Peacock, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

NANOMI BABUASIN AND OTHERS (*Plaintiffs*) *v.* MODHUN MOHUN AND OTHERS (*Defendants*).

[24th and 30th June, 1st July and 1st December, 1885.]

Hindu Law—Alienation by father—Mitakshara and Mithila Law—Execution of decree—Sale of ancestral estate in satisfaction of father's debt—Liability of sons' shares—Parties to proceedings.

There is no conflict of authority as to the principle that sons cannot set up their rights, which are to take present vested interests, on their birth, jointly with their father in ancestral estate against their father's alienation for an antecedent debt, or against his creditors' remedies for his debt, if such debt has not been contracted for an immoral purpose; the law on this point being the same under the Mitakshara and the Mithila shasters.

From the above must be distinguished the question how far the joint sons can be precluded from disputing the liability attaching to their shares, where proceedings have been taken by, or against, the father alone.

If the father's debt, not having been contracted for an immoral purpose, is such as to support a sale of the entirety of the joint estate, either he may sell

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(1) 12 I. A. 23 = 11 C. 301.

the latter without suit, or the creditor may obtain a sale of it by suit. But the joint sons, not being parties to the execution proceedings or to the sale, are not precluded from having a question as to the nature of the debt tried in a suit of their own—a right which will, however, avail them nothing unless it can be shown that the debt was not such as to justify a sale of the joint estate.

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If, upon the proceedings and in regard to the intention of the parties, doubts are raised whether what has been sold is the interest of the father alone, or the joint estate, the absence of the sons from the proceedings may be a material consideration. But, if the purchaser has bargained and paid for the entirety, he may defend his title upon any ground which would have justified a sale, had the sons been brought in to defend their interests in the execution proceedings.

Deendyal v. *Jugdeep Narain Singh* (1) does not lay down as an invariable rule that co-parcenary interests will not pass by an execution sale unless the co-parceners are joined in the suit, or that only the father's interest passes to the purchaser where the suit was against the father alone.

This debt being one which must be taken as a joint family debt, though the suit upon it was against the father alone, *held* that a claim by minor sons for exemption of their shares failed on the merits, the entire family estate having passed by the sale.

[F., 8 A. 231 (234); 72 P. R. 1898; 1 A. L. J. 310=24 A. W. N. 151=27 A. 16; 15 C. 70 (81) (P. C.); 12 M. 309 (311); 1 O. C. 53; 21 M. 222 (226); 9 M. 424 (428); 11 B. 42 (44); 12 B. 625 (631); 11 M. 64 (66); 17 C. 584 (588) (P. C.); 17 C. W. N. 1022 (1024)=19 Ind. Cas. 878 (880); 17 C. L. J. 38 (45)=17 C. W. N. 280=18 Ind. Cas. 625; **Appl.**, 11 B. 361 (365); **Expl.**, 28 A. 508=3 A. L. J. 274 (298)=2 A. W. N. (1906) 117; 34 C. 735=11 C. W. N. 613=5 C. L. J. 569; **Rel. on**, 1 A.L.J. 191 (194); 27 C. 724=4 C. W. N. 701; 14 Ind. Cas. 183; **R.**, 87 P. R. 1887; 20 B. 385 (388); 19 A. 26 (F.B.)=16 A. W. N. 183; 24 A. 459 (460)=22 A. W. N. 123; 29 A. 544=A. W. N. (1907) 159=4 A. L. J. 424; 30 A. 156=5 A. L. J. 175 (180) =A. W. N. (1908) 61; 11 B. 37 (41); 12 B. 18 (22); 12 B. 431 (436); 14 B. 320 (325); 2 C. P. L. R. 234; 20 C. 453 (462); 15 A. 75 (F. B.); 16 A. 449 (457)=14 A. W. N. 169; 1 O. C. 112 (115); 17 A. 537 (F. B.); 10 C. P. L. R. 67 (71); 22 B. 825 (830); 22 M. 49 (F. B.)=8 M. L. J. 312; 21 A. 301 (304)=19 A. W. N. 79; 16 C. P. L. R. 19 (21); 3 Bom. L. R. 322 (331); 26 M. 214=23 A. W. N. 21 (F.B.); 4 Bom. L.R. 587; 6 O. C. 101 (102); 14 M.L.J. 431 (432); 29 M. 200 (202)=1 M.L.T. 28=16 M.L.J. 69 (F. B.); 11 C.W.N. 294=34 C. 184=5 C.L.J. 441; 34 C. 642 (F. B.)= 11 C.W.N. 593=5 C.L.J. 491=2 M.L.T. 207; 34 C. 941 (F. B.) =11 C.W.N. 959 (963)=6 C. L. J. 237; 14 C 572 (579); 8 A. 205=6 A.W.N. 58; 9 A. 142 (145)=6 A.W.N. 323; 10 M. 316 (318); 12 B. 691 (693); 13 M. 47 (50); 14 B. 597 (604); 15 B. 87 (89); 23 C. 262 (276); 24 B. 135 (146); 1 Bom. L.R. 627; 26 C. 677 (684); 3 C.W.N. 637; 20 B. 338 (344); 21 B. 616 (618); 6 S.L.R. 150=19 Ind. Cas. 378 (380); 9 M.L.T. 235=8 Ind. Cas. 1072 21 M.L.J. 320=34 M. 188; 36 M 325 (343); 9 Ind. Cas. 406; **R. & Expl**, 15 P.W R. 1913=69 P.L.R. 1913=50 P.R 1913=17 Ind. Cas 735; 31 A. 176= (196)=6 A.L.J. 263=1 Ind. Cas. 479; 9 C.L.J. 453 (455)=13 C.W.N. 544 (546)= 1 Ind. Cas. 434; **D.**, 9 A. 493 (494)=7 A.W.N. 116.]

[22] APPEAL from a decree (16th June 1882) of the High Court reversing a decree (14th May 1879) of the Subordinate Judge of Bhagulpur.

The question raised on this appeal was whether the entirety of a family estate, including the shares of minor sons, who were jointly interested in it with their father, had passed to a purchaser at a sale in execution of a decree obtained against the father alone, the minors not having been represented in the suit, nor in the execution proceedings.

Kirat Singh, who died in 1858, gave shares in his estate, Mouzah Lalpur Bhatkera in Tirhut, to his two sons, one of whom was Girdhari Singh, the father of the two minor plaintiffs in this suit, now the appellants. Litigation between the brothers resulted in a decree, whereby Girdhari Singh obtained an eight annas $11\frac{1}{4}$ gundas share of the mouzah.

The minor sons of Girdhari were both born before November 1864, in which year, having borrowed Rs. 45,000 from one A. Christian,

(1) 4 I.A. 247=3 C. 198.

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he executed leases of the above share of the mouzah to H. Collis, son-in-law of his creditor, for repayment of that sum, as advanced zar-i-peshgi. On the death of Collis occurring in 1869, and the leases passing to the widow of the latter, Girdhari Singh dispossessed her.

Bringing a suit against him, the widow obtained a decree (10th April 1871) for possession with mesne profits, interest and costs ; and in satisfaction of the money also decreed, now amounting to Rs. 51,767, obtained an order (15th January 1872) for the sale of the eight annas 11¼ gundas share of Lalpur Bhatkera. It was accordingly sold to Hardinarain, now represented by the respondent, Modhun Mohun, and the sale was confirmed in April 1872 by the District Court of Bhagulpur. Girdhari Singh in vain attempted to get this sale set aside, it being in the end upheld by order of Her Majesty in Council (19th May 1876).

The present suit (14th September 1878) was brought on behalf of Girdhari's minor sons by their mother, and afterwards by leave on her own behalf also, against the purchaser and Girdhari Singh, on the ground that the eight annas 11¼ gundas share being ancestral property had not been sold under such circumstances as to deprive the plaintiffs of their shares. They claimed that the [23] interest of Girdhari Singh alone passed by the sale, and that on their shares being ascertained by partition, they should have them ; Nanomi Babuasin, the mother, being entitled to one-fourth, and three-fourths being divisible between the minors on the one hand and the auction-purchaser on the other.

The principal defence, which was that by the sale of 1872 the entirety of the family estate passed to the purchaser, raised the question disposed of on this appeal.

Upon other issues, the Subordinate Judge having found that Nanomi Babuasin had a money provision made for her at her marriage by her father-in-law, held that she was disentitled, under the law of Mithila, to a share on the partition of the family estate ; and he was of opinion that the father was entitled to a double share. But on the principal question, he decided that the decree of 10th April 1871, did not extend over, or bind, the entirety of the joint property, the members of the family entitled to shares in it not having been made defendants in the suit, or parties to the decree, along with Girdhari Singh, whose share alone was liable for the debt.

The judgment of the Court of first instance as to this part of the case was reversed by a Divisional Bench of the High Court (CUNNINGHAM and PRINSEP, JJ.). The above decision as to the shares of Nanomi Babuasin and of Girdhari Singh was approved by the appellate Court ; but in regard to its judgment on the principal point, *viz.*, that the entire family estate passed by the sale of 1872, it became unnecessary to decide those subordinate questions.

That part of the judgment of the senior Judge of the Bench, CUNNINGHAM, J., which related to the principal point, was as follows :—

" In the first place, then what did the auction sale purport to convey to the purchaser ? The decree in this case was for restoration to the plaintiff of the possession to which she was entitled under the lease, and for payment of mesne profits. It did not affect any specific portion of the estate, and in this respect the present case differs from those in which a specific portion of the estate having been mortgaged a decree was given for its sale, and no question as the actual property sold could arise. This being [24] so, we have next to look to what the language of the sale proceedings expresses to be the subject of the sale. In the petition for execution

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an inventory of the judgment-debtor's property was given, which described it as 'the share of 8 annas 11¼ gundas out of the entire 16 annas, the right and interest of the judgment-debtor in Mouzah Rampur Bhatkera, bearing a jumma of Rs. 8,106-11,' and prayed that this might be attached and sold. The proceeding confirming the sale and the certificate of sale produced at the hearing of the appeal, are to the same effect, *viz.*, describing the property as 8 annas 11¼ gundas share, and stating it to be the right and interest of the judgment-debtor in the whole estate. This language might be regarded as specifically stating the object of the sale *viz.*, an 8 annas 11¼ gundas share in the 16 annas, and the statement as to its being the right and interest of the judgment-debtor as mere description. Section 249 of the Civil Procedure Code, however, provides that the proclamation of sale shall declare that the sale extends only to the right, title and interest of the judgment-debtor in the property specified; and it may be contended that, read in the light of this section, this was the proper meaning of the petition and the certificate. This is the view taken by the original Court. On the other hand, there was much in the character of the previous transactions and the proceedings in the case to justify a more extended meaning. The action was one against the father and manager for a wrongful act affecting the joint estate, and by which the joint family had benefited. The whole share, and not merely Girdhari's interest in it, had been originally charged with the payment of the instalments and interest in violation of this charge, and it was for the profits wrongfully obtained and presumably enjoyed by the joint family that the suit had been brought and the property put up for sale. The interest of the ostensible owners would not unnaturally be supposed to be identical throughout all the proceedings. Though the sale effected was not on a mortgage-decree against specific mortgaged property, it arose out of a charge legally imposed upon specific property, and the unlawful breach by the manager of the terms involved in that charge; and thus a purchaser might reasonably be led to believe that the entire property was being put up to sale. As to this, the original Court [25] observes: 'The circumstances at the time of sale were such as to impress any person not acquainted with the minor plaintiffs' family with the belief that the entire share aforesaid was the property of the Babu defendant, and it is very probable that upon such belief the first party defendant made the auction purchase; and when the first party defendant enforced the process of delivery of possession, no one even at that time on the part of the minor plaintiffs or Mussumat plaintiff offered opposition, and the absence of such opposition confirmed the first party defendant in his belief. Hence the first party defendant made a *bona fide* purchase of the entire share of 8 annas 11¼ gundas in the belief that it belonged to the Babu defendant, and entered upon possession, and the minor and Mussumat plaintiffs, by the omission of an act, allowed that belief which was founded on good faith to stand up to the day of institution of this suit.'

"The Judge goes on to arrive at the conclusion that the plaintiffs and their mother believed, at the time of the sale, that the entire 8 annas 11¼ gundas were being sold, and that in fact it is only owing to the new view taken of such proceedings consequent on the decision of the Judicial Committee of the Privy Council in the *case of Deendyal* that the present claim is advanced. The probability that this was so is greatly increased by the fact that, though the father persistently disputed the validity of the sale, and carried the case up to the Privy Council, he on no occasion

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took the point that the minors' share of the property was not affected by it. I must, therefore, conclude that whatever may have been the ambiguities in the language employed, the interest which the Court intended to sell, and which the purchaser and all others concerned believed that he was buying was the whole 8 annas 11¼ gundas' share, of which Girdhari Singh was ostensible owner, and that, as a fact, the purchaser has under the sale been put in actual possession of the whole of that share. This being so, I come to consider the claim of the minor sons to set the sale wholly or partially aside. As regards that part of the plaintiffs' prayer which seeks to have the auction sale of the 9th September 1872, set aside, there is no difficulty in deciding that it ought not to be granted. The doubts which formerly existed in Bengal on this point were removed by the decision in *Deendyal* [26] v. *Jugdeep Narain Singh* (1), and *Suraj Bunsi* v. *Sheo Pershad Singh* (2), the result of which cases is to affirm that in Bengal, as in the other Presidencies, the undivided interest of a Mitakshara coparcener in the joint property may be sold in execution of a decree against him for his personal debt. It is less easy to dispose of the contention that the sons' share of the estate was not affected by the execution sale. As to this, it has been pressed upon us that we are concluded by the decision in *Deendyal* v. *Jugdeep Narain Singh* from holding that anything more than the right, title and interest of the judgment-debtor passed in the present instance by the sale. I do not, however, consider that this is the necessary legitimate result of that decision. It is true that it was there held that in the circumstances of the case, the judgment-creditor, purchasing at an execution sale under a money-decree obtained against a member of a joint family, had acquired only the right, title and interest of the judgment-debtor ; and that if he had wished to go further and enforce his debt against the whole family, he ought to have framed his plaint accordingly, and made the co-sharers parties. I think, however, that the observations in that judgment must be read with reference to the circumstances of the case, and not as laying down an invariable rule that in no case will the co-parceners' interest pass in an execution sale unless they are joined in the suit. Such a view would be in direct contradiction of the rule laid down in *Muddun Thakoor* v. *Kantoo Lal* (3) in the Privy Council and the decisions of this Court which have followed that ruling. I think, therefore, that although there may be cases in which the debt is personal to the father, and the father's interest alone is affected by the decree, there are other circumstances in which the father should be presumed to have been acting on behalf of the family, and the decree accordingly to have been one binding on the joint estate, and that in the absence of words to a contrary effect, the execution-sale affects the whole property and not merely the judgment-debtor's interest in it. The present case appears [27] to be of this character. The debt was one which *prima facie* certainly could have been recovered from the sons; the manager was the only ostensible owner, representing the family to the world at large, and it would seem to follow that the interest affected by the execution proceedings should be the interest with which Girdhari Lal was competent to deal, and which was in fact his, so far as liability for his debts, not being immoral, was concerned. Upon the whole, we consider that the sale having been in discharge of the father's antecedent debt, which,

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(1) 4 I.A. 247 = 3 C. 198. (2) 6 I.A. 88 = 5 C. 148 = 4 C.L.R. 226.
(3) 1 I.A. 321 = 14 B.L.R. 187.

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accordingly the sons could repudiate only on the ground of its immorality, —the joint family having persumably benefited by the wrongful act which resulted in the decree and execution-sale,—the language of the execution proceedings not being inconsistent with the view that the whole estate was sold,—the mistake, if mistake there was, as to the interest passed by the auction-sale having been one which the minors' guardian might have prevented and did not prevent, and actual possession of the entire 8 annas 11 gundas having been taken under the sale by the auction-purchaser, we are not now at liberty to set it aside, and declare that the first defendant's possession, so far as the sons' interests are concerned, has been unlawful. We think that we are bound to follow the rule laid down by the Privy Council in *Ram Sahai* v. *Sheopershad Singh* (1) *viz.*, that, when joint ancestral property has passed out of a family either by a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay such a debt, or in execution of a decree for the father's debt, the sons cannot dispute it except by showing (1) that the debt was immoral, and (2) that the purchaser had notice of the immorality. This rule was held not to be applicable in that case, and the plaintiffs were allowed to contest the sale on the ground that the purchaser had notice of their claim, but that is not suggested to have been the case in the present instance, and we think that its general principle ought to govern our decision. This view appears to be in accordance with the principles laid down by the Judicial Committee in *Bissesswar Lal Sahu* v. *Luchmeswar Singh* (2), **[28]** and in *General Manager of the Raj Darbhanga* v. *Maharaj Coomar Ramapat Singh* (3) as to the interpretation to be put on execution proceedings, when the wording leaves room for doubt as to the interest which they affect. I think, accordingly, that this appeal must be admitted, and the plaintiffs' suit should be dismissed with costs throughout."

The suit having been dismissed by the decree of the High Court.

On this appeal, Mr. *R. V. Doyne* appeared for the appellants.

Mr. *J. T. Woodroffe* and Mr. *C. W. Arathoon*, for the respondents.

Mr. *R. V. Doyne*, for the appellants.—The execution sale did not transfer the entirety of the joint family estate, but only the father's right, title, and interest therein. By the father alone was the debt contracted, on which the decree of April 1872, the cause of the execution sale, was obtained; and the appellants, being then in existence, and consequently co-parceners in the family estate (Mitakshara, Chap. 1, s. 5), jointly with their father, were not made co-defendants in the suit, nor were they parties to the proceedings in execution. The result is that, as in *Suraj Bunsi Koer* v. *Sheopersad Singh* (4), the sale is only good as to the share of the judgment-debtor, and does not affect the shares of the other co-parceners. The decree-holder might attach the interest of the father, bring it to sale, and the purchaser could work out his right by means of a partition: see *Deendyal* v. *Jugdeep Narain Singh* (5). It has not, however, been affirmed by the decisions that the family property is available to satisfy the father's creditor, under whatever circumstances, short of immorality as regards the purpose, the debt may have been contracted. It appears that only in cases where the indebted co-sharer has been sued as the representative of the family, has the sale, when purporting to

(1) 6 I.A. 88=5 C. 148=4 C.L.R. 226.
(2) 6 I.A. 233.
(3) 14 M.I.A. 605=10 B.L.R. 294.
(4) 5 C. 148=6 I.A. 88.
(5) 3 C. 198=4 I.A. 247.

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be only of his right, title, and interest, been allowed to convey the interests of the other members of the family; see *Baijun Doobey* v. *Brij Bookun Lal Awasti* (1) and *Deendyal* v. *Jugdeep Narain Singh* (2). [29] And with regard to the words of s. 249 of the Code of Civil Procedure, although the 8 annas 11¼ gundas' share was specified in the order for sale, only the right, title, and interest of Girdhari Singh therein should have been understood to be sold.

The opinion was intimated in the judgment in *Sadabart Prasad Sahu* v. *Foolbash Koer* (3) that joint property cannot be followed in the hands of co-parceners to whom it may have passed. But this does not hold good where the obligation upon sons to pay their father's debts upon his death arises and conflicts with the right of survivorship. Or, as expressed in *Girdhari Lal* v. *Kantoo Lal* (4), the ancestral estate, upon the death of the father, is not exempted in the hands of the son from liability to pay the father's debt, which it is the son's pious duty to pay; and see *Muttayyan Chettiar* v. *Sangili Vira Pandia Chinatambiar* (5). But the responsibility of the joint estate seems to have been maintained only where the father as manager, or *karta*, for the family, has charged upon it a debt incurred for the family benefit; or the debt, at all events, is of that character; or where, at the father's death, sons have the pious duty of paying the father's debt out of their shares in the ancestral estate, the father's own share being insufficient to meet it. None of these cases has arisen here. The debt in its inception was the debt of the father alone, he having borrowed money. That the family profited by his acts, such as the ouster which materially added to his debt, has not been made out. The result is that the debt cannot be taken as a family debt, and the only ground on which the judgment of the High Court could be maintained would be that a father contracting debts, however imprudently, provided that his purpose was not immoral, could render liable the shares in ancestral property already vested in his sons. It accords with the decisions that the father's share in such a case should be sold; and that the *onus* should be thrown on the purchaser at an execution sale in satisfaction of a decree against the father, to make due enquiry whether the property specified for sale is so held, as to be liable to sale [30] in satisfaction of the decree, appears to follow from the application of the principles on which *Hanuman Persad Panday* v. *Babooee Munraj Kooer* (6) was decided.

The appellant's case is strongly supported by the decision in *Deendyal* v. *Jugdeep Narain* Singh (2). There, as here, the proceedings had been taken against the father alone, and there it was held that the purchaser at the execution sale could not have acquired more than the interest of the judgment-debtor; and it was pointed out, in the judgment, that if the creditor had sought to enforce his debt against the co-sharers, who were not parties to the transaction giving rise to the debt, and if he had sufficient basis of claim against them, he ought to have framed his suit accordingly. That equally applies to the present case.

Reference was also made to the *Collector of Monghyr* v. *Hardinarain Sahu* (7); *Hardinarain Sahu* v. *Ruderperkash Misser* (8). As to the rights of a mother on a partition, and as to the proportionate shares taken by the father and sons, questions subordinate to the main one, were cited, Mitakshara, Chap. I, s. 2, v. 8, and s. 5; Vivada Chintamoni,

(1) 2 I.A. 275. (2) 3 C. 198 = 4 I.A. 247. (3) 3 B.L.R. (F.B.) 31.
(4) 1 I.A. 321 = 14 B.L.R. 187. (5) 9 I.A. 128 = 6 M. 1.
(6) 6 M.I.A. 424. (7) 5 C. 425. (8) 10 C. 626.

edit. Prosonna Kumar Tagore, 1863, p. 230; Colebrooke's Digest, books 5 and 6; Strange's Hindu Law, Chap. 9; Mayne's Hindu Law and Usage, Chap. XV; *Mohabir Persad* v. *Ramyad Singh* (1).

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Mr. *J. T. Woodroffe* and Mr. *C. W. Arathoon*, for the respondents.—The estate has been treated as ancestral, but the circumstances under which Girdhari Singh obtained his share in Mouzah Lalpur Bhatkera might have to be considered on the question, whether it is ancestral, if it were raised: see *Mohabir Koer* v. *Joobha Singh* (2). The first and main point is that the whole family estate is liable, because the debt, contracted for no immoral purpose, is due by the father of the family, living under the Mithila law, on this point identical with the Mitakshara. This supports the sale of the family estate in [31] satisfaction of the decree upon the father's debt. It may, however, be taken as a second ground that the father here was manager of the family estate and represented the sons' interests; the family also profited by the money, and had the temporary benefit of the rents and profits after the ouster. It has been found, moreover, by both Courts that the family estate was understood to be sold. The nature of the debt contracted by the father will govern the question what was liable to be sold, whether the whole or only the father's share. The order for sale comprises the whole estate; but it is not the construction of the order, and of the written proceedings, that will determine the question. It is the general principle that a Hindu son is liable for his father's debt to the extent of the ancestral estate, which comes to the son, under the Mitakshara at his birth, and under the Dayabhaga at his father's death; provided always that the debt has not been contracted for an immoral purpose. Practically, the result of the decisions in Bengal, as to the effect of attachment of family property for sale in execution of a decree against the father, is much the same as in the other provinces. For Madras decisions see *Ponnappa Pillai* v. *Papuvayyangar* (3) cited with approval by this Committee in *Muttayyan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (4). In Bengal the principle which was declared in *Janak Kishour Koonwar* v. *Roghoonundun Singh* (5) by the Sadr Court in 1861 appears again in the judgment in *Hanuman Persad Pandey* v. *Babooee Munraj Kooer* (6), and is declared in *Girdhari Lal* v. *Kantoo Lal* (7); and is, briefly, that exemption of the son's estate from liability for the father's debt is founded upon the nature of that debt.

The difference between the Bengal decisions and those of Madras and Bombay seems only to be that, according to the first, the son's interest in the family estate is *prima facie* bound by a decree for debt against the father, although if the son has not been made a party to the suit, or proceedings against the father, [32] he may question the decree upon any ground upon which he could have contested it, if he had been joined; one ground being that the debt was incurred for an immoral purpose. The Courts in Madras have held that the son's share is always bound, unless he shows that the debt has been incurred for an immoral purpose. And in Bombay the same liability attaches to the son's estate, see the judgment of Westropp, C.J., in *Udaram Sitaram* v. *Rana Panduji* (8).

The decision in *Deendyal* v. *Jugdeep Narain Singh* (9), on which reliance is placed for the appellant's case, only in effect comes to this,—

(1) 12 B.L.R. 90 = 20 W.R. 192. (2) 8 B.L.R. 38 = 16 W.R. 221
(3) 4 M. 1. (4) 6 M. 1 = 9 I.A. 128. (5) S.D.A. (1861) 213.
(6) M.I.A. 421. (7) 1 I.A 321 = 14 B.L.R. 187.
(8) 11 B.H.C. 76. (9) 3 C. 198 = 4 I.A. 247.

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that whatever may be the distinction between the rights of a purchaser under a conveyance from a co-parcener, holding a share in joint property, and the rights of a purchaser at an execution sale of a co-parcener's rights, the purchaser, at a sale in execution of decree, acquires all the right to compel the same partition which the judgment-debtor might have compelled, if minded so to do, when he was situated as he was before the decree against him.

Upon the second ground, that the father being head of the family, and *karta*, may bind it; See *Deva Singh* v. *Ram Monohur* (1); *Ram Narain Lal* v. *Bhawani Prasad* (2), and these cases show that the interests of the rest of the family are not exempt from liability. It is the remedy of the sons that they may sue to prevent their father from wrongfully dealing with the estate; but they are not co-equal with him as regards authority to deal with others concerning, it, and the father has authority over them. The father's position in his capacity of representative of the estate must be put on a level, as regards execution for debts due from the family, with that of a widow representing the family estate. For the effect of the sale of her right, title, and interest in execution of a decree, where she represents, not only her own interest for life, but the estate at large, see *Jugolkisor* v. *Jotindro Mohun Tagore* (3), and the *Court of Wards* v. *Maharaja Coomar Ramaput Singh* (4) **[33]**. And the father, though the only person named in a transaction, may be shown to have acted as the representative of the family; see *Baso Koer* v. *Hurry Das* (5). The sale in this case was not merely of the personal interest of the father, but of his interest as representing the family. See W. H. Macnaghten's note to Case III in the Precedents; Principle and Precedents of Hindu Law, Chap. XI, of Sale, Case III.

Reference was also made to *Sheoprosad* v. *Jung Bahadur* (6); *Umbica Prosad Tewari* v. *Ram Sahai Lal* (7); *Laljee Sahi* v. *Fakeerchund* (8); *Mudden Gopal Lal* v. *Gowrunbutty* (9); *Rambhunjun Singh* v. *Munder Kooer* (10); *Ram Nagra Singh* v. *Kishen Kishore Narain* (11).

Their Lordships having intimated that they would decide the main point first, without hearing the respondents upon the minor points before the former had been disposed of, Mr. *R. V. Doyne* replied.

JUDGMENT.

On a subsequent day (December 18th) their Lordships' judgment was delivered by

LORD HOBHOUSE.—This is one of the cases, frequently occurring of late years, which raise questions as to the circumstances under which ancestral estate of a family subject to the Mitakshara law becomes liable to answer the debts of the head of the family.

This family is one governed by the Mithila law, which, on the point under consideration, does not differ from the Mitakshara. Its head was one Girdhari Singh. He had a wife, the appellant, Nanomi Babuasin, and two sons, the other two appellants, who were born before the transactions which gave rise to this suit, and were minors when this suit was commenced. The family are, or were, possessed of valuable ancestral property in land.

(1) 2 A. 751. (2) 3 A. 443. (3) 10 C. 985=11 I. A. 66.
(4) 14 M.I.A. 605=10 B.L.R. 294. (5) 9 C. 495.
(6) 9 C. 389. (7) 8 C. 898. (8) 6 C. 135.
(9) 15 B.L.R. 264=23 W.R. 365. (10) 23 W.R. 127. (11) 23 W.R. 266.

In the year 1870 one Mrs. Collis, complaining that Girdhari had wrongfully ousted her from land held under lease from him, sued him to recover possession and mesne profits. The lease had been granted as part of an arrangement under which Girdhari took a loan of Rs. 45,000 from Mr. Collis, the predecessor [34] in title of Mrs. Collis. On the 10th April 1871 a decree was made according to the prayer of Mrs. Collis' plaint, and the sum of Rs. 32,318 was awarded to her for mesne profits.

On the 9th of September 1872 a portion of the family ancestral land was brought to sale by execution proceedings in satisfaction of the decree, and the respondent Hardi Narain became the purchaser. The property sold was described as "8 annas $11\frac{1}{4}$ gundas out of the entire 16 annas, the right and interest of the judgment-debtor in mouzah Rampur Bhatkera." The fraction mentioned was the share of the whole ot Girdhari's joint family, the remaining annas and gundas belonging to some relatives who were separate in estate. A dispute arose as to the regularity of the sale, which led to further litigation; but in the result the sale was upheld and Hardi Narain took possession, which he still retains.

In September 1878 the present suit was brought by the appellants against Hardi Narain and Girdhari. They pray that either the sale to Hardi Narain may be wholly set aside, or that they may recover possession of the land, and that Hardi Narain may be put to take proceedings for partition. They contend, first, that nothing passed by the sale except such share as Girdhari would have taken on partition, and, secondly, that he would only have taken one-fourth part.

The Subordinate Judge of Bhagulpur agreed with the appellants on the first point, but differed on the second. He was of opinion that, by the Mithila law, the wife, having had a provision made for her would take no share on partition, and that the father would take a double share. He therefore gave the appellants a decree for a moiety of the estates in suit. In deciding for the first contention, the Subordinate Judge founded himself on *Deendyal's case* (1). In his opinion, as Mrs. Collis sued Girdhari alone, she did not intend her decree to extend over the entire property of the joint family. And on the same grounds he construed the language used to describe the property in the execution proceedings as though it meant nothing more than the co-parcenary interest of Girdhari.

[35] Both parties appealed to the High Court, who were of opinion that the whole interest of the family passed to Hardi Narain by the sale, and ordered that the suit should be dismissed with costs. The Court considered that the interest which all parties believed that Hardi Narain was buying was the whole 8 annas 11 gundas into possession of which he was actually put. As regards *Deendyal's case*, they held that it does not lay down an invariable rule that in no case will the co-parceners' interest pass in an execution sale unless they were joined in the suit. And they point out that in *Muddun Mohun's case* (2) a different rule was laid down; and that in *Suraj Bunsi's case* (3) a statement was made of the effect of the then decisions on the subject which embodied the principle of *Muddun Mohun's case.* The present appeal is brought from the decree of the High Court.

There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's

(1) 4 I. A. 247 = 3 C. 198. (2) 1 I. A. 321 = 14 B. L. R. 187. (3) 6 I. A. 85 = 5 C. 148.

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debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony, either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case.

It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

[36] The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deendyal's case* bound the Court to hold that nothing but Girdhari's co-parcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in *Deendyal's case* there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings.

That brings their Lordships to consider the nature of the debt in this case. There was a great deal of discussion whether the debt originated in the loan of Rs. 45,000 or in Girdhari's receipt of the mesne profits for which the decree was given. It appears to their Lordships that the new debt for which the decree was made is the foundation of the sale. But, whichever it was, they think the High Court are clearly right in holding that it must be taken as a joint family debt. The Subordinate Judge does not give any opinion on this point. If it is a joint family debt, a sale to answer it, effected either by Girdhari or in a suit against him, cannot be successfully impeached.

The remains only the question whether any thing more than the father's coparcenary interest was bargained for, paid for, and taken [37] possession of by the purchaser. On this point their Lordships are clearly of opinion that the High Court have decided rightly. Indeed the Subordinate Judge did not decide otherwise, so far as the facts go. As before mentioned, he held that only the co-parcenary interest passed, because of

the effect he ascribed to *Deendyal's case*. But he was clear that the language of the execution and sale proceedings was such that the purchaser must have thought that he was buying the entirety. It is equally clear that all parties thought the same.

The purchaser, therefore, has succeeded in showing that he bought the entirety of the estate, which could lawfully be sold to him, and the suit fails upon the merits. Their Lordships will humbly advise Her Majesty to dismiss this appeal and the appellants must pay the costs.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitor for the respondent, Modun Mohun: Mr. *T. L. Wilson.*

C. B.

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13 C. 37.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, and Mr. Justice Trevelyan.

WALLIS AND OTHERS (*Plaintiffs*) v. TAYLOR (*Defendant*).*
[3rd April, 1886.]

Small Cause Court (Presidency Towns) Act (XV of 1882), *s.* 18—*Jurisdiction—Army Act of* 1881 (44 *&* 45 *Vic., c.* 58), *ss.* 148, 151—*Leave to sue.*

The jurisdiction given to Small Cause Courts by Act XV of 1882 is not affected by 44 and 45 Vic., c. 58, s. 151.

[Appl., 18 C. 144 (145); Expl., 14 C. 526 (530).]

THIS was a reference from the Calcutta Court of Small Causes.

The facts of the case were that the plaintiffs, who had obtained leave to sue under s. 18 ot the Small Cause Court Act of 1882, brought a suit in the Calcutta Court of Small Causes against the defendant, who was a lieutenant in the 45th (Rattray's) Sikhs and who was then stationed at Quetta, to recover Rs. 320-15-9 for goods sold and delivered. It was admitted that there was a Court of Small Causes in Quetta.

[38] The defendant contended, with reference to the Army Act of 1881, that the Calcutta Court of Small Causes had no jurisdiction over an officer on duty outside Calcutta, in respect of suits of a less value than Rs. 400.

On the new trial out of which this reference arose the learned Judges differed in opinion on the question of jurisdiction. The Chief Judge, after stating his opinion of the effect of ss. 148 and 151 of the Army Act of 1881, and stating that it had been contended before the Court that the words "shall be cognizable," in s. 151 meant "shall be cognizable only," and that the whole spirit of the Act was to give to officers the privilege of being sued in the places where they may be serving, was of opinion that there was a marked distinction between s. 148 and s. 151 which led to the belief that the legislature did not intend to place the same restriction on matters coming within the purview of s. 151 as it did on those coming within that of s. 148: s. 148 using the words "shall be cognizable before a Court of Requests . . . and not elsewhere," thus excluding the jurisdiction of all other Courts,

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* Small Cause Court Reference No. 4 of 1885, made by H. Millet, Esq., Chief Judge of the Court of Small Causes at Calcutta, dated the 2nd of May 1885.

1886 APRIL 3. — SMALL CAUSE COURT REFERENCE. — 13 C. 37.

s. 151 using the words "shall be cognizable by such Court to the extent of its powers," the words "not elsewhere" being omitted, thus showing that the legislature did not intend to interfere where there might be a jurisdiction common to two Courts of Small Causes.

The Officiating Fourth Judge was of opinion that the Court of Small Causes referred to in s. 151 of the Army Act was the Court within the jurisdiction of which the defendant resided, and that there being a Court of Small Causes in Quetta the suit should have been brought there.

The learned Chief Judge, therefore, referred to the High Court the question, whether the Calcutta Court of Small Causes had jurisdiction in the matter?

Mr. *Pugh*, for the plaintiffs, contended that the jurisdiction of the Small Cause Court was not excluded by the Army Act of 1881; that s. 151 of that Act referred to personal jurisdiction, and that the suit had been rightly brought, after leave obtained under s. 18 of Act XV of 1882, in the Small Cause Court.

No one appeared for the defendant.

OPINION.

[39] The opinion of the High Court was delivered by

PIGOT, J.—It appears to us clear that the Small Cause Court has jurisdiction in such a case as the present.

By the Small Cause Court Act jurisdiction is expressly conferred on Small Cause Courts in cases the facts of which are such as those appearing here; and all that has to be considered in this case is, whether there is any provision in the Army Act of 1881 which takes way that jurisdiction.

We are of opinion that there is none. The doubt which has been felt in the matter arises from its being apparently supposed, that the words "shall be cognizable" in s. 151 of the Army Act mean "shall be cognizable only."

We are of opinion that there is nothing in that section of the Army Act, either in express words or by reasonable inference to lead us to believe that it was the intention of the Legislature in that section to effect the jurisdiction of the Small Cause Courts. We therefore answer the question referred to us in the affirmative.

We think it desirable to add that the discretion of the Small Cause Courts in giving leave to sue under s. 18 of Act XIV of 1882 is one that ought to be only very cautiously exercised in cases such as the one before us.

Attorneys for the plaintiffs: Messrs. *Sanderson & Co.*

T. A. P.

13 C. 39.

1886
MAY 12.

ORIGINAL CIVIL.

13 C. 39.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

KRISTO BHABINEY DOSSEE (*Plaintiff*) *v.* ASHUTOSH BOSU MULLICK AND ANOTHER (*Defendants*).* [12th May, 1886.]

Hindu Law—Partition—Widow's Share.

The plaintiff, the widow and heiress of one *N*, brought a suit for partition of the estate of one *R*, her late husband's father against *A*, a son of her late husband's half-brother, and *K*, the widow of *R*, the parties to the suit being the only members of the family then alive.

Held, that *A*, took a one-half share in the estate, the other half-share being divisible between the widow of *R*, and the widow of *N*. *Cali Churn Mullick* v. *Janova Dossee* (1) followed.

[R., 31 C. 1065=8 C.W.N. 763.]

[40] THIS was a suit brought by one Kristo Bhabiney Dossee, the widow of one Nilmadhub Bosu Mullick, for partition of a house and premises formerly belonging to one Ram Chundur Bosu Mullick, the father of her late husband.

The following table shows the position of the parties to the suit :—

RAM CHUNDER BOSU MULLICK.
m. 1 Doorga Money Dossee died 1836.
m. 2 Kristo Money Dossee, defendant.

By First Wife.	By Second Wife.
Preonath Bosu Mullick *m.* Mokhoda Dossee.	Nilmadhub Bosu Mullick *m.* Kristo Bhabiney Dossee, Plaintiff.
Ashutosh Bosu Mullick. Defendant.	

The members of the family alive at the date of suit were Kristo Bhabiney Dossee (the plaintiff), Ashutosh Bosu (defendant No. 1) a grandson of Ram Chunder Bosu Mullick, by his first wife, and Kristo Mohiney Dossee (defendant No. 2) the widow of Ram Chunder Bosu Mullick.

The plaintiff sought partition of the house hereafter mentioned and stated that Ram Chunder Bosu Mullick died in 1856, leaving him surviving two sons by different wives, *viz.*, Preonath Bosu Mullick, by his first wife, and Nilmadhub Bosu Mullick by his second wife Sreemutty Kristo Mohiney Dossee; that Ram Chunder was at his death possessed of a certain house situate at No. 94, Hurry Ghose's Street in Calcutta; and that after his death Preonath Bosu Mullick and Nilmadhub Bosu Mullick inherited this house, enjoying it in equal shares up to the date of their respective deaths.

That Preonath Bosu Mullick died on the 23rd November, 1872, intestate, leaving him surviving a son named Ashutosh Bosu Mullick, and a widow named Sreemutty Mokhoda Dossee; that Nilmadhub Bosu Mullick died on the 29th July, 1875, intestate, and without issue, leaving a widow Kristo Bhabiney Dossee as his sole heiress.

* Original Civil No. 63 of 1886.

(1) 1 Ind. Jur. N. S. 284.

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This suit as originally framed was brought against Ashutosh Bosu Mullick alone, but subsequently Kristo Mohiney Dossee, the widow of Ram Chunder Bosu Mullick, applied to be added as a party defendant, and the Court, on the authority of the case [41] of *Torit Bhushun Bonnerjee* v. *Taraprosunno Bonnerjee* (1) made an order directing her to be added as a party.

The defendants were all willing that a partition should take place, and the only matter discussed at the hearing was as to the shares to be allotted to the different parties.

Mr. *Handley* for the plaintiff referred to the decree in the case of *Torit Bhushun Bonnerjee* v. *Taraprosunno Bonnerjee*, and relied on the way in which the decree in that suit had directed the property to be divided into four parts, allotting to the plaintiff and Taraprosunno, and the committee of Kaliprosunno each a one-fourth share, and to the two widows the remaining fourth share between them; but pointed out to the Court the case of *Cali Churn Mullick* v. *Janova Dossee* (2) which was against him.

Mr. *Sale*, for Kristo Bhabiney Dossee.

Ashutosh Bosu Mullick appeared in person.

JUDGMENT.

TREVELYAN, J.—I do not think that there is in reality any conflict of authority in this case. Mr. Justice Phear's decision in *Cali Churn Mullick* v. *Janova Dossee*(2) was based upon three decisions of the Supreme Court. Mr. Justice Phear's decision seems to have been accepted as an authority with regard to the Bengal school of law in the recent case. *Damoodur Misser* v. *Senabutty Misrain* (3). According to Mr. Justice Phear's decision, in a partition between sons by different wives, the respective mothers are only entitled to share equally with their own sons the aggregate of the shares which an equal division among the brothers allots to those sons, or in other words the property must be first divided into as many shares as there are sons. Each widow then shares equally with each of her sons the portion allotted to her sons. I have been referred to a decree passed by Mr. Justice Wilson on the 21st of July 1880 in a case of *Tarit Bhushun Bonnerjee* v. *Taraprosunno Bonnerjee*. In that case one Dhurm Dass Bonnerjee left him surviving the plaintiff, two other sons, and two widows, one of them the mother of the plaintiff, and the other the mother of the two other sons. Mr. Justice Wilson ordered the property [42] to be divided into four parts, giving one of such parts to each of the three sons, and the fourth part to the two widows.

In that case, however, it does not appear that there was any contest or argument.

I think that I must follow Mr. Justice Phear's decision, and declare that the male defendant is entitled to a half share of the property.

As I understand it, the plaintiff does not dispute the right of her mother-in-law to a share on partition. The other half will therefore be divided between the plaintiff and the female defendant in equal shares.

Suit decreed.

Attorneys for plaintiff: Messrs. *Harris & Simmons*.

Attorney for second defendant: Baboo *Nobodeep Chunder Roy*.

T. A. P.

(1) 4 C. 756. (2) 1 Ind. Jur. N. S. 284. (3) 8 C. 542.

13 C. 42 = 10 Ind. Jur. 458.

1886
MAY 25.

ORIGINAL CIVIL.

13 C. 42 = 10 Ind. Jur 458.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

BIPIN BEHARY DAW (*Plaintiff*) *v.* SREEDAM CHUNDER DEY (*Defendant*).* [25th May, 1886.]

Evidence Act (*I of* 1872), s. 32, *cl.* 5 *and. ill* (*l*)—*Hearsay Evidence—Pedigree—Proof of birth—Statement of deceased father.*

In a suit on a promissory note, to which the only defence was minority, a statement made by the defendant's father, (who died before proceedings by way of suit had been contemplated) to a witness as to the age of his son, *held* to be inadmissible as evidence of the age of the defendant in support of his defence.

THIS was a suit brought on a promissory note. The only defence was that the defendant was a minor at the time the note was signed.

During the course of the defendant's case, one Motiloll Day was called as a witness and deposed as follows: "I took Sreedam in 1876 to the Metropolitan Institute for the purpose of getting him admitted. . . . I did not know personally what Sreedam's age was when I took him to the Institute; whilst there his age was mentioned. At the time of his admission a statement of his age was given to me by his father."

Sreedam's father admittedly died after this event and before legal proceedings had been contemplated.

[43] Q. By Mr. *Mittra* (defendant's Counsel).—What did his father say?

Mr. *M. P. Gasper* objected.

Mr. *Mittra* contended that the question was admissible under s. 32, cl. 5 and illustration (*l*) of the Evidence Act.

RULING.

TREVELYAN, J.—I think the question is inadmissible. I do not think the statement of the father as to the date of the son's birth is evidence. Illustration (*l*) to s. 32 would be material in cases of pedigree; but the rule which admits hearsay evidence in pedigree cases is confined to the proof of the pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriages when they have to be proved for other purposes. *See Haines* v. *Guthrie* (1).

This question does not come under para. 5 of s. 32 or any other paragraph of that section.

Attorney for plaintiff: Babu *Bolye Chund Dutt.*

Attorneys for defendant: Messrs. *Bose & Bose.*

T. A. P.

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* Suit No. 331 of 1885.

(1) L.R. 13 Q.B.D. 818.

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APRIL 3.

REFERENCE FROM THE BOARD OF REVENUE.

13 C. 43= 11 Ind. Jur 22.

13 C. 43=11 Ind. Jur. 22.

REFERENCE FROM THE BOARD OF REVENUE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot and Mr. Justice Trevelyan.

In re THE KONDOLI TEA CO. LD.* [3rd April, 1886.]

Stamp Act (I *of* 1879), *art.* 21, *sch.* I—*Conveyance by vendors under one denomination to the same persons, purchasers under another denomination.*

Eight persons, the owners of tea estate, purported to convey their rights in the estate to a Company; the consideration expressed in the deed of conveyance being £ 43,320, payable in shares and debentures of the Company taken at *par.*

The only shareholders or debenture-holders of the Company were the eight persons who purported to sell the estate to the Company.

Held, that, although the conveying parties were the shareholders of the Company, there was just as much a sale and transfer of the propery and a change of ownership as there wouldhave been if the shareholders had been differentpersons; and that the proper duty payable on the conveyance was, therefore, that mentioned in art. 21, sch. I of the Stamp Act.

[D., 17 B. 235 (250).]

[44] REFERENCE to the High Court under s. 46 of Act I of 1879.

On the 8th October 1885 the attorneys of the Kondoli Tea Co., presented to the Collector of Stamps for adjudication of stamp duty, under s. 30 of the Stamp Act, an unexecuted deed of assignment of a tea estate, called the Nowgong Tea Estate, purporting to be made between E. D. Wylie of the first part, W.P. Mackinnon of the second part, W. Mackinnon, P. Mackinnon, D. Mackinnon, N. Mackinnon, T. M. Russell and William Peddie Alexander of the third part; J. Macalister Hall of the fourth part; Thomas Henderson of the fifth part, and the Kondoli Tea Company, Ld., of the sixth part.

The consideration for this assignment from the 1st, 2nd, 3rd, 4th, and 5th parties to the Company was stated to be £ 43,320 of which a portion was to be paid in debentures of the Company and the remainder in shares in the capital stock of the Company; there being no actual cash payment of any portion of the intended purchase money.

The only shareholders and debenture holders in the Kondoli Tea Co., Ld., were the individuals who purported to sell the property, and it was, therefore, submitted that the only effect of the conveyance would be that the nominal ownership in the property would be changed, the actual beneficial interest still belonging to the vendors in their character of debenture-holders and shareholders of the Company; and that it was not the intention of the legislature that a nominal transfer of this description should be subject to an *ad valorem* duty calculated on a nominal price.

The Collector submitted the case through the Commissioner of the Presidency Division to the Board of Revenue, expressing his opinion that the instrument was an intended conveyance of a tea estate as a going concern; the consideration £ 43,320 intended partly to be paid in capital stock and partly in debentures of the Company; and that, therefore, on the authority of *In re Menglas Tea Estate* (1), the deed was chargeable with *ad valorem* duty of Rs. 4,335.

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* Reference No. 1 of 1886 under s. 46 of the Stamp Act, made by C. A. Samuells, Esq., Offg. Secretary to the Board of Revenue, dated the 18th of February 1816.

(1) 12 C. 383.

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The Board of Revenue were of opinion that, so long as the transfer was one between the existing owners under one denomination, to the same persons only under different nomenclature, [45] the document could not properly be considered as a conveyance, and that, therefore, the duty payable on it was that laid down under art. 60 (*b*) of sch. I of the Stamp Act; they, however, referred the question to the High Court.

Mr. Stokoe for the Company.—The instrument is not a conveyance on sale as defined in s. 3 of the Stamp Act; it is merely a transfer of property. In *Denn* v. *Diamond* (1), Holroyd, J., says: A sale "imports a *quid pro quo* enuring to the party selling." In that case the form of the document was that of a deed of a sale, but the Court held it was not a purchase by the son. The form of a document is not a sufficient basis to go upon in determining the character of an instrument; the interest we get in the land as a Company is the same as we had in it in our private capacity. In *Christie* v. *Commissioners of Land Revenue* (2), Kelly, C. B., says: "The substance of a transaction is alone to be considered upon the question whether an instrument is liable to stamp duty." *In the matter of the Maharaja of Dhurbunga* (3), the Court in determining the questions raised followed this rule. The case of *Ex parte Hill* (4) is one under s. 7 of the Stamp Act. *In re The Port Canning Co. Ld.* (5), it is decided that no *ad-valorem* duty is payable upon a conveyance where the consideration consists of shares in a public Company. Section 31 of the Stamp Act might meet this case.

The case of a *Reference under Stamp Act*, s. 46 (6), is distinguishable; it is no authority in the face of the cases cited above.

The Advocate-General (Mr. *Paul*) for the Crown was not called upon.

OPINION.

The opinion of the Court was delivered by

PETHERAM, C.J.—The question in this case is, whether a document carrying out a particular transaction is a conveyance within the meaning of the definition contained in cl. 9 of s. 3 of the Stamp Act, and within the meaning of art. 21 of sch. I of that Act.

[46] The document, upon the face of it, professes to be a conveyance of a tea garden from eight gentlemen to the Kondoli Tea Company, Limited, in consideration of £ 43,320, the said consideration being payable in shares and debentures of the Company, taken at a *par*.

It is said that that is not what the real transaction is; because the only shareholders in the Kondoli Tea Company are the eight gentlemen who conveyed the estate, and that therefore it was not really a conveyance or transfer by way of sale, but a mere handing over of the property from them in one name to themselves under another name.

I think that is a fallacy. Whoever the shareholders in the Kondoli Tea Company, Limited, were, I think the Kondoli Tea Company, Limited, was a separate person, a separate body, and a conveyance to the Kondoli Tea Company, Limited, of property which was the property of the sharers in their individual capacity, was just as much a conveyance, a transfer of the property as if the shareholders in the Company had been totally different persons.

This is the only thing that I think it necessary for us to say in giving judgment, namely, that, in my opinion, the Kondoli Tea Company,

(1) 4 B. & C. 243. (2) L.R. 2 Exch. 46. (3) 7 C. 21.
(4) 8 C. 254. (5) 16 W.R. 208. (6) 7 M. 350.

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Limited, is a separate body; and for the purpose of seeing what their transactions are, I do not think it is possible to look at the Register of shareholders to ascertain who the shareholders were: and, consequently, although the conveying parties here were the shareholders of the Company, there was just as much a sale and transfer of the property and a change of ownership as there would have been if the shareholders had been different persons.

I, therefore, think that the proper stamp to be put upon this document is the *ad valorem* stamp mentioned in art. 21 of sch. I of the Stamp Act, and that it mut be calculated on the amount of the consideration mentioned in the instrument.

Attorneys for the Company: Messrs. *Barrow & Orr.*

Attorney for the Crown: The Government Solicitor, Mr. *R. L. Upton.*

T. A. P.

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13 C. 47.

[47] APPELLATE CIVIL.

Before Mr. Justice McDonnell and Mr. Justice Beverley.

JANAKI BALLAV SEN (*one of the Defendants*) *v.* HAFIZ MAHOMED ALI KHAN AND OTHERS (*Plaintiffs*) AND ANOTHER (*Defendant*).* [23rd March, 1886.]

Certificate of Administration—Act XXVII of 1860—*Right to recover debts of deceased person.*

Where payment of a debt is not being withheld from fraudulent or vexatious motives, but from a reasonable doubt as to the party entitled to it, the person desirous of recovering the amount of the debt is bound to produce a certificate under Act XXVII of 1860 before he can obtain a decree, or execute a decree already obtained by the deceased, though he may institute his suit, or apply for execution without such certificate, provided a certificate is filed before decree or before execution issues.

[F., 19 C. 482 (485); Doubted, 15 C. 54 (57); R., 22 C. 143 (151); 23 C. 87 (111) (F.B.); 12 C.W.N. 145 (149) = 7 C.L.J. 658; D., 19 C. 336 (339).]

THE facts of this case, as far as they are material to this report were as follows:—

On 9th Aghran 1277 (23rd November 1870), defendant No. 2 executed in favour of his father-in-law, one Sadat Ali Khan Saheb, a mortgage bond for Rs. 30,000, to be repaid without interest in ten yearly instalments of Rs. 3,000 each. In default of payment interest was to run at the rate of 1 per cent. per mensem till realization. Payments were to be made by hundis, and to be entered on the bank of the bond.

On the 10th Aghran 1277 (24th November 1870), *i.e.*, on the following day, an ijara lease of the mortgaged properties was executed by defendant No. 2 in favour of Sadat Ali at an annual rent of Rs. 3,000, payable in two instalments of Rs. 1,500 each, and on the 11th Aghran 1277 (25th November 1870) a dur-ijara of the same properties was granted by Sadat Ali to Ram Nath Singh at an annual rent of Rs. 3,600, payable in two instalments of Rs. 1,800 each. It was admitted that Ram Nath Singh was in reality the servant and benamidar of defendant No. 2.

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* Appeal from Original Decree No. 97 of 1885, against a decree of Baboo Nobin Chundra Ganguli, Rai Bahadoor, Subordinate Judge of Rungpore, dated the 29th of December 1884.

On 24th Assar 1286 (17th June 1879), defendant No. 2 executed a second mortgage of the same properties (together with other [48] properties) in favour of defendant No. 1, who, having obtained a decree upon his bond, brought the properties to sale, and himself purchased them.

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The present suit was brought by the heirs of Sadat Ali Khan upon the bond of 9th Aghran 1277 for the sum of Rs. 30,000 as principal, and Rs. 24,600 as interest, on the allegation that nothing whatever had been paid.

Defendant No. 2 admitted the execution of the bond, and that he had not paid anything in liquidation thereof. Defendant No. 1, the second mortgagee and auction-purchaser of the mortgaged properties, pleaded that the first mortgage had been liquidated by the execution of the ijara and dur-ijara, which substituted an annual payment of Rs. 3,600 for ten years, in lieu of principal and interest, and that such payments had in fact been made. He also objected that the plaintiffs were not the sole heirs of Sadat Ali, and that they had not obtained a certificate under Act XXVII of 1860 empowering them to realize the debts due to the estate of the deceased.

The Subordinate Judge who tried the suit found that the plaintiffs were bound either to produce a certificate under Act XXVII of 1860, or to show that they were the only heirs, and that they had not done so. On the merits he came to the conclusion that nothing had been paid upon the bond, and he, therefore, gave the plaintiffs a decree for their entire claim, to be realized in the first instance by the sale of the mortgaged properties, and in the event of the sale proceeds of such properties being insufficient, by the sale of other properties belonging to defendant No. 2. But coupled with his decree was an order directing that the plaintiffs should not be entitled to execute it unless and until they produced a certificate under Act XXVII of 1860.

From this decision the first defendant appealed.

Mr. *Evans*, Baboo *Mohini Mohun Roy*, Baboo *Guru Das Banerjee* and Baboo *Mokoond Nath Roy*, for the appellant.

Mr. *Woodroffe*, Baboo *Srinath Das* and Baboo *Jogesh Chandra Roy*, for the respondents.

JUDGMENT.

The judgment of the Court (MCDONELL and BEVERLEY, JJ.) so far as is material to this report, continued (after stating the facts as above), as follows :—

[49] Now the first point taken in appeal is that this order of the lower Court is wrong. It is contended that under s. 2 of Act XXVII of 1860, no decree should have been made without production of a certificate, especially as the plaintiffs had failed to establish that they were the sole heirs of Sadat Ali.

In making the order referred to, the Subordinate Judge has relied on the case of *Luchmin* v. *Gunga Pershad* (1), but that decision only goes so far as to lay down that in certain exceptional cases, provided for by the Statute, a suit may be instituted and decreed without the production of a certificate. In the case of *Hati Lall* v. *Hurdeo* (2), it was similarly held that a certificate was not imperatively necessary in every case before the execution of a decree could be taken out, but that when the judgment-debtor objects to the title of the person claiming to execute the decree, the Court should consider whether the objection is *bona*

(1) 4 A. 485. (2) 5 A. 212.

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fide or vexatious. It is not alleged that in the present case payment is being withheld from fraudulent or vexatious motives. In the case of *Tarini Pershad Ghose* v. *Gungadhur* (1), it was held that the production of a certificate was necessary before a decree in favour of a deceased person could be executed by a person claiming to be his heir. In the case of *Shodone Mohaldar* v. *Halalkhore Mohuldar* (2), the guardian of a minor sued to recover upon a bond which he alleged had been devised to the minor by the deceased, and it was held that such a suit would not lie unless probate of the will were taken out, or unless the guardian had obtained a certificate under Act XXVII of 1860. In that case it was distinctly held that the Subordinate Judge was wrong in making a decree, such as has been made in this case, that is to say, a decree coupled with a condition that it shall not be executed without the production of a certificate.

In *Chunder Coomar Roy* v. *Gocool Chunder Buttacharjee* (3), a similar view was held, though an expression of opinion was at the same time thrown out, that possibly a suit might be instituted before a certificate was actually obtained, if such certificate was subsequently produced at the trial.

[50] Rulings to this effect are to be found in *Ramakrishna Moodelly* v. *Soobraya Gramany* (4) and *Govind Appah* v. *Kondappah Sastrulu* (5).

The result of these decisions, we think, is that where payment of a debt is not being withheld for fraudulent or vexatious motives, but from a reasonable doubt as to the party entitled, the plaintiff is bound to produce a certificate under Act XXVII of 1860 before he can obtain a decree or execute a decree already obtained by the deceased, though he may institute his suit or apply for execution without such a certificate provided it is filed before decree or before execution issues.

In the present case, then, the order of the lower Court would appear to be technically wrong; but we should not be prepared to set the decree aside, or dismiss the suit on this ground alone.

[The decree of the Subordinate Judge was eventually set aside on the merits of the case, and on this ground, and the case remanded for further enquiry.]

J. V. W. *Case remanded.*

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13 C. 50.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Beverley.

DOMA SAHU (*Plaintiff*) *v.* NATHAI KHAN AND OTHERS (*Defendants*).*
[5th April, 1886.]

Mortgage—Foreclosure—Notice of foreclosure—Reg. XVII of 1806.

A notice of foreclosure signed by the Sheristadar of the Judge's Court and bearing the seal of the Court, but not the signature of the Judge, *held*, following the principle of the decision in *Basdeo Singh* v. *Mata Din* (6), not to be a valid notice under Reg. XVII of 1806, s. 8.

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*Appeal from Original Decree No. 22 of 1885, against the decree of Baboo Girish Chandra Chatterji, Rai Bahadur, Subordinate Judge of Mozufferpore, dated the 27th of December 1884.

(1) 6 W.R. Mis. 34. (2) 4 C. 645. (3) 6 C. 370.
(4) 6 Mad. Jur. 262. (5) 6 M.H.C. 131. (6) 4 A. 276.

1886 APRIL 5. — APPELLATE CIVIL. — 13 C. 50.

THE material facts of this case were as follows :—

Certain properties, which were set out in the first paragraph of the plaint, were mortgaged by the father of the defendant No. 1 to the plaintiff, to secure a sum of Rs. 7,635 under a deed of conditional sale, dated the 17th December 1875, corresponding with the 3rd of Pous 1282. In the deed of conditional sale the term for repayment of the amount was fixed at two years.

[51] After the deed had been executed, the right of the original mortgagor in certain of the properties devolved upon the defendants in this suit, amongst others, the defendants Nos. 4 and 5. The plaintiff being desirous of foreclosing the mortgage and rendering the sale absolute and conclusive after the expiration of the period prescribed by s. 8 of Regulation XVII of 1806, followed, or rather purported to follow, the provisions of that section, and applied by a written petition to the Judge. The Judge, on receiving the petition, forwarded a copy of it, together with a notice, to the defendants Nos. 4 and 5.

The notice bore the seal of the Court, and was signed by the sheristadar of the Court, but did not bear the signature of the Judge.

Subsequently a suit was brought for possession upon the foreclosure. When the suit came to be tried, the defendants Nos. 4 and 5 objected that the notice upon the defendant No. 5, Harihar Pershad, had not been properly served, and also that, as a matter of law, no notice had been served upon him. These objections were based on the grounds that Harihar Pershad was not correctly described in the petition ; and that the notice was invalid as not having been signed by the Judge.

The Subordinate Judge upheld both the objections, and found that there was no valid service of notice on Harihar Pershad. From this decision the plaintiff appealed.

Baboo *Mohesh Chunder Chowdhuri* and Baboo *Umakali Mookherji*, for the appellant.

Baboo *Kali Kissen Sen* and Baboo *Kullod Kinkur Rai*, for the respondents.

The judgment of the Court (NORRIS and BEVERLEY, JJ.), after stating the facts and disposing of the objection as to the misdescription in the petition by saying that the defendants could not possibly have been misled by it, proceeded as follows :—

JUDGMENT.

Another objection was raised before the Subordinate Judge, which is this : s. 8, Regulation XVII of 1806, says that the perwana which the Judge is to send with a copy of the petition shall be "under his seal and official signature." The Subordinate Judge has found, and his finding of facts is not questioned, [52] that the notice, a copy of which was served upon the defendant Harihar Pershad, does not bear the official signature of the District Judge. It bears the seal of the Judge and the signature of the sheristadar of his Court. And upon the authority of a case *Basdeo Singh* v. *Mata Din* (1) the Subordinate Judge has held that that is not a valid notice. We are of opinion that this view of the Subordinate Judge is right. We quite agree that the Allahabad decision does not go to the full extent to which the Subordinate Judge goes ; and that the two cases differ in this respect—that in the Allahabad case there was only the official seal of the Court and no signature of the Judge or of any other officer, but in the present case there is the signature of the sheristadar.

(1) 4 A. 276.

1886 APRIL 5. — APPELLATE CIVIL. — 13 C. 50.

It would be almost impossible to hold, we think, that the sheristadar's signature is the official signature of the Judge. If there were any evidence from which we could have found as a fact that the Judge authorized the sheristadar to affix the official seal of the Court upon this perwana and authorize the sheristadar to sign his, the Judge's, name by signing his, sheristadar's, own name, the Subordinate Judge might have been in error. But there is absolutely no evidence upon the record, and one can hardly imagine any circumstances which would warrant the drawing of such an inference. We think, therefore, that this objection must hold good.

We have been asked by Baboo Mohesh Chunder that, if we find either or both of these objections to be good, to follow the decision, to which he has called our attention, of Mr. Justice Mitter and Mr. Justice Field in *Pergash Koer* v. *Mohabir Pershad Narain Singh* (1). We do not think that, under the circumstances of the case, we should be justified in doing this, because we are not satisfied that all parties, who are interested in the mortgaged properties, are before the Court. In that case apparently all the proper parties interested in the mortgaged properties were before the Court. In this case we are not satisfied that such is the case; and it might give rise to great injustice and certainly to considerable confusion, if we were to follow the course which [53] we are asked to follow. We cannot therefore accede to that application.

The result is that the appeal must be dismissed with costs.

J. V. W. *Appeal dismissed.*

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13 C. 53.

APPELLATE CRIMINAL.

Before Mr. Justice Wilson and Mr. Justice Porter.

KALACHAND SIRCAR AND OTHERS *v.* QUEEN-EMPRESS.*
[16th April, 1886.]

Evidence Act (*I of* 1872), *S.* 154—*Hostile witness.*

The mere fact that at a Sessions trial witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from the constradictions going to the whole texture of the story is not that the witness is hostile to this side or to that but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.

IN this case there were four persons committed to the Sessions Court and charged as follows:

Kalachand Sircar and Moser Sheikh with the murder of one Sital Chunder De, and with having wrongfully confined the said Sital Chunder De and four other persons, namely, Ketu, Adu, Lalu and Meher, and with causing hurt to them with the object of compelling them to confess to the commission of theft and of compelling them to restore the property stolen

Prannath Shah with abetting all the above offences.

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* Criminal Appeal No. 173 of 1886, against the order passed by W. H. Page Esq., Sessions Judge of Furridpore, dated the 4th of January 1886.

(1) 11 C. 582.

And Prosunno Coomar Shome, head-constable, with abetment of hurt only.

The facts as stated by the prosecution were: That on the 18th October 1885 the house of one Shibnath Sircar was broken into and property stolen therefrom; that on the night of the 19th October Ketu, Adu, Lalu and Meher were brought to the house of Prannath Shaha and were there tortured and beaten with the object of extorting a confession from them regarding the persons implicated in the theft from Shibnath Sircar; that at a later period that night Kalachand Sircar and Meher Sheikh were sent [54] to bring Sital Chunder De to the same place, representing to him that he was sent for by Prosunno Coomar Shome the head-constable; that on his appearance he was beaten so severely that he died of the injuries received then and there; that the body of Sital was then removed from the house and placed on the side of the road not far from the house; that a nephew of the deceased the next morning went to the Police station and informed the Police that the persons who had committed the crime were, Prannath Shaha and his servants, Kalachand Sircar, Moser Sheikh, the head-constable Prosunno Coomar, and a number of subordinate Police officers.

The matter was then inquired into by the Magistrate. Ketu, Adu, Lalu and Meher then gave evidence to the effect that the outrage was committed by Prannath Shaha and his servants, representing the Police as taking no active part in the transaction.

On this part of the case in the Sessions Court the same witnesses, Ketu, Adu, Lalu and Meher there deposed that the two servants of Prannath, Kalachand and Moser Sheikh, took part in the outrage upon Sital, but that they did so neither in the presence nor with the sanction of Prannath Shaha, but under the orders of Prosunno Coomar Shome, the head-constable.

At the time when each of the four witnesses in turn gave this evidence, the Government Pleader, considering the witness to be hostile, asked permission of the Court to cross-examine under s. 154 of the Evidence Act. Objection to this was taken, but overruled, and the Government Pleader, on obtaining leave from the Court, elicited from each witness that he had made a different statement in the Magistrate's Court; and in turn each witness thereupon stated that the evidence given by him before the Magistrate was the real truth of the story.

It was in the course of the trial in the Sessions Court proved that Ketu, Adu, Lalu and Meher were men of the worst character, two of them being at the time under Police surveillance.

The Sessions Judge and the Assessors, considering that the story told by these witnesses before the Magistrate's Court was not to be believed, rejected the story given by them in the Sessions [55] Court, save so much thereof as was elicited in the cross-examination held under s. 154 of the Evidence Act, and was confirmatory of the evidence given in the Magistrate's Court.

The prisoners Kalachand and Moser were thereupon found guilty of culpable homicide not amounting to murder, and were sentenced to rigorous imprisonment for seven years; and Prannath Shaha, who was found guilty of abetment of the same offence, was sentenced to ten years' rigorous imprisonment; Prosunno Coomar Shome being acquitted.

The prisoners Kalachand, Moser and Prannath appealed.

Mr. *M. P. Gasper* (with him Baboo *Jasoda Nundun Pramanick*), for the appellants.—The treatment of the four witnesses of the Crown as

1886 APRIL 16. — APPELLATE CRIMINAL. — 13 C. 53.

hostile was not justifiable. There was no hostility: they merely made two contradictory statements. The effect of their evidence, I submit, is that they have proved themselves to be utterly unworthy of belief, all the evidence in chief brought out under s. 154 ought to be struck out and there being no other evidence directly in point the prisoners must be acquitted. The evidence given by the witnesses before the Magistrate is not sufficient to convict unless it is corroborated by independent testimony. *See Queen* v. *Amanullah* (1). As to the result of such cross-examination, *see Faulkner* v. *Brine* (2) ; *Wright* v. *Beckett* (3) ; *Reg* v. *Ball* (4).

[WILSON, J.—The English law at the time the last case was decided was entirely different to the law out here.] I refer to that case for the conclusion that you were formerly not allowed to do away with the effect of such evidence.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

The Court (WILSON and PORTER, JJ.) were of opinion that the convictions could not safely be sustained, and acquitted the prisoners; but as regards that part of the case touching upon the cross-examination of the four witnesses for the prosecution under s. 154 of the Evidence Act, the following passage in their judgment is extracted:—

JUDGMENT.

[56] The Sessions Judge, in concurrence with the assessors who sat with him, has selected the story told by the four witnesses for the prosecution before the Magistrate, and has rejected the one that was told before him. He arrived at this result partly in this way:—When the witnesses, one after another, told the story sworn to in his own Court, he allowed the advocate for the prosecution to cross-examine these, his own witnesses, apparently on the ground that they were hostile (of which we can see no trace), and so brought out by reference to their depositions given before the Magistrate the story which had been given in the Magistrate's Court,

It appears to us that there was no sufficient ground for allowing such cross-examination. We can see nothing on the face of their evidence to lead to the supposition that they were hostile witnesses, that is, witnesses who were trying to defeat the prosecution by suppressing the truth. The mere fact that at a sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from the contradictions in their evidence—contradictions so far as Prannath is concerned, not in the details, but in the whole texture, of the story—is not that they are witnesses hostile to this side or to that, but that they are witnesses who ought not to be believed, unless supported by other satisfactory evidence, which they are not. That in itself is sufficient to show that the conviction of Prannath cannot be supported.

But it is a somewhat different question whether the conviction of Kalachand and Moser Sheikh can be supported. As to them, these four witnesses Adu, Meher, Ketu and Lalu, have not contradicted each other in any specific and precise way; but there is a substantial contradiction between the story now told against Kalachand and Moser Sheikh, and the story as told in the first information given at 4 o'clock on the day after the occurrence. In the first information it was represented that the outrage was committed by Prannath and his servants, and Prosunno Coomar the jemadar, and the whole body of the Police. That is quite inconsistent

(1) 21 W.R. 49.
(2) 1 F. & F. 254.
(3) 1 M. & R. 423.
(4) 8 C. & P. 745.

with the story believed in the Court below, that Kalachand and Moser Sheikh [57] and others committed this crime with the sanction of Prannath, and in his presence, or with the other story that they did so under the orders of Prosunno Coomar, the Police jemadar, alone.

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When these witnesses have told such fundamentally different stories about the whole transaction, and when they are proved to be disreputable men, and the story told by them is on the face of it so full of unexplained improbabilities, we do not think it safe to act upon their unsupported testimony as to the *parts* these two men, Kalachand and Moser Sheikh, are said to have taken in the alleged outrage.

We, therefore, set aside the convictions and acquit all three prisoners, Prannath Shaha Chowdhuri, Kalachand Sircar and Moser Sheikh, and direct their release.

T. A. P. *Conviction set aside.*

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13 C. 57.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

LALLA CHEDI LAL AND OTHERS (*Plaintiffs*) *v.* RAMDHUNI GOPE AND OTHERS (*Defendants*).* [11th February, 1886.]

Bengal Act VIII *of* 1869, *s.* 38—*Measurement of waste lands—Bengal Civil Courts Act* (VI *of* 1871), *s.* 22—*Appeal.*

An application for the measurement of a whole estate under s 38 of Bengal Act VIII of 1869 cannot be granted where waste lands in that estate have been brought into cultivation by various ryots, and the landlord is unable to ascertain which of the ryots have appropriated such waste lands as part of their jotes.

Before a measurement can be ordered under that section, it is necessary to establish by evidence the facts set out in the petition for measurement and to show that the lands sought to be measured are known, but that the tenants liable to pay rent in respect of such lands are unknown.

IN January 1882 Lalla Chedi Lal and others, the proprietors of mouzah Ahiari, applied to the Subordinate Judge of Mozufferpore [58] under s. 38 of Bengal Act VIII of 1869, to have it declared that they were entitled to have the lands of their mouzah measured. The petition, amongst other matters, stated that the area of the mouzah was approximately 3,500 bighas, and the annual income therefrom Rs. 7,000, that the mouzah had not been measured for many years, and that it contained large tracts of waste land which had since been gradually cultivated by the tenants; but that unless measurement were taken it was impossible to ascertain the quantity of lands taken by each respective tenant. On the 5th January 1882 the Subordinate Judge, without taking any evidence on the petition, transmitted the papers to the Collector (under s. 38 of Bengal Act VIII), who, on the 11th February 1882, deputed an Ameen to take measurement of the mouzah. On the 10th October 1882 the Ameen completed his report. In December 1882 some of the ryots preferred a joint petition to the Collector impugning the accuracy of the Ameen's measurements. On the 21st March 1883 the Ameen forwarded his report

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* Special Appeal No. 1488 of 1884, from the decision of A. C. Brett, Esq., District Judge of Tirhoot, dated 19th May 1884, reversing the decision of J. C. Price, Esq., Collector of Dhurbhanga, dated 31st August 1883, and the Robocari of Baboo Ram Pershad Rai, the Sub-Judge, dated 22nd March 1884.

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to the Collector, the delay being accounted for by time taken up in fair copying the proceedings and in obtaining the signature of the ryots to the necessary papers. On the 22nd March 1883 the report was duly filed in Court.

On the 5th April 1883 one hundred and twenty-eight of the tenants jointly objected that the proprietors had no right to obtain measurement under s. 38, at the same time stating that as soon as they had seen the report they would file their objections in a supplemental petition. On the 18th August these objections were filed, and after argument, were decided against the ryots on the 31st August 1883, on the ground that a joint petition of objection was not such as was contemplated by s. 38 of Bengal Act VIII of 1869, and that the petition of objection was out of time, the time running from the date on which the Ameen presented his papers. On the 4th January 1884 the Ameen's report was confirmed, and the papers sent back to the Subordinate Judge who, on the 22nd March 1884, directed that the report and papers should be put up with the record.

The tenants appealed separately to the District Judge, on the grounds that the order of the Sub-Judge, dated 22nd March 1884, filing the report, was bad, in as much as the Collector had no [59] power to proceed with the case on the order of the Subordinate Judge, dated 5th January 1882, directing measurement and making over the case to him, the Subordinate Judge having neglected to take any evidence on the petition of the proprietors, and that the petition of objection was within time. The respondents objected that inasmuch as all the tenants impugned the Subordinate Judge's order, and the value of the land sought to be measured was over Rs. 5,000, the appeal would only lie to the High Court, and that the order of the Subordinate Judge could not be interfered with, the appeal being from the Collector's decision.

The District Judge decided that the appeal would lie to his Court, inasmuch as *the subject-matter in dispute* was not the lands of mouzah Ahiari, but the right to measure those lands, it being by no one alleged that the value put upon such measurement was over Rs. 5,000; that the Collector's decision was the final decree and the Subordinate Judge's order an interlocutory order, which could be impeached in the appeal from the decree of the Collector; and that being so, he held that the order of the Subordinate Judge was bad, no evidence having been taken on the petition of the proprietors—*Mohammed Bahadoor Mazoomdar* v. *Raja Rajkissen Singh* (1); that the Collector's decision as to the objections being made out of time was wrong, the date from which the 15 days allowed by the Act should run being from the date when the Collector formally accepted the Ameen's proceedings, and not from the date on which the Ameen returned the papers to the Court.

The proprietors appealed to the High Court on the grounds: (1) that the Subordinate Judge had no jurisdiction to entertain the appeal; (2) that the Subordinate Judge was wrong in holding that he had jurisdiction to set aside the order of 22nd March 1884; (3) that the objections were filed out of time; (4) that the measurement having been completed without any objection as to the right of the proprietors to measure having been taken, the lower Court was wrong in holding that it had jurisdiction to go into that point.

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(1) 10 B.L.R. 401.

1886 FEB. 11. — APPELLATE CIVIL. — 13 C. 57.

Mr. *C. Gregory* (with him Baboo *Taruk Nath Palit* and Baboo *Abinash Chunder Bonnerjee*) for the appellants, cited [60] *In the matter of Dooli Chund* (1) and *Omed Ali* v. *Nityanund Roy* (2), on the question of jurisdiction, and *Goluck Kishore Acharjee* v. *Kesha Majhee* (3), to show that where ryots take no objection during the progress of the measurement the Court on appeal should not set aside the proceedings on objections made subsequently.

Mr. *Woodroffe*, Baboo *Hem Chunder Banerjee* and Baboo *Anand Gopal Palit*, for the respondents, were not called upon.

The judgment of the Court (MITTER and NORRIS, JJ.) was as follows :—

JUDGMENT.

We agree with the District Judge that the appeal in this case lay to him and not to this Court, but we would guard ourselves from being understood to say that we concur in all his reasons. It appears to us that the decision of this question depends upon s. 22 of Act VI of 1871, which says : "Appeals from the decrees and orders of Subordinate Judges and Munsifs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds five thousand rupees, in which case the appeal shall lie to the High Ccurt."

It is quite clear that the value of the subject-matter in dispute is the capitalized value of the excess rents, which, after the measurement applied for had been effected, the appellant before us expected that he would recover. Of this value there is no evidence on the record. That being so under the first part of s. 22 the appeal lay to the District Judge.

Upon the merits we also agree with the District Judge that the order of the Court of first instance is erroneous : The appellant before us stated in his petition : "Sixteen annas of mouzah Ahiari (main and hamlet), pergunnah Bherwara and the tolals are the right of your petitioners and their proceeds are Rs. 7,000 and approximate area 3,500 bighas."

"It is a long time ago that the said mouzah with the tolas are not measured, and in the said mouzah and tolas thousands of bighas of land were waste and pasturage for cattle. and those lands have come under cultivation, and most of the tenants, [61] besides their jotes, have gradually brought those waste lands in their possession along with their former jotes ; but your petitioners do not know which tenants have cultivated how much land and what kind of land is in the jote of each tenant."

That is the ground upon which this application was made for measurement under s. 38, and the ground may be put shortly thus : The waste lands of the estate having been brought under cultivation by various ryots, and the landlord not having been able to ascertain which of the ryots have appropriated these lands as part of his jote, an application was made under s. 38 for the management of the whole estate. We think that such an application as this does not come under s. 38 of the old Rent Act, which runs as follows :—

"If the proprietor of an estate or tenure, or other person entitled to receive the rents of an estate or tenure, is unable to measure the lands comprised in such estate or tenure, or any part thereof, by reason that he cannot ascertain who are the persons liable to pay rent in respect

(1) 9 B.L.R. 190=18 W.R. 262 (268). (2) 24 W.R. 171. (3) 15 W.R. 23.

1886 FEB. 11. — APPELLATE CIVIL. — 13 C. 57.

of the lands, or any part of the lands comprised therein, such proprietor or other person may apply to the Court which would have had jurisdiction in case a suit had been brought for the recovery of such lands, and such Court thereupon, and on the necessary costs being deposited therein by the applicant, shall order such lands to be measured." . . . . It is quite clear that two conditions are necessary, *viz.*, that the lands are known, but the tenants are unknown. But according to the averments in the petition the tenants are known, but the lands are unknown. Section 38, therefore, cannot apply. We also agree with the District Judge that even supposing that s. 38 does apply, still before any proceeding could be initiated under that section, it was necessary for the petitioner to establish by evidence those conditions upon the establishment of which the Court could proceed to order the measurement under s. 38 of the old Rent Act. We dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

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13 C. 62.

[62] APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson

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GOPAL CHANDRA LAHIRI (*Plaintiff*) *v.* SOLOMON (*Defendant*).*
[26th February, 1886.]

Review—Mistake of Counsel—Civil Procedure Code (Act XIV of 1882), *s.* 623—*Limitation Act* (*XV of* 1877), *s.* 5—"*Sufficient Cause.*"

Per GARTH, C.J.—Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason" in s. 623 of the Civil Procedure Code, yet from the earlier part of the clause it is clear that the point which might have been, but which was not, discovered at the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review.

Per WILSON, J.—*Semble.*—If at a trial all parties, counsel on both sides, and the Judge, are under a misapprehension as to the contents of a document, or, even if the Judge alone is misled on such a point, and in consequence a wrong decree is made, the mistake ought to be corrected on review.

Per Curiam.—*Held* on the facts, that there was no "sufficient cause" for not making the application within the time limited by s. 5 of the Limitation Act, 1877.

[R., 5 C.L.J. 380 (383) = 34 C. 216; 12 C.W.N. 25 (27); 118 P.R. 1908 ; D., 126 P.W.R. 1912 = 1912 P.L.R. Sup. 7; 17 C.W.N. 807 (809) = 19 Ind. Cas. 931 (932).]

THIS was an appeal from a decision of Mr. Justice Norris granting an application for a review.

The facts of the case are fully set out in the report of the case before the lower Court to be found on page 767 of I.L.R., 11 Calc.

Mr. *Allen*, Mr. *Mitra* and Mr. *J. G. Apcar*, for the appellant.

Mr. *Bonnerjee* and Mr. *Gasper*, for the respondent.

The only two points argued were: (1) Whether there was reason sufficient for granting the review; and (2) whether the application was in time?

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* Original Civil Appeal No. 28 of 1885, against the decree of Mr. Justice Norris, dated the 16th of July 1885.

1886 Feb. 26. — Appeal from Original Civil. — 13 C. 62.

The following judgments were delivered by the Court (GARTH, C.J., and WILSON, J.) :—

JUDGMENTS.

GARTH, C.J.—This is an appeal against an order of Mr. Justice Norris granting an application for review. The facts are somewhat peculiar.

The suit was brought by the plaintiff against the defendant Bibi Solomon, to recover a portion of certain property which the plaintiff claimed as having been conveyed to him by one Khajah [63] Abdul Azeez, the brother of the defendant, under a conveyance, dated the 19th of March 1883.

Mr. Phillips, who appeared for the plaintiff at the trial, opened the plaintiff's case, and claimed the property in question as having been conveyed to his client by that deed. The deed itself was produced and proved in the usual way, and as the Counsel for the defendant raised no objection to the conveyance, it was taken as read.

The written statement raised the question as to the *bona fides* of the deed, as also whether Bibi Solomon's estate passed by it; but the only defence apparently which was put forward by the defendant's Counsel, was that the deed was fraudulent and void as against Bibi Solomon, and that the plaintiff was merely a trustee of the property conveyed.

This defence, however, the learned Judge considered that the defendant was not entitled to raise in such a suit; and consequently the plaintiff obtained judgment. This was on the 5th of February 1885.

On the 26th of the same month the defendant Bibi Solomon brought a fresh suit against the plaintiff, praying, amongst other things, that it might be declared that the transaction evidenced by the said indenture of the 19th of March 1833 was invalid and inoperative, or that at all events it was fraudulent and void against her, Bibi Solomon. In fact that suit was founded on the same grounds as the defendant's Counsel desired to set up as a defence to this suit.

On the 2nd of March notice was served on behalf of Bibi Solomon upon the plaintiff in this suit of an application that the decree in the first suit should not be executed until the suit brought by Bibi Solomon had been disposed of; and that application was heard by Mr. Justice Wilson on the 30th and 31st of March.

Mr. Bonnerjee and Mr. Gasper appeared in support of it, and Mr. Hill and Mr. O'Kinealy against it.

In the course of that hearing, Mr. Bonnerjee called for the conveyance of the 19th of March 1883, and on reading it discovered that, according to his construction of the deed, Bibi Solomon's interest in the said property (being a 7/24th share) did not pass by the instrument.

On the 9th of April following, Mr. Hill made an application to [64] Mr. Justice Norris, who tried the suit, for a rule to show cause why there should not be a review of judgment.

A rule *nisi* was granted; and on its coming on to be argued before Mr. Justice Norris, it turned out that, although the defendant had not been allowed before the trial to inspect the original deed of the 19th of March 1883, upon the ground that it was the plaintiff's title deed, the defendant's attorney had been supplied with a copy of it for the purpose of preparing the written statement, and also that each of the counsel for the defendant, Mr. Bonnerjee and Mr. Gasper, had copies of the deed supplied them at the trial.

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Two objections were raised on the argument of the rule: 1*st*, whether there was sufficient reason for granting the review; and, 2*ndly*, whether there was sufficient cause for not applying for the review within the 20 days allowed by the Limitation Act.

Both these points, after some hesitation, the learned Judge decided in favour of the applicant; and the rule was made absolute for a review.

This is an appeal against that decision; and the questions submitted to us in appeal were those which were raised in the lower Court, namely, 1*st*, whether there was sufficient reason for granting the review; and, 2*ndly*, whether the application was in time.

Now, as to the first of these points, the material facts, as I understand them, are these—

The claim to the property in suit as conveyed by the deed in question was *bona fide* made by the plaintiff at the trial. It is not suggested that there was any want of good faith in the way in which the plaintiff's case was presented or conducted, or that there was any attempt to put a construction upon the deed, which the plaintiff's advisers did not believe to be correct.

The deed itself in the operative part of it professed to convey to the plaintiff the whole of the house and premises which were the subject of the suit; and it was only by a careful examination of the recitals that the point raised by Mr. Bonnerjee in his application for review was discovered.

The defendant's advisers, her attorney and counsel, had ample opportunity for examining the deed, and of ascertaining its true construction before the trial. They had a copy of it furnished [65] to them for preparing the written statement, and each of the counsel at the trial had also a copy in his brief. If, therefore, they failed at the trial to see the point now raised, it was entirely their own fault.

Mr. Bonnerjee very properly and candidly admits that he did not read the deed. His attorney did not call his attention to the point now raised, and he had no reason to suppose that there was anything in the document which required examination. But whether the omission was his or the attorney's, it is obvious that the point was one which, by the exercise of due diligence, would have been discovered.

To allow a review under such circumstances would, I think, be acting in opposition, both to the letter and the spirit of s. 623 of the Code. It may be difficult, no doubt, and perhaps undesirable, to attempt to define precisely the meaning of the words "*any other sufficient reason*" in that section; but it is clear from the earlier part of the clause that a point which might have been, but which was not, discovered at the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review.

But secondly the question as to limitation appears to me to present at least as much difficulty as the other.

The judgment was given on the 5th of February 1885; the decree was signed on 25th day of February 1885; but the application for review was not made until the 9th of April, long after the 20 days prescribed by the Limitation Act had expired.

Mr. Bonnerjee contends that there was sufficient cause, within the meaning of s. 5 of the Act, for not making the application within the 20 days. But what is the alleged cause? Merely that the learned counsel did not happen to read the deed until the 30th of March, when he did so for the purpose of a proceeding in another suit. If this were to be deemed

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a sufficient excuse for the application not being made in due time, it would be an equally good excuse for delaying the application for a year or any longer time, whenever the learned counsel might happen to read its contents.

The case of *In re The Manchester Economic Building Society* (1) [66] was cited to us as an authority in favour of extending the time; but that case is no authority in favour of the respondent.

Even assuming the rules upon this subject in England to be the same as they are here, it will be found that in the case of the *Manchester Economic Building Society*, the fact which was made the ground for allowing the appeal after time, was one which the applicant was not, and could not, even by the exercise of due diligence, have been made aware of at the time when the order was made which was sought to be appealed against.

I think that the appeal should be allowed, and the application for review dismissed with costs.

WILSON, J.—Upon the first question whether there were in this case grounds upon which a review could be granted, I express no opinion. If at a trial all parties, counsel on both sides and the Judge are under a misapprehension as to the contents of a document, or even if the Judge alone is misled on such a point, and in consequence a wrong decree is made, I am disposed to think that the mistake ought to be corrected on review.

Upon the question whether there was sufficient cause for not applying within the time limited by law, I agree with the Chief Justice.

T. A. P. *Appeal allowed.*

Attorney for the appellant: Mr. *C. F. Pittar.*

Attorneys for the respondent: Messrs. *Watkins & Co.*

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13 C. 66.

INSOLVENCY.

Before Mr. Justice Norris.

IN RE MAHOMED MAHMUD SHAH, AN INSOLVENT.

[3rd March, 1886.]

Insolvency—Interest on scheduled debts—Official Assignee's Commission on interest.

Where an insolvent's estate is sufficient to pay off his creditors in full, leaving a balance in the hands of the Official Assignee, the Court will direct interest at 6 per cent. to be paid on such proved or admitted contract debts as expressly or impliedly carry interest as from the date of the filing of the petition in insolvency; and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands, to be made over to the insolvent.

[67] IN this case the Official Assignee applied to the Court for an order that he might be at liberty to pay and divide amongst the creditors of the estate of the insolvent, after proof of their debts, a dividend amounting to Rs. 100 per cent. in proportion to their respective debts and claims; and that he might further be at liberty to pay interest on such of the admitted claims as bore interest at such rate as the Court might direct,

(1) L.R. 24 Ch. D. 488.

1886 MARCH 3. — INSOL-VENCY. — 13 C. 66.

from the date of the filing of the petition of insolvency to the present application; and that he might be at liberty to retain his commission on the amount of such interest, and to pay over to the insolvent such balance as might remain due after making all such payments as aforesaid.

The petitioner stated that the debts due from the estate amounted to Rs. 1,116-11-9; that there was then in his hands the sum of Rupees 12,106-12-11, belonging to the estate; that after payment of his commission and other charges there would remain in his hands the sum of Rs. 12,020-15-7, capable of being divided amongst the creditors of the estate; and that after payment of the scheduled creditors in full there would remain in his hands the sum of Rs. 10,904-3-10; he therefore asked for the order set out above.

The *Official Assignee* (Mr. *J. C. MacGregor*) appeared in person.

ORDER.

NORRIS, J.—In this case I think the surplus assets in the hands of the Official Assignee, after payment of the debts in full, ought to be applied in payment of interest at 6 per cent. on contract debts which expressly or impliedly carry interest; and that the Official Assignee should retain his commission of 5 per cent. on the amount of such interest. The balance then remaining in the hands of the Official Assignee should be paid to the insolvent.

T. A. P. *Order as prayed.*

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13 C. 67.

INSOLVENCY.

Before Mr. Justice Norris.

IN RE J. W. FOX, AN INSOLVENT. [3rd March, 1886.]

Insolvency--Final discharge where insolvent is not personally present in Court-Affidavit explaining absence—Opposition to final discharge.

An insolvent who has obtained a rule *nisi* for his final discharge, but who is not personally present in Court on the return of the rule, is entitled, where no one appears to oppose the rule, to have the rule made absolute on his putting in a sufficient affidavit explaining his absence.

[68] THIS was an application that an order *nisi*, dated the 13th January 1886, directing the final discharge of the insolvent, might be made absolute, notwithstanding the fact that the insolvent was not himself present before the Court.

The insolvent had, on the 13th January 1886, obtained a rule *nisi* directing his final discharge, and fixing the further hearing of the matter for the 3rd March.

On that day no creditor appeared to oppose the rule, nor was the insolvent personally present in Court; he, however, appeared through his Attorney, who asked for the insolvent's final discharge, and placed before the Court an affidavit sworn on the 2nd March by the insolvent from which it appeared that the insolvent was the Commander of the S. S. "Indore" trading between Calcutta and Assam; that he had arrived in the port of Calcutta on the 28th February; that in the ordinary course of his employment he had been ordered to leave Calcutta on the morning of the 3rd March 1886, bound on a voyage to Assam in command of the said steamer, and would be unable, therefore, to appear before the Court

in the forenoon of that day at the hearing of the matter of his petition and application to make absolute the order *nisi*, dated the 13th January 1886. 1886 MARCH 3.

Mr. *Orr* appeared for the Insolvent. INSOLVENCY.

ORDER. 13 C. 67.

NORRIS, J.—I have consulted Mr. Justice Pigot and Mr. Justice Trevelyan, and they both agree with me in thinking that the affidavit is sufficient in this case to enable me to make the rule absolute. The affidavit states sufficient reasons for the absence of the insolvent; and there is no opposition; if any one had appeared to oppose I should not have made the order.

Rule absolute.

Attorneys for insolvent: Messrs. *Barrow & Orr.*

T. A. P.

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13 C. 68.

INSOLVENCY.

Before Mr. Justice Norris.

IN RE NOBODEEP CHUNDER SHAW, AN INSOLVENT.
[5th May, 1886.]

Insolvency—Infant—Minor—Trading contract—Insolvent Act (11 & 12 *Vict.*), *c.* 21.

A minor who has traded cannot be adjudicated an insolvent on the petition of the persons who have supplied him with funds for the purposes of his business

[69] THIS was a rule calling upon certain adjudicating creditors to show cause why an order, dated the 4th March 1886, adjudicating one Nobodeep Chunder Shaw, an insolvent, should not be set aside.

It appeared that on the 4th March 1886, Bhuggoban Chunder Roy and Bhoyrub Chunder Roy had obtained an order adjudicating Nobodeep Chunder an insolvent, alleging that he had for about 2½ years personally conducted and carried on the business of a dealer in jute, holding himself out as an adult and trading as such, and alleging that he had contracted with them debts which remained unpaid, and was indebted to them in an aggregate sum of Rs. 17,000, for which sum two High Court decrees had been obtained.

On the 29th March 1886, Nobodeep Chunder obtained a rule calling on the adjudicating creditors to show cause why the order should not be set aside, stating in the petition on which the rule was obtained that at the time the debts mentioned by the adjudicating creditors were contracted, he was a minor, and therefore not a trader within the meaning of the Act for the Relief of Insolvent debtors, and that on the 9th April 1884 he had himself filed his petition in insolvency, the present adjudicating creditors opposing; that the application was dismissed on the ground that he was an infant at the time of the filing of his petition; he further denied that he had ever held himself out as an adult, stating on the contrary that the adjudicating creditors knew, and had every means of knowing, that he was an infant, and that with full knowledge of his minority they had lent money to him; that the decrees obtained against him by the adjudicating creditors were null and void, they having been passed against him *ex parte* when he was an infant, no guardian of suit having been assigned to him, and the summons having been improperly served.

1886 MAY 5. — INSOLVENCY. — 13 C. 68.

Mr. *T. A. Apcar* showed cause. The infant held himself out to us as an adult, and therefore can be adjudicated an insolvent—*see Ex parte Jones* (1) and *Ex parte Watson* (2); see s. 11 of Act IX of 1872 as to the power of a minor to contract.

Mr. *Pugh* and Mr. *Allen, contra,* were not called upon.

JUDGMENT.

[70] NORRIS, J.—I do not think it necessary that I should take time to consider what judgment I should give in this case, or encumber the record with an elaborate investigation of the older authorities in a case where the question is set at rest by the decision of the Appeal Court in *Ex parte Jones* (1), the principle of which was adopted in the Court of Appeal in Ireland in the case of *In re Rainys* (3). It seems to me that the provisions of the Contract Act are much stronger than the Infants Relief Act, a provision which formed the basis of the decision in *Ex parte Jones.* I therefore think this adjudication should be set aside.

Rule absolute.

Attorney for petitioner: Baboo *G. C. Chunder.*
Attorneys for adjudicating creditors: Messrs. *Sen & Co.*
T. A. P.

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13 C. 70.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

ABOOL HOSSEIN (*Plaintiff*) *v.* RAGHU NATH SAHU (*Defendant*).*
[30th March, 1886.]

Registration—Notice—Mortgagor and Mortgagee—Unregistered mortgage—Purchaser with notice of prior unregistered mortgage—Priority.

Where property has been mortgaged by a deed, the registration of which is not compulsory, a subsequent purchaser of the property, who has duly registered his purchase deed, but who has bought with notice of the unregistered mortgage, takes the property subject to that mortgage.

[F., 19 A. 145 (147)=17 A.W.N. 19; 5 L.B.R. 184; R., 16 M. 148 (F.B.); 6 C.P.L.R. 112 (114); 27 B. 452 (472); D., 9 C.W.N. 14 (17).]

THIS was a suit instituted on the 7th February 1884 to recover the sum of Rs. 86-15-0, being Rs. 50 principal and Rs. 36-15-0 interest due on a mortgage bond executed by the defendant Raghu Nath Sahu, on the 12th of December 1877. The bond had not been registered. It appeared that Raghu Nath Sahu had, on the 29th of January 1884, sold the mortgaged property by a registered deed of sale to one Mahadeo, who was made a defendant on 18th of April 1884.

[71] The plaintiff adduced evidence to prove that Mahadeo had, previous to his purchase, notice of the plaintiff's mortgage, but the lower appellate Court held that the question of notice was immaterial, as the

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* Appeal from Appellate Decree, No. 1990 of 1885, against the decree of Baboo Ram Pershad, Subordinate Judge of Patna, dated the 30th of June 1885, affirming the decree of Moulvi Abdul Bari, Khan Bahadur, Munsif of Patna, dated the 23rd of February 1885.

(1) L.R. 18 Ch. D. 109. (2) 16 Ves. 265. (3) 3 Ir. L. Rep. Ch. 459.

defendant Mahadeo's registered deed was entitled, notice or no notice, to priority over the plaintiff's unregistered deed. The plaintiff appealed to the High Court.

1886 MARCH 30. — APPELLATE CIVIL. — 13 C. 70.

Baboo *Saligram Singh*, for the appellant.

Baboo *Karuna Sindhu Mookerjee*, for the respondent.

JUDGMENT.

The judgment of the Court (PIGOT and O'KINEALY, JJ.) was delivered by

PIGOT, J.—The question in this case which arose before both the lower Courts was, whether, when there is an unregistered mortgage, the registration of which is not compulsory, a purchaser of the property who has registered his deed of sale, but who has bought with notice of the unregistered mortgage, purchases subject to the mortgage · the Courts below held that such notice is immaterial, taking that view in consequence of what they understood to be the effect of the judgment of Mr. Justice Field in *Bamasundari Dassi* v. *Krishna Chundra Dhur* (1). In that case Mr. Field expressed the opinion that the effect of the decisions in the cases of *Fuzladdeen Khan* v. *Fakir Mahomed Khan* (2) and of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (3) was not, in his opinion to decide the point, the observations in those decisions being no more than *obiter dicta* ; and the case of *Denonath Ghose* v. *Aluck Moni Dabi* (4) not having been decided by both members of the Court on the ground of notice.

Now, it is to be observed that Mr. Justice Field, in *Bamasundari Dassi's case* (1) says, at the bottom of page 427*** : "We think that in the present case the question does not really arise." The learned Judge's decision, therefore, does not amount, in our opinion, to a decision upon the effect of the judgments in the other case; the learned Judge was careful to point out that there was no proof or reasonable presumption of notice in the case; and that, [72] therefore, the question did not arise—see again at page 428. In the recent case of *Bhalu Roy* v. *Sakhu Roy* (5), the question was raised and expressly decided, that in such a case as the present, the purchaser with notice takes subject to the mortgage. We think that that principle must be taken to be the principle of this Court, having regard to the cases referred to by Field, J., and further to the case of *Nemai Charan Dhabal* v. *Kokil Bag* (6), where Mr. Justice Mitter followed the case of *Waman Ramchundra* v. *Dhondika Krishnaji* (7). According to these cases a person who purchases with notice of a contract for the sale of property, not requiring registration, and unregistered, purchases subject to the rights of the person with whom the contract has been entered into. We see no difference between the principle in the one case and that in the other ; and we may add that the passage from Lord Cairns' judgment in *Agra Bank* v. *Barry* (8) cited in the Bombay case is one to which attention may well be invited. It lays down the principles applicable to a question of this sort. The decision of Lord Cairns is upon the Irish Act, one very similar in terms to the Indian Registration Act, and identical in principle with it.

We must remand this case, therefore, for we cannot find that the learned Subordinate Judge has come to a definite finding, aye or no, whether Mahadeo had notice of the mortgage. We express no opinion ourselves upon the evidence as to this question. We remand the case to the

(1) 10 C. 424. (2) 5 C. 336. (3) 8 C. 597. (4) 7 C. 753.
(5) 11 C. 667. (6) 6 C. 534. (7) 4 B. 126. (8) L.R. 7 H.L. 135.

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Subordinate Judge for a finding upon that question. The case will be kept on the file, and the record will be sent down with this judgment, and the Subordinate Judge will return his finding within three weeks from the receipt of this order.

P.O'K. *Case remanded.*

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13 C. 73.

[73] APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

JUDHISTIR PATRO (*Judgment-debtor*) *v.* NOBIN CHANDRA KHELA (*Decree-holder*).* [11th February, 1886.]

Limitation—Execution of Decree—Decree payable by Instalments—Instalment Decree—Option to execute—Waiver—Construction of Decree.

Where a decree is made payable by instalments, and contains a provision that, on failure of any one instalment, the whole is to become due, the question whether the decree-holder may waive the benefit of the provision or must execute his decree within three years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case.

On an application for execution of a decree made payable by instalments, *held*, that the application was barred by limitation, on the ground that the judgment-creditors should have applied for execution within three years from the date of the first default in payment.

[R., 21 C. 542 (546).]

THIS was an application for execution of a decree which had been drawn up in accordance with a compromise come to between the plaintiff and the defendant. The decree directed payment of the amount due by instalments, namely, Rs. 50 in Magh 1289 (*Vilaity*) ; Rs. 100 in Phalgoon 1290 ; Rs. 65 in Magh 1291 ; and Rs. 60 in Magh 1292 (January-February 1885). The decree declared that on failure to pay any one instalment the agreement for payment by instalments should come to an end, and the whole sum should become due and payable with interest at 12 per cent.

The decree-holder, whose application for execution was made in April 1885, stated that the judgment-debtor had paid the first instalment, but had made default in payment of the remaining instalments, and he prayed for execution for Rs. 225 with interest from the due date of the second instalment. The judgment-debtor denied that he had paid any of the instalments, and he pleaded that the application was barred by limitation.

The lower Courts found as a fact that the judgment-debtor had not paid any of the instalments, but they held the application not barred by execution on the authority of *Nilmadhub* [74] *Chuckerbutty* v. *Ramsody Ghose* (1). The judgment-debtor appealed to the High Court.

Baboo *Horendra Nath Mookerjee*, for the appellant.

No one appeared for the respondent.

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*Appeal from Appellate Order No. 367 of 1885, against the order of R. Towers, Esq., Judge of Midnapur, dated the 14th of August 1885, affirming the order of Baboo Purna Chunder Chowdhry, Second Munsif of Tumluk, dated the 5th May 1885.

(1) 9 C. 857.

1886 FEB. 11. — APPELLATE CIVIL. — 13 C. 73.

JUDGMENT.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—No appearance has been made before us on behalf of the respondent in this case. We have been obliged to hear the appeal *ex parte.*

The case is one not of an uncommon character. A decree was passed providing for payment by instalments. It provided that, on failure to pay any one instalment, the debtor should become liable to have the whole decree executed at once at a particular rate of interest therein mentioned.

This was an application made for the execution of the whole decree with interest at the rate provided for in that decree.

The Courts below appear to have held that default was made in the very first instalment, which was to have been paid in Magh 1289; and they have ordered execution in respect of the subsequent instalments, which were not barred, it being admitted that the first instalment was barred.

It is contended for the judgment-debtor, who is the appellant before us, that the application for execution was barred by limitation. It is argued that there was no option to waive the right to realize the whole amount of the decree upon the first default, and that as the decree-holder had not done so, and as he did not bring this application within three years of the first default, the application was barred.

The Courts below relied upon a decision of this Court in *Nilmadhub Chuckerbutty* v. *Ramsody Ghose* (1). It was there held that, as the decree-holder had the option, on default of payment of any one instalment, to execute the whole decree, and did not exercise that option but received instalments due subsequent to the default, he must be considered to have waived his right to execute the whole decree. The Judges who decided that case decided it upon the terms of the decree before them. Having [75] regard to the terms of the decree in this case, we think that the ruling in *Nilmadhub Chuckerbutty* v. *Ramsody Ghose* (1), relied upon by the Courts below, is not applicable. Here the decree distinctly provides that, upon failure to pay any one instalment, the agreement for payment by instalments shall be cancelled and the decree-holder shall thereupon realize the whole decree, and shall also obtain from the judgment-debtor interest at a certain specified rate. The decree-holder in the present instance does not profess to have waived his claim, for he seeks to realize the whole decree, and he also claims interest at the rate stipulated. He therefore seeks to take advantage of the provisions of the decree. He must, we think, be also bound by any disability which may arise upon a proper construction of that decree. Upon the terms of the decree we think that he had no option to waive his right to execute it for the whole amount; and, having neglected to take advantage of the privilege given in that decree, he is now too late to realize anything.

We accordingly allow this appeal, set aside the orders of the Courts below, and dismiss the application, with costs in this Court and the lower Courts.

P. O'K. *Appeal allowed.*

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(1) 9 C. 857.

1886
FEB. 12.

APPELLATE
CIVIL.

13 C. 75.

13 C. 75.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

DWARKA NATH RAI AND OTHERS (*Plaintiffs*) *v.* KALI CHUNDER RAI AND OTHERS (*Defendants*).* [12th February, 1886.]

Co-sharers—Notice to Quit—Co-sharers, Suit by—Withdrawal of one co-sharer from the suit—Ejectment.

Where several co-sharers have served a joint notice to quit, upon which notice they jointly institute a suit for the recovery of the land, the fact that one of the plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.

[R., 29 M. 29 (34).]

[76] THE judgment appealed from was as follows :—

"These are two appeals Nos. 46, 50, from one and the same case. Plaintiffs sued the defendants Nos. 1 to 5 to eject them from the land in dispute after giving them notice of ejectment. During the hearing of the case, one of the plaintiffs, *viz.*, Saroda Sundari, withdrew from the suit, and the first Court, therefore, dismissed the suit for ejectment on the ground that her co-sharers alone, *viz.*, the remaining plaintiffs, could not maintain the suit.

"These remaining plaintiffs make appeal No. 46, and contend among other things: (1) that Saroda Sundari after having jointly with them served notice of ejectment and brought the suit could not withdraw from it, and that at any rate defendants Nos. 1 to 5's tenancy terminated on the expiration of the notice, and her withdrawal, therefore, could not protect the defendants; and (2) that the tenant-defendants having denied in their written statement the plaintiffs' title as landlords, they should have been treated as trespassers, and a decree should have been given to the remaining plaintiffs for possession of their share in the land.

"The tenant-defendants make appeal No. 50, and they contend among other things that the first Court, finding that the remaining plaintiffs alone were not entitled to eject, should have simply dismissed the suit, and should not have recorded its findings on the other points which arose in the case.

"On the first point in appeal No. 46, the ruling in *Mohamaya Chowdhrani* v. *Durga Churn Shaha* (1) shows that as Saroda Sundari did not ask for permission to bring a fresh suit, the first Court could allow her to withdraw from the suit. The appellants in No. 46 then refer to s. 111 of the Transfer of Property Act, and contend that the defendants Nos. 1 to 5's tenancy terminated on the expiration of the notice of ejectment, and that to hold that the suit could not be maintained on account of Saroda Sundari's withdrawal, would be virtually to enable her to re-introduce tenants on ijmali land without the consent of her co-sharer. But reading s. 113 of the same Act I hold that, as the notice was expressly waived by the plaintiff Saroda Sundari, it became void *ab initio*, as respects her share, so that the [77] case stood after withdrawal as if there had been no notice given on her part. If the land were *bhiti*, and its

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* Appeal from Appellate Decree No. 749 of 1885, against the decree of Baboo Mati Lal Sarkar, Subordinate Judge of Dacca, dated the 26th of January, 1885, reversing the decree of Baboo Ram Chunder Dhur, Second Munsif of Manickgunge, dated the 22nd of December 1883.

(1) 9 C.L.R. 332.

tenants were given notice to quit after 11 years' occupation, and then the notice were waived, and the tenant allowed to occupy for one year more, would cl. (*h*), s. 111 of the Transfer of Property Act, prevent the tenant from acquiring a right of occupany ? I think under s. 113 of the Act it would not. In this view of the case, I think the first point should be decided against the appellants in No. 46, as they alone could not have sued to eject.

1886 FEB. 12.

APPELLATE CIVIL.

13 C. 75.

" On the second point in appeal No. 46, I think plaintiffs can, after the tenant-defendants have denied the relation of landlord and tenant, treat the defendants as trespassers and bring a suit for possession of their share. But I doubt if a decree for possession on that ground can be given in the present suit. Here the repudiation was after the institution of the suit. I have not been shown any authority giving a decree on a cause of action accruing after the institution of the suit. Two rulings have been cited by the appellants—*Shumsher Ali* v. *Doya Bibi* (1), and *Sutyabhama Dassee* v. *Krishna Chunder Chatterjee* (2). But it appears to me on reading the full report that in each of these cases there was a repudiation on the part of the tenant before the cases were brought, and as the tenants insisted on their repudiation of the plaintiffs' title, the High Court decided against them. Neither of these two cases shows that a decree was given simply because during its progress the tenants repudiated the plaintiffs' title. I therefore find the second point in No. 46 also against the appellants in that case."

"On the tenants' appeal the Subordinate Judge reversed the findings of the Munsif on the authority of *Barhamdeo Narain Sing* v. *Mackenzie* (3)."

The plaintiffs appealed to the High Court.

Baboo *Durga Mohun Das*, for the appellants.

Baboo *Hari Mohun Chackrabati* and Baboo *Kuloda Kinkur Rai*, for the respondents.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

[78] This is a suit originally brought by five persons claiming as proprietors of the land held by the defendants, to eject them on service of notice.

In the course of the proceedings in the first Court, one of the defendants, Saroda Sundari Gupta, obtained leave to withdraw from the appeal, and was accordingly made a defendant by the other plaintiffs.

The Subordinate Judge in appeal has found that, although notice was served by all the landlords, still, inasmuch as one of them was not a plaintiff in the present suit, it must fail. The authorities cited to us—*Radha Proshad Wasti* v. *Esuf* (4), and *Reasut Hossein* v. *Chorwar Sing* (5) —do not support this view of the law. It seems rather that the plaintiffs now on the record are entitled to ask for a decree to get possession as against the defendants of their share of the estate provided that they succeed in other respects. As has been pointed out already by this Court, if such a suit were not possible, it would be in the power of the proprietor of a very small portion of a property to prevent the other proprietors from ever asking for their rights. We think, therefore, that the suit should proceed.

P. O'K. *Appeal allowed.*

(1) 8 C. L. R. 150. (2) 6 C. 55. (3) 10 C. 1095. (4) 7 C. 414. (5) 7 C. 470.

1886
FEB. 11.

APPELLATE CIVIL.

13 C. 78.

13 C. 78.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

MOSHAULLAH (*Defendant*) *v.* AHMEDULLAH (*Plaintiff*).*

[11th February, 1886.]

Appeal—Ex parte Order—Admission of Appeal—Limitation Act, 1877, s. 5—*Sufficient cause.*

An *ex parte* order admitting an appeal is subject to reconsideration on the hearing of the appeal.

Poverty is not sufficient cause, within the meaning of s. 5 of the Limitation Act, Act XV of 1877, for admitting an appeal after the ordinary period of limitation prescribed therefor has expired.

[F., 9 A. 11 (18) ; 5 M.L.T. 28=19 M.L.J. 209=1 Ind. Cas. 73 ; R., 9 A. 655 (659) =6 A.W.N. 245 ; U.B.R. (1892—1896) Vol. II, 452 (453).]

THIS was a suit to recover from the defendant the sum of Rs. 7,000, and for a declaration of lien over certain properties, situated in the 24 Pergunnahs, belonging to the defendant, a list of which was annexed to the plaint. The Court of first instance [79] passed a decree in favour of the defendant on the 27th of September 1883. On the 12th of December 1883 the plaintiff applied for a review of judgment, which was granted, and by a decree passed on review on the 27th of February 1884, the Subordinate Judge decreed the plaintiff's claim.

The defendant applied to the High Court for leave to appeal *in forma pauperis*, and on the 6th of January 1885, an *ex parte* order was passed, directing that the appeal be registered on payment of the Court-fee stamp of Rs. 34-3, which was done. When the appeal came on to be heard, the pleader for the respondent took a preliminary objection that the appeal had not been filed in proper time.

Baboo *Rajendro Nath Bose*, Baboo *Jadub Chunder Seal*, and Baboo *Gopal Chunder Ghosal*, for the appellant.

Baboo *Saroda Churn Mitter*, for the respondent.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows :—

JUDGMENT.

It is sufficient for the matter now under consideration, that is to say, whether or not the appellant has satisfied us that he had sufficient cause for not presenting this appeal within the period prescribed by law, to refer only to the order passed by a Division Bench of this Court on the 6th January 1885, admitting the appeal. That order was passed *ex parte*, and without notice to the respondent; and it was therefore open to reconsideration if the respondent after notice of the appeal thought proper to question the right of the appellant to have it admitted.

The grounds assigned by the appellant for special indulgence under s. 5 of the Limitation Act were then stated to be that he had not sufficient funds to proceed in the regular manner within the time prescribed by law, and it is now objected that this is not a sufficient cause. We think that the objection is fatal. If such ground be accepted as sufficient cause for

*Appeal from Original Decree No. 6 of 1885, against the decree of Baboo Nuffur Chunder Bhutto, First Subordinate Judge of 24-Pergunnahs, dated the 27th February 1884.

a special order of this description, there would be no limit to the period for extending the usual term of limitation to presenting an appeal. We therefore feel bound to hold that this appeal is barred by limitation, and we accordingly dismiss it.

Each party must pay his own costs.

P. O'K. *Appeal dismissed.*

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13 C. 80 = 11 Ind. Jur. 23.

[80] CIVIL REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Beverley.

DHUMEE BEHARA (*Plaintiff*) *v.* C. H. C. SEVENOAKS (*Defendant*).*
[7th January, 1886.]

Master and Servant—Monthly service—Wrongful leaving of employment, Consequence of—Right to Wages.

When a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all rights to wages for the time he had actually served during that month.

[Cited, 140 P.L.R. 1901 = 118 P.R. 1901; R., U.B.R. (1905), Master and Servant, p. 1 (3); 35 A. 132 = 11 A.L J. 104 (105).]

DHUMEE BEHARA, who had been a punka-puller in the service of C. H. C. Sevenoaks, brought a suit against the latter for balance of wages due for the month of July and 12 days of August. The defendant pleaded payment of Rs. 2 for the month of July and non-liability for the 12 days of August, on the ground that the man had left his service without giving any previous intimation. The Munsif, sitting as a Court of Small Causes, found that the plaintiff had been engaged on Rs. 3 a month; that he had abruptly left his employment without any reasonable cause, and received only Rs. 2 for the month of July; but, in pursuance of the rule followed by the Calcutta Court of Small Causes in such cases, namely, that "when a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all right to wages for the time he had actually served during that month," gave a decree for one rupee and dismissed the claim for the 12 days of August, subject to the decision of the High Court, to which he referred the following question under s. 617 of the Civil Procedure Code:—

"Whether a servant who was employed by the month, but who leaves his employment abruptly and without any previous intimation in the middle of the month, and that not on account of any fault, omission or ill-treatment on the part of the employer, is entitled to his wages proportionate to the number of days he has actually served."

The decision of the High Court (GARTH, C.J. and BEVERLEY, J.) was as follows:—

OPINION.

We think that the rule laid down by the Judges of the Calcutta [81] Court of Small Causes is correct, and that the same rule is applicable to the

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* Civil Reference No. 24 of 1886, made by Baboo Behari Lal Mullick, Munsif of Midnapur, dated the 16th of September 1885.

1886 JAN. 7. — CIVIL REFERENCE. — 13 C. 80 = 11 Ind. Jur. 23.

Mofussil. An old Regulation (Regulation VII of 1819) provided that in such cases fifteen days' notice should be given by either party wishing to terminate the contract, and that in default of notice fifteen days' pay should be forfeited. But that Regulation has been repealed, and in the absence of any legislative enactment on the subject, we think that the Calcutta rule is generally and correctly followed.

K. M. C.

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13 C. 81 (P.C.) = 13 I.A. 44 = 4 Sar.P.C.J. 700 = 10 Ind. Jur. 233 = Rafique and Jackson's P.C. No. 93.

PRIVY COUNCIL.

PRESENT :

Lord Blackburn, Lord Monkswell, Lord Hobhouse and Sir R. Couch.
[*On appeal from the Court of the Judicial Commissioner, Oudh.*]

SARABJIT SINGH (*Plaintiff*) *v.* F. C. CHAPMAN (*Defendant*).
[10th February, 1886.]

Lunatic—Act XXXV of 1858, *s.* 9—*Court of Wards in Oudh—Power to lease lands of proprietor disqualified from lunacy.*

The order of a Civil Court declaring, under Act XXXV of 1858, an Oudh talukdar to be of unsound mind and incapable of managing his affairs, renders him a disqualified proprietor within the meaning of s. 9 of that Act with the result that the Court of Wards is authorized to take charge of his estate without a further order of the Civil Court appointing the Court of Wards to be manager.

A Civil Court having made an order declaring a talukdar to be of unsound mind and incapable of managing his affairs, and having at the same time appointed to be manager of his estate the Deputy Commissioner of the district, who also acted as manager of the Court of Wards :

Held, that a lease for more than five years made by the latter officer, as representing the Court of Wards, was not invalidated under s. 14 of the above Act, providing that no manager, appointed by the Civil Court under it, shall have power to grant a lease for any period exceeding five years.

APPEAL from a decree (19th September 1883) of the Judicial Commissioner of Oudh, affirming a decree (19th September 1882) of the District Judge of Rae Bareli.

The principal question now raised related to the provision in s. 14 of Act XXXV of 1858 (an Act to make better provision for the care of the estates of lunatics) that no manager appointed by the Civil Court under that Act to take charge of the estate of a person adjudged to be of unsound mind and [82] incapable of managing his affairs, should have power to grant a lease for any period exceeding five years.

Whether this had the effect of invalidating a lease of lands, part of a taluk, for twenty-five years, made by the Court of Wards, the Deputy Commissioner of the District having been appointed manager of the talukdar's estate by the same order which adjudged the talukdar to be a lunatic, was the point raised by this appeal.

On the 10th April 1872 Rae Jagat Bahadur Singh, talukdar of Bhadri, through whom the plaintiff claimed, was adjudged by the Deputy Commissioner of Sultanpur, under Act XXXV of 1858, to be of unsound mind and incapable of managing his affairs, and by the same order the Deputy Commissioner of Pertabgurh was appointed his guardian and manager of his estate.

On the 23rd June 1874, under the sanction of the Chief Commissioner, a lease for twenty-five years from the Court of Wards as manager of the Bhadri estate, was made of four villages belonging to it, at the annual rent of Rs. 15,565. This was registered on 6th July 1874.

1886 FEB. 10. — PRIVY COUNCIL. — 13 C. 81 (P.C.) = 13 I.A. 44 = 4 Sar. P.C.J. 700 = 10 Ind. Jur. 233 = Rafique & Jackson's P.C. No. 93.

On the 3rd February 1878, Rae Jagat Bahadur Singh died, and the plaintiff, as his successor, obtained possession of the Bhadri estate on the 1st October following.

The present suit was instituted on the 20th December 1881 to obtain a declaration that the lease was null and void, and for possession of the land comprised in it with mesne profits and costs. The defence, *inter alia*, was that the lease was valid, having been duly sanctioned, the Chief Commissioner, as the principal Revenue officer in Oudh, having plenary powers under the orders contained in paragraph 76 of the letter of the Government of India, dated 4th February 1876, which had obtained the force of law under Indian Councils Act 1861 (24 and 25 Vic. c. 67), s. 25.

The Court of first instance, the District Judge of Rae Bareli, held that the lease was originally valid, being within the powers of the Court of Wards to grant. He also held that, because the plaintiff had by the receipt of rent and other acts appeared to ratify the lease, acquiescing in the lessee's possession, the lease could not now be disputed. On the latter ground a decree [83] dismissing the suit was supported on appeal by the Judicial Commissioner, who was of opinion that the lease was originally invalid on account of the restriction in s. 14, although the plaintiff was not now in a position to assert its invalidity.

The plaintiff having presented this appeal,

Mr. *J. Graham, Q. C.*, and Mr. *J. D. Mayne* for the appellant, argued that the Judicial Commissioner had correctly held the lease to be invalid in its origin, and that both the Courts below had attributed too great an effect to such acquiescence on the part of the plaintiff as might have taken place. This had not affected the duration of the lease, the term remaining subject to the express language of s. 14 of Act XXXV of 1858.

Their Lordships intimated that it was in regard to the original validity of the lease for twenty-five years that they desired to hear argument.

Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne*, for the respondent, argued that the Deputy Commissioner, as representative of the Court of Wards, was not bound by the restriction in s. 14, although he had been appointed in the order declaring Rae Jagat to be a lunatic. He was manager of the lunatic's estate as representing the Court of Wards, without any authority as manager derived from the order of the Civil Court appointing him.

Mr. *J. Graham, Q. C.*, replied.

JUDGMENT.

At the conclusion of the arguments their Lordships' judgment was delivered by

LORD BLACKBURN.—Their Lordships think that the decision of the Court below, which has been appealed against, was the right decision, but they do not agree exactly with the reasons given below.

Their Lordships have first to consider what point is raised by this case. The talukdar who owned the property in question became a lunatic, and an application was duly made for an enquiry into the state of his health under the 3rd section of Act XXXV of 1858. That application was made by the officer of the district where this taluk was situated ; and the

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Civil Court to which the application was made, having caused notice to be given, did [84] enter into an enquiry, and the result was that the talukdar was adjudged to be a lunatic. Thereupon the 9th section of Act XXXV of 1858 applied, which provides that: "when a person has been adjudged to be of unsound mind and incapable of managing his affairs, if the estate of such person or any part thereof consist of property which by the law in force in any Presidency subjects the proprietor, if disqualified, to the superintendence of the Court of Wards, the Court of Wards shall be authorised to take charge of the same." At the time Act XXXV of 1858 was passed, Oudh was not part of the British dominions (1), but it has become so since, and their Lordships take it that the Court of Wards may be considered as having the same jurisdiction, and all the powers that the Court of Wards elsewhere would have had. Therefore, under s. 9, the Court of Wards was authorised "to take charge of the same." It seems to have been rather hastily concluded by the Judge below that the Court of Wards being authorized by the Legislature "to take charge of the same," required some further order from the Civil Court which adjudged the talukdar to be a lunatic to justify them in acting. Their Lordships think there is no ground for saying that, though s. 9 goes on to provide: "In all other cases, except as otherwise hereinafter provided, the Civil Court shall appoint a manager of the estate."

It appears that the Civil Court, when they declared the taluqdar to be a lunatic and so authorized the Court of Wards in Oudh to manage his property, did contemporaneously make an order appointing as the manager of the property the same person who acts as the manager under the Court of Wards. In the 14th section of the Act there is a provision that "every manager of the estate of a lunatic appointed as aforesaid," that is a manager appointed, not the Court of Wards, "may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the lunatic; but no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of [85] any immoveable property for any period exceeding five years." Their Lordships suppose that the object of this order probably was that the Court thought *ex majore cautela* "if there is any ambiguity about it, we will take care that the Court of Wards has double power, and the manager shall act both under this Court and the Court of Wards." It may not have been judicious, but that is the utmost object the Court could have had, and if it was wrong it will not be a bit the worse.

Such being the case, the Court of Wards did enter into possession of the estate and the management of it. The lunatic continued to live till 1874, when a lease was granted, the details of which need not be further stated than to say that it was a lease for 25 years with various terms and provisions in it. It professes to be a lease of certain villages belonging to the Bhadri estate under the Court of Wards which was granted to Captain F. C. Chapman, with the sanction of the Chief Commissioner of Oudh, conveyed in a letter of the 2nd April 1874 to the Subordinate Commissioner. Their Lordships pause to ask what objection is there to this lease? No attempt is made to show that it was a lease improper in its terms, or that there was anything that amounted to

(1) This seems to be mistake. Act XXXV of 1858 was passed on the 14th September 1858 and the annexation of Oudh had then taken place.—ED.

an imposition, or that it was obtained by fraud or obtained improperly; but the one point relied upon against the lease is that it could not be granted for more than five years, and that objection, whatever might be its importance if the lease had been granted by one acting only under the authority of an appointment as manager by the Civil Court, does not seem to apply to a lease granted by the Court of Wards. That is the objection on which it is sought to set the lease aside.

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The Judge of first instance entered into a great many questions which their Lordships do not pretend to follow; but there are a great many allegations to show that, even if the lease was originally void if granted for more than five years, it had been made good by subsequent acts after the lunatic was dead, and the present appellant (the plaintiff in the suit) had come into enjoyment of the estate. Their Lordships do not propose to enter into those questions at all, because they do not arise, unless it can be shown that the objection that the lease exceeded a term of five years applies, and it certainly seems to their Lordships that [86] it does not. The Judicial Commissioner on appeal arrived at the same result, that the lease was good, by a different process of reasoning, for he held that there were various things, by estoppel and otherwise, which prevented the plaintiff from setting aside an invalid lease. Their Lordships would require a good deal more thought and consideration than has yet been given to the case before they pronounced an opinion upon such a point as that; but if it be correct to say, as their Lordships are decidedly of opinion that it is, that the Court of Wards could grant such a lease as this, and that it was not impeachable merely because it exceeded five years in length, no other objection being made, this lease is good and nothing further arises upon it. The lease was not void and could not be set aside, and consequently it stands. If there were other objections than this they have not been raised. Their Lordships do not suppose there are any, and they therefore think that the judgment appealed from should be affirmed, although not for the same reasons by any means that were given below.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from should be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Solicitors for the appellant : Messrs. *Barrow & Rogers.*
Solicitors for the respondent : Messrs. *Sanderson & Holland.*
C. B.

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APPEL-
LATE
CIVIL.

13 C. 86.

13 C. 86.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

HURROSUNDARI DABI (*Plaintiff*) *v.* BHOJOHARI DAS MANJI (*Defendant*).* [4th March, 1886.]

Second Appeal—Appeal to the High Court—General Clauses Act (*I of* 1868), *s.* 6—*Effect of Repeal—Proceedings—Bengal Rent Act* (*VIII of* 1885), *s.* 5.

The words "any proceedings commenced before the repealing Act shall have come into operation" in s. 6 of the General Clauses Act (I of 1868), include an [87] appeal against a decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit.

In a suit between landlord and tenant, a decree was passed by the lower appellate Court on the 28th of July 1885. Under the provisions of the Act then in force, namely, Beng Act VIII of 1869, s. 102, a second appeal to the High Court was prohibited. That Act was repealed by Act VIII of 1885, which came into force on the 1st of November 1885, this latter Act allowing an appeal to the High Court in suits similar to the one in question. A second appeal to the High Court in that suit was filed on the 18th of November 1885.

Held, that no appeal lay.

[**Appr.**, 15 C. 107 (108); **R.**, 16 C. 267 (274) (F.B.); 32 B. 337 (345) = 10 Bom. L.R. 330 (336); **D.**, 16 C. 429 (431).]

THIS was a suit for arrears of rent at an enhanced rate. The sum claimed was Rs. 24-7-6, being the rent of the year 1290 (1883-84). The plaint stated that the defendant was one of the plaintiff's ryots; that the plaintiff had re-measured the defendant's holding and found that he held more land than he was entitled to; that thereupon the defendant's rent was increased in proportion, the rate per bigha being settled by the defendant, who caused his agent to sign on his behalf the jamabandi which was prepared on the occasion. The defendant, by his written statement, denied that he had agreed to pay the increased rent, and also denied that he had authorized any one to sign the jamabandi on his behalf. Both the lower Courts found in favour of the defendant, and gave a decree for the amount admitted by him.

The plaintiff appealed to the High Court, on the ground that the Courts below should have found what excess lands were held by the defendant, and should have given a decree for the rent of the excess which might, on investigation, be found in the plaintiff's possession. The suit was instituted on the 30th July 1884. The decree of the Court of first instance bore date the 20th January 1885, and that of the lower appellate Court was dated the 28th July 1885. The grounds of appeal to the High Court were filed on the 18th of November 1885, on the opening of the Court after the Dusserah vacation. At the hearing of the appeal the pleader for the respondent objected that the case was governed by the provisions of Beng. Act VIII of 1869, and not by those of the new Rent Act, VIII of 1885, which came into force on the 1st of November 1885, and that therefore no appeal lay to the High Court.

[88] Baboo *Jagat Chunder Banerji*, for the appellant.

Baboo *Taruck Nath Sen*, for the respondent.

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* Appeal from Appellate Decree No. 2292 of 1885, against the decree of S. H. C. Taylor, Esq., Judge of Burdwan, dated the 28th of July 1885, affirming the decree of Baboo Nilmoni Das, Munsif of Raneegunge, dated the 28th of January 1885.

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JUDGMENT.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was delivered by

WILSON, J.—The question raised in this case is, whether an appeal lies.

The decree appealed against was a rent decree of such a character that under s. 102 of the old Beng. Rent Act (VIII of 1869) no second appeal would lie to this Court. After the date of that decree the new Rent Act (VIII of 1885) was passed, and that Act repealed s. 102 of Act VIII of 1869, and substituted other provisions on the subject. And we may take it, for the purpose of the present point, that those provisions are such that the present appeal would not be excluded by them. The question whether this appeal lies or not depends on the construction of s. 6 of the General Clauses Act (I of 1868). That section says: "The repeal of any Statute, Act, or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or *any proceedings commenced before the repealing Act shall have come into operation.*" The question is whether the words, "any proceedings *commenced before the repealing Act shall have come into operation,*" include an appeal against a decree made before the passing of the repealing Act If they do, the repealing Act cannot give an appeal in this case We think that there is clear authority for saying that the word "proceedings" in s. 6 of the General Clauses Act does include an appeal.

In the case of *Mungal Pershad Dichit* v. *Girja Kant Lahiri* (1) a very similar question was before their Lordships in the Privy Council with regard to the construction of the Limitation Act (IX of 1871). By s. 1 of that Act nothing contained in certain portions of the Act was to apply to suits instituted before the 1st of April 1873; and it was held by their Lordships that applications for execution in suits instituted before the passing of that Act fell within those terms. Their Lordships said: "It appears to their Lordships that a thing which applies, to an application [89] in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained." If an application for the execution of a decree in a suit is a proceeding in the suit, it would seem to follow that an appeal is also a proceeding in the suit; and the word "proceeding" appears to be quite as wide a word as "suit." But on the point before us there are no less than three direct decisions.

In the case of *Ratan Chand Shrichand* v. *Hanmantrav Shivbakas* (2), the question was raised in this way: There was an Act in force under which an appeal was given in certain cases. That Act was repealed, and on the date on which it was repealed the decree in question then had already been passed, but no appeal had been filed, and the question was, whether on the construction of s. 6 of the General Clauses Act the word "proceeding" in that section included an appeal, and whether therefore the appeal lay. The Court held that an appeal was a part of the "proceedings," and therefore was not affected by the repealing Act.

The same view was taken by two Judges, Sir R. Garth, C.J., and Jackson, J., in a Full Bench of this Court, in *Runjit Singh* v. *Meherban Koer* (3). And the same view was also taken by a Full Bench of the Allahabad High Court in the case of *Thakur Pershad* v. *Ashan Ali* (4).

(1) 8 C. 51. (2) 6 B. H. C. 166. (3) 3 C. 662. (4) 1 A. 668.

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These cases are on all fours with the present case, with this exception that there an appeal was given under the repealed Act, and it was held that the repealing Act did not take away the appeal. Here the repealed Act excluded an appeal. It follows on the same principle, that the repealing Act cannot give an appeal.

We hold therefore that no appeal lies in this case.

The appeal is dismissed with costs.

P. O'K. *Appeal dismissed.*

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13 C. 90.

[90] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

RABBABA KHANUM (*Petitioner*) *v.* NOORJEHAN BEGUM, *alias* DALIM SHAHIBA AND OTHERS (*Opposite Parties*).*

[12th March, 1886.]

Parties—Interpleader suit, Application to be made a party to—Civil Procedure Code, ss. 32, 622—Power of High Court on Revision—Power to add parties

A merely erroneous construction of the provisions of an Act is not a ground for relief under s. 622 of the Civil Procedure Code.

M J instituted an interpleader suit against two rival claimants, *N* and *A*, in respect of a sum of Rs. 20,000. *R* subsequently claimed a portion of the money and applied to be made a party to the suit; but was opposed by *M J* and *N*. The Subordinate Judge refused the application on the ground that though it was probably made under s. 32 of the Civil Procedure Code, *R*'s right or claim not having been admitted by the plaintiff nor asserted to his knowledge, she was not a necessary party under the special provisions of Chapter XXXIII of the Civil Procedure Code, and referred her to a regular suit.

Held, that the order, though based upon an erroneous construction of the provisions of s. 32 of the Code, did not come within the scope of s. 622, inasmuch as it could not be said that the Subordinate Judge had failed to exercise a jurisdiction vested in him by law.

Held, also, that a Court may, in the exercise of its discretion under s. 32 of the Code, add a party to a suit upon his own application.

[F., 8 P.R. 1897 ; R., L.B.R. (1872—92) Vol. I, 509 (511) ; 21 C. 539 (541) ; D., 11 C.L.J. 420=6 Ind. Cas. 546.]

MIRZA JURAT, on the allegation that he held a sum of Rs. 20,000 for the benefit of the widows of his father, Mirza Himmat, instituted an interpleader suit in the Court of the Subordinate Judge of Gya, in which he represented Noorjehan Begum and Mussamut Azmatunnissa as the rival claimants. Rabbaba Khanum then came in, and, alleging herself to be one of the widows of Mirza Himmat, made an application to the Court that she might be added as a party to the suit. Mirza Jurat, as well as Noorjehan Begum, having opposed the application, the Sub-Judge disallowed it, and referred the petitioner to a regular suit. Against that order Rabbaba Khanum presented a petition to the High Court (GARTH, C.J., and BEVERLEY, J.) and obtained a rule calling upon the plaintiff and Noorjehan Begum to show cause why the prayer of the petitioner to be made a party to the suit should not be granted.

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* Civil Rule No. 1451 of 1885, against the order of Baboo Kali Prasanna Mukherji, Subordinate Judge of Gya, dated the 18th of November 1885.

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[91] On the rule coming up for argument,—

The Advocate-General (Mr. *Paul*) and Baboo *Saligram Singh*, for the petitioner.

Mr. *Abul Hossain* and Baboo *Surendra Nath Roy*, for the plaintiff, opposite party.

Mr. *O'Kinealy* and Munshi *Mohamed Yusoof*, for the defendant, opposite party.

The Court (MITTER and NORRIS, JJ.) delivered the following judgment:—

JUDGMENT.

This rule was argued before us on Tuesday last; Mr. *O'Kinealy* showing cause against it, and the Advocate-General supporting it.

The facts of the case, as stated in the affidavit of the petitioner, are as follows:—

One Mirza Himmat, who was possessed of considerable property in British India, was killed in Turkish-Arabia on 26th August 1884; he left four widows, *viz.*, Mussamut Rabbaba, Mussamut Jhabhan, Mussamut Goharunnissa, and Mussamut Azmatunnissa, together with a child or children by each. It was alleged by Mr. *O'Kinealy* that Mirza Himmat left a fifth widow, by whom he had four children; the Advocate-General alleged that the lady, Noorjehan Begum, had been divorced by Mirza Himmat in his life-time. On 3rd September 1884 the children of Noorjehan Begum applied to the District Judge of Gya for a certificate under Act XXVII of 1860, in which they admitted that their mother had been divorced from their father. On 16th September 1884 Mirza Jurat, one of Mirza Himmat's sons by Mussamut Goharunnissa, also applied for a certificate, and he alleged that his father had divorced Noorjehan Begum. On 6th November 1884 Mussamut Rabbaba, who is a Persian lady, residing in Persia, preferred a petition to the Persian Consul at Baghdad, praying that her interests as widow and heiress of Mirza Himmat might be protected. This petition was forwarded to the Government of India, and found its way to the Judge of Gya on 15th January 1885. On 27th March 1885 Mussamut Rabbaba sent a petition to the Judge of Gya, and on 4th June [92] 1885 sent him a telegram, to which telegram the Judge replied, advising her to send a vakalutnama to a pleader; she sent the vakalutnama, but before it reached Gya, the Judge had, on 26th May 1885, disposed of the applications for a certificate and had granted it to Mirza Jurat. The Judge appears to have recognised the rights of Mussamut Rabbaba as an heiress to her husband, for he directed Mirza Jurat to hold Government Promissory Notes for Rs. 20,000 on her account.

On 25th July 1885 Mirza Jurat put in a petition before the Judge in which he withdrew his former statement that Noorjehan Begum had been divorced by his father; and in breach of the Judge's order paid over to her Rs. 10,000 out of the Rs. 20,000 he had been directed to hold for Mussamut Rabbaba. Upon this Mussamut Azmatunnissa put in a petition alleging that Mirza Jurat, in making the payment of Rs. 10,000 to Noorjehan Begum, was acting fraudulently and in breach of the security bond he had given, whereupon the Judge ordered him to take back the Rs. 10,000 from Noorjehan Begum, which he did. On 11th September 1885 Mirza Jurat (in collusion, it was alleged by the Advocate-General, with Noorjehan Begum), instituted

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an interpleader suit against Noorjehan Begum and Mussamut Azmatunnissa in respect of the Rs. 20,000 in the Court of the Subordinate Judge of Gya.

On 8th October 1885, Mussamut Rabbaba put in a petition praying to be made a party to the interpleader suit. On 17th November 1885 Mussamut Azmatunnissa put in a petition admitting Mussamut Rabbaba as widow and heiress of Mirza Himmat, and offering no objection to her being made a defendant in the interpleader suit. Mirza Jurat and Noorjehan Begum opposed the application, and on 19th November 1885 the Subordinate Judge dismissed the application. His judgment was as follows: "This is an application on behalf of one Mussamut Rabbaba to be made a party to an interpleader suit pending in this court. The application is probably made as one under s. 32 of the Civil Procedure Code; but the suit is one of peculiar character; such suits are not common, and the special provisions made for them are those contained in chapter XXXIII of the Civil Procedure Code. Such a suit is instituted when [93] two or more rival claimants assert claims in respect of the same thing against a stake-holder, who in such circumstances institutes the suit to have the right of the different claimants determined. Here the applicant's right or claim is not admitted by the plaintiff, and so I do not think her to be a necessary party to this suit. If she has any right, she can assert it in a regular suit. I do not think it right to make this suit complicated by introducing in it parties whose rights are in dispute and who asserted no claim to the plaintiff. I refuse to admit this petition, and it is accordingly rejected." This is no doubt an unfortunate judgment, and it is difficult to understand what the Subordinate Judge really means. The Advocate-General urged that the Subordinate Judge meant to say that the provisions of s. 32 had no application to interpleader suits, and were not capable of application to such suits. If we were satisfied that such was the Judge's meaning, we think we might reasonably have held that he "had failed to exercise a jurisdiction vested in him by law," and might have interfered under s. 622 of the Code of Civil Procedure. But we do not think the Judge means to hold that s. 32 is not capable of application to interpleader suits. What we think he has held, and held erroneously, is that no person should be added as a defendant to an interpleader suit unless the plaintiff recognizes some right in the party who seeks to be added to share in the thing in respect of which the interpleader suit is brought. This is not "failing to exercise a jurisdiction vested in him by law," but simply putting an erroneous construction upon the provisions of an Act. We are therefore constrained, reluctantly, to discharge the rule, but we shall do so without costs. Mr. O'Kinealy, in the course of his argument, urged that s. 32 of the Civil Procedure Code did not contemplate the addition of a party upon his or her own motion, and in support of his contention he cited *Badsha* v. *Nicol Fleming & Co.* (1), *Parshadi Lal* v. *Ramdial* (2) and *Biswas* v. *Biswas* (3). In the first case the plaintiffs had purchased a cargo of rice, by sample, from the defendants, who had purchased it, by sample, from one Pestonjee Eduljee; the defendants applied to have their vendor [94] added as a defendant, alleging that the question between the plaintiffs and themselves was the same as between themselves and their vendor. Pontifex, J., refused the application upon the ground "that he could not say that, in the suit by the defendant against Nicol Fleming & Co., the

(1) 4 C. 355. (2) 2 A. 744. (3) 5 C. 882.

plaintiff *ought* to have joined Pestonjee Eduljee as a defendant; nor could he say that the presence of Pestonjee Eduljee was *necessary* in order to enable the Court effectually and completely to adjudicate and settle the question involved in the suit between Badsha and Nicol Fleming and Co." The question whether Pestonjee Eduljee might have been added on his motion, though he was hardly likely to make such a motion, was not considered. The case of *Biswas* v. *Biswas* was a suit for the partition of joint family property, and the mortgagees of the right, title and interest of the plaintiff applied under s. 32 of the Civil Procedure Code to be added as parties. Wilson, J., refused the application upon the ground "that he did not consider their presence necessary to enable the Court effectually and completely to adjudicate upon and settle the questions involved in the suit." No doubt the learned Judges are reported to have said "that s. 32 does not contemplate any application by the person proposed to be added." But we have the authority of the learned Judge to say that he did not mean to lay down as a matter of law that no party could be added to a suit upon his own application. In the case of the *Oriental Bank Corporation* v. *Charriol*, No. 29 of 1882, Pigot, J., in an unreported judgment, delivered on 25th January 1886, deals exhaustively with this point (1). He says: "An objection was taken preliminary to the question as to the propriety of making the Banque parties; it was that s. 32 does not expressly provide that persons not parties to the suit may apply under the section, and a case of *Biswas* v. *Biswas* (2) was referred to; if that case laid down that such an application could not be entertained, I should of course follow it, but I do not understand that this is so, and I find that in *Vavasseur* v. *Krupp* (3), Jessel, M.R., upon the application of the Mikado of Japan, made that sovereign a party defendant under the English **[95]** rule corresponding to this section" (*i.e.*, order XVI, rule 13) "and in *Khadarsaheb* v. *Chotibibi* (4) and *Vydianadayyan* v. *Sitaramayyan* (5) orders making persons defendants on their own application under s. 32 were affirmed. A similar order was made by Bayley, J., in *Ahmedbhoy Hubibhoy* v. *Vuleebhoy Cassumbhoy* (6), where that learned Judge refers to *Campbell* v. *Holyland* (7), where after decree in a foreclosure suit, Jessel, M.R., made the purchasers after decree of the mortgagee's interest parties defendants upon their application, made *ex parte*; and also, upon the same application, made a purchaser of the mortgagee's interest party defendant." We entirely agree with this judgment and have no hesitation in holding that a Court may in the exercise of its discretion, add a party to a suit upon his own application.

K. M. C. *Rule discharged.*

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(1) See the case reported on appeal, 12 C. 642. (2) 5 C. 882.
(3) L.R. 9 Ch. D. 351. (4) 8 B. 616. (5) 5 M. 52.
(6) 8 B. 323. (7) L.R. 7 Ch. D. 166.

1886
APRIL 1.

APPEL-
LATE
CIVIL.

13 C. 95.

13 C. 95.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

HUKUM CHAND ASWAL (*Decree-holder*) *v.* GYANENDRA CHUNDER LAHIRI (MINOR) BY HIS GUARDIAN ABHAI CHUNDER BAGCHI, (*Judgment-debtor.*)* [1st April, 1886.]

Foreign Court, Decree of—Execution of decree—Jurisdiction—Court of Cooch Behar, Decree of.

The Courts of British India have no power to execute a decree passed by the Court of a Foreign State.

A decree of the Civil Court of Cooch Behar having been transferred for execution to the district of Rungpore: *held* that the Courts of Rungpore had no jurisdiction to execute the decree.

THIS was a proceeding in execution of a decree of the Civil Court of Cooch Behar. The decree-holder had applied for and obtained a certificate for the execution of the decree within the district of Rungpore. The certificate was sent to the Munsif of Gaibanda, who dismissed the application on the ground that the decree was barred by time. The Subordinate Judge concurred in that order.

[96] An appeal was preferred to the High Court.

Baboo *Durga Mohun Das*, for the appellant.

Baboo *Grija Sunkar Mozoomdar*, for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows:—

JUDGMENT.

MITTER, J.—This is an appeal against the decisions of the lower Courts passed in execution of a decree which was transferred from the Civil Court in Cooch Behar.

The lower Courts have decided that the decree is barred by limitation, but we are of opinion that they had no jurisdiction to execute the decree in question. There is no provision in the Code of Civil Procedure under which a Court in British India is competent to execute a decree transferred to it by any Court in a Native State out of British India.

That being so, the decree-holder, who is the appellant before us, has mistaken his remedy. The application for execution should have been dismissed on the ground that the Courts in British India have no power to execute a decree passed by the Courts of a Foreign State.

The appeal will therefore be dismissed with costs.

K. M. C. *Appeal dismissed.*

* Appeal from Appellate Order, No. 442 of 1885, against the order of Baboo Hemango Chunder Bose, Rai Bahadur, Subordinate Judge of Rungpore, dated the 3rd of October 1885, affirming the order of Baboo Krishtodhan Chowdhuri, Rai Bahadur, Munsif of Gaibanda, dated the 3rd of August 1884.

13 C. 96.

1886
APRIL 8.

APPELLATE CIVIL.

13 C. 96.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

PRANNATH SHAHA AND ANOTHER (*Plaintiffs*) v. MADHU KHULU AND OTHERS (*Defendants*).* [8th April, 1886.]

Landlord and Tenant-Suit for ejectment—Cause of action—Landlord's title, Denial of —Written statement.

P and *R* brought a suit for ejectment on the allegation that their tenants had failed to come to a settlement in respect of a certain *jote*, and that a notice to quit had thereupon been served on them. The defendants (tenants) in their written statement denied the landlords' title. The lower Courts found that the *jote* belonged to the plaintiffs, and the defendants had been and still were in possession of the same as tenants; but dismissed the suit on the ground that the service of notice had not been proved.

Held, (on second appeal) that, inasmuch as the cause of action must be based on something that accrued antecedent to the suit, the denial by the [97] defendants of their landlords' title in the written statement would not entitle the plaintiffs to a decree on the ground of forfeiture.

[F., 28 C. 135=5 C.W.N.263 ; 2 C.L.J. 389 (396)=9 C.W.N. 928 ; 31 M. 261=18M.L.J. 153=3 M.L.T. 265; 6 N.L.R. 83=6 Ind Cas. 927; **Cons.**, 13 C.W.N 949 (959)= 36 C. 927=2 Ind. Cas. 686; **R.**, 13 B. 323 (325) ; 12 M. 353 (354); 9 A.W.N. 176 ; 15 B. 407 (411) ; L.B.R. (1893-1900) 36 (37) ; **D.**, 13 C.W.N. 108 N.]

ON the facts stated as above, it was contended before the High Court, on the authorities of *Suttyabhama Dassee* v. *Krishna Chunder Chatterjee*(1), *Ishan Chunder Chattopadhya* v. *Shama Churn Dutt* (2), and *Baba* v. *Visvanath Joshi* (3), that the defendants, by denying the title of the plaintiffs (appellants), had forfeited their tenancy, and proof of service of notice being, under the circumstances, immaterial, the plaintiffs were entitled to a decree.

Baboo *Kishori Mohun Rai*, for the appellants.

Baboo *Jadab Chunder Seal*, for the respondents.

JUDGMENT.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J.—This was a suit brought by the plaintiffs to recover possession of a piece of land which it is alleged was held by the defendants as their tenants.

The plaintiffs alleged that they called upon the defendants to come to settlement with them in respect of the said land, and they say, as the defendants have refused to do so, they are entitled to evict them and get *khas* possession. They also alleged that they served the defendants with a notice to quit.

The Courts below have dismissed the plaintiffs' suit upon the ground that no notice to quit is proved to have been served upon the defendants.

It is contended before us that the Courts below were not right in dismissing the suit upon that ground, because the defendants in this case alleged that they were not the tenants of the plaintiffs ; and if it were found that they were not, no notice to quit would have been necessary.

*Appeal from Appellate Decree, No. 2095 of 1885, against the decree of G. G. Dey, Esq., Judge of Pubna and Bograh, dated the 13th of August 1885, affirming the decree of Baboo Bepin Behari Mukherji, Munsif of Pubna, dated the 2nd of April 1885.

(1) 6 C. 55. (2) 10 C. 41. (3) 8 B. 228.

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We are of opinion that this contention is not valid. If it should be found that the defendants were not the tenants of the plaintiffs, the plaintiffs' suit would be liable to be dismissed upon the ground that they have not established any cause of **[98]** action. Their cause of action was that the defendants were their tenants; that they called upon the defendants to settle for the lands ; that they refused to do so ; that they then served upon them a notice to quit ; and that, as they have not quitted the land, the plaintiffs are entitled to evict them and get *khas* possession, so that, if it were once found that the defendants were not the plaintiffs' tenants, their plaint as framed would disclose no cause of action against the defendants for possession.

It was contended before us that the plaintiffs might have been able to prove some other cause of action at the trial. But the answer to that is, that they would not be allowed to prove a cause of action different from the one set up in the plaint.

In point of fact, no other cause of action was alleged or proved upon the evidence that was taken. We asked the learned pleader, who argued the case before us, to point out any evidence showing that the plaintiffs were in possession otherwise than through the defendants as their tenants, but he admitted that there was no such evidence. Consequently, we may take it that the plaintiffs attempted to prove the cause of action which they set up, and *that* they could not do unless it were proved that notice had been served upon the defendants.

It was further contended that, although no notice was served upon the defendants, the plaintiffs were still entitled to a decree for ejectment, inasmuch as the defendants had, by their conduct in denying in their written statement the plaintiffs' title, forfeited their tenant right.

We are of opinion that this contention also is not valid. The plaintiffs' cause of action must be based on something that accrued antecedent to the suit. The fact that the defendants in their written statement denied their tenancy under the plaintiffs would not give the plaintiffs a cause of action upon which to found their suit.

The learned Vakil for the appellant referred us to three cases in support of his contention. The first is *Suttyabhama Dassee* v. *Krishna Chunder Chatterjee* (1). The cause of action in that case was, that the defendant, the tenant, had denied the landlord's title before the institution of the suit, and the Munsif, upon the evidence adduced in that case, found that to be the case, and this **[99]** Court, in confirming the Munsif's decision, held that this denial of the landlord's title gave the landlord a right to evict the tenant. It is true that the Judges who decided that case also refer to the further denial of the plaintiff's, the landlord's title contained in the written statement, but that was done merely with the view of showing that the conduct of the defendant had been throughout such that the Court could not take an equitable view of the case and interfere to prevent the forfeiture which he had incurred by denying his landlord's title from taking effect. The next case is *Ishan Chunder Chattopadhya* v. *Shama Churn Dutt* (2). There, the denial was by one of four defendants, and the learned Chief Justice, in delivering judgment, held that the denial by that one defendant was made on behalf of all, and that it therefore gave the plaintiff, the landlord, a right to bring a suit, upon that denial, against them all. The last is *Baba* v. *Vishvanath Joshi* (3), but that case does

(1) 6 C. 55. (2) 10 C. 41. (3) 8 B. 228.

not touch the point now before us, which is whether the denial of a landlord's title by way of defence to an action of ejectment a works forfeiture. That case was decided upon the ground that, as the defendant had set up a permanent title, and had failed to prove it, the landlord was entitled to recover possession. No question of the defendant (the tenant) having forfeited his right in the tenure by denying the landlord's title in his written statement was raised or decided in that case.

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We are, therefore, of opinion that these cases do not support the contention of the learned vakil.

The appeal will be dismissed with costs.

K.M.C. *Appeal dismissed.*

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13 C. 100.

[100] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ABIRUNNISSA KHATOON (*Petitioner*) *v.* KOMURUNNISSA KHATOON AND OTHERS (*Opposite parties*).* [13th April, 1886.]

Appeal—Civil Procedure Code, ss. 32 *and* 588, *cl.* 2—*Order rejecting application to be made a party.*

An order rejecting an application under s. 32 of the Civil Procedure Code to be made a party to a suit is not appealable under cl. 2, s. 588.

[F., 21 C. 539 (541); R., 12 C.P.L.R. 41 (42).]

ABIRUNNISSA KHATOON made an application to the Subordinate Judge of Pubna, that she might be added as a party to a suit pending in the Court. The petitioner represented that the subject-matter of the suit related to the estate of her deceased father, Fakruddin Ahmed, and she, being an heiress under the Mahomedan law, was a necessary party.

The Subordinate Judge passed the following order rejecting the application: "Unless I go into the merits of the case I cannot make the applicant a co-defendant against the will of the plaintiffs. As yet it does not clearly appear whether or not the petitioner is a necessary party in order to enable the Court to adjudicate more completely and effectually on the questions involved in this case."

The petitioner appealed to the High Court.

Mr. *Bonnaud* (with him Moulvie *Mohammed Yusuf*), for the appellants, referred to *Ghunrani* v. *Raj Coomar* (1). Although cl. 2, s. 588, mentions only the striking out or adding the name of a plaintiff or defendant, it has been held that an order made under s. 32 refusing to make an applicant a party to a suit is appealable.

Mr. *Bonnerjee* (with him Mr. *Gasper* and Mr. *O'Kinealy*), for the respondents, were not called upon.

JUDGMENT.

The judgment of the Court (MITTER and GRANT, JJ.) was delivere by

MITTER, J.—We are of opinion that there is no appeal in this case. All orders made under s. 32 of the Code of Civil [101] Procedure are not

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*Appeal from Order, No. 7 of 1886, against the order of Baboo Nilmani Das, Subordinate Judge of Pubna, dated the 5th of October 1885.

(1) A.W.N. 55, Broughton's Notes of Cases, 624.

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appealable by the 2nd clause of s. 588, but only orders striking out or adding the name of any person as plaintiff or defendant. As the order against which this appeal has been preferred does not come within the purview of this clause, we think there is no appeal. The appeal is rejected with costs.

K. M. C. *Appeal dismissed.*

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13 C. 101.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

SARAT SUNDARI DABIA (*Defendant*) *v.* BHOBO PERSHAD KHAN CHOWDHURI (MINOR) BY HIS MOTHER RAM SUKHI DABIA AND ANOTHER (*Plaintiffs*).* [14th April, 1886.]

Limitation Act. 1877, *art.* 144—*Ijardar, Dispossession of—Adverse possession—Zemindar, Suit by.*

Possession taken by a trespasser during the currency of an *ijara* lease does not become adverse to the zemindar (lessor) until upon the expiration of the term, and a suit for possession may be brought within 12 years of that date under the provisions of art. 144 of the Limitation Act.

Krishna Gobind Dhur v. *Hari Churn Dhur* (1) followed.

[F., 10 C.W.N. 343 (314); 29 A. 593=A.W.N. (1907) 185=4 A.L.J. 726; R., 18 B. 51 (55); 27 B. 43 (54)=4 Bom. L R. 721; 16 C.P.L.R. 154 (155); 18 C. L. J. 399 (414); D., 1 C.W.N. 246 (247); 26 C. 460 (464).]

THIS suit, which was one for recovery of possession of an 8-anna share of two mouzahs, was instituted on the 5th Aughrah 1291 B.S. (19th November 1884). It was alleged that the plaintiff's predecessors in title had granted an *ijara* of the property to one Mr. Brodie, who remained in possession till 1285 B.S. (1878), the end of the term of his lease, and that ever since the month of Joisto 1286 B.S. (May-June 1879) the plaintiff had been wrongfully kept out of the land. The defendant, among other things, pleaded that she having been in exclusive possession of the land since the month of Joisto 1276 B.S. (May-June 1869), the plaintiff's claim, if any, was barred by lapse of time.

The Subordinate Judge decreed the suit, and held upon the authorities of *Krishna Gobind Dhur* v. *Hari Churn Dhur* (1) and *Woomesh Chunder Goopto* v. *Raj Narain Roy* (2), that [102] although the plaintiff's *ijardar* had been dispossessed by the defendant in 1278 B.S. (1871), the limitation as against the plaintiff would not begin to run until upon the expiration of the *ijara* lease. The Judge confirmed the decree.

The defendant appealed to the High Court.

Baboo *Srinath Das* and Baboo *Kishori Lall Sircar*, for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Girija Sunkar Mozumdar*, for the respondent.

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* Appeal from Appellate Decree, No. 2275 of 1885, against the decree of J. F. Stevens, Esq., Judge of Mymensingh, dated the 18th of August, 1885 affirming the decree of Baboo Rajendra Coomar Bose, Subordinate Judge of that district, dated the 30th of March 1885.

(1) 9 C. 367. (2) 10 W. R. 15.

1886 APRIL 14. — APPELLATE CIVIL. — 13 C. 101.

JUDGMENT.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J.—The plaintiff seeks to recover possession of an 8 anna share of two mouzahs, alleging that the said share appertains to his zemindari No. 6100, and that the defendant, who is the owner of the other 8-annas is in wrongful possession of the whole. He further alleges that his zemindari was let out in *ijara*: that the *ijara* lease terminated in the year 1285; and that on the termination of that lease he was dispossessed from the disputed land in the beginning of 1286.

The defendant denied the plaintiff's allegation that he was dispossessed 1286, and alleged that these two mouzahs constituted the holding of one Goluck in the defendant's zemindari, and that in execution of a rent decree this tenure was sold and purchased by him, the defendant, in the year 1276. He therefore contended that the plaintiff's suit was barred by limitation, and that he was entitled to retain possession of the sixteen annas of the lands of these two mouzahs.

The lower Courts decreed the plaintiff's claim. They found that the 8 annas share of the two mouzahs appertains to the plaintiff's zemindari No. 6100, but they were of opinion that the dispossession of the plaintiff's *ijaradar* took place in the year 1278, when the plaintiff's zemindari was in *ijara* to Mr. Brodie, and that the *ijara* terminated in the year 1285. They accordingly decreed the suit, holding that, as it was brought within twelve years of the termination of that *ijara*, at which period the plaintiff's cause of action accrued, it was not barred.

[103] It is contended before us that this decision is erroneous in law; that the cause of action in this case accrued to the plaintiff when possession was taken by the defendant in the year 1278, and that as the present suit was not brought within twelve years of that date, it was barred by limitation. It was contended, on the other hand, that the dispossession of the *ijaradar* was not the dispossession of the zemindar.

Various rulings of this Court have been cited before us. It appears that there is a conflict of decisions in this Court on this point. The latest ruling—*Krishna Gobind Dhur* v. *Hari Churn Dhur* (1)—is in favour of the view taken by the lower Courts. It follows an earlier ruling—*Woomesh Chunder Goopto* v. *Raj Narain Roy* (2). Having considered these and the other cases to which we were referred, we are of opinion that the view taken by the lower Courts on this point is correct. For the reasons given in *Krishna Gobind Dhur* v. *Hari Churn Dhur* (1) we are of opinion that the present case is governed by art. 144 of the Limitation Act; and that as the adverse possession of the defendant against the plaintiff commenced only on the termination of the *ijara* lease, within twelve years of the suit, the suit is not barred.

Another point has been raised before us, that the plaintiff was not at any rate entitled to *khas* possession.

I was under the impression when the case was being argued that the defendant set up a tenancy under both zemindaries; but even if it were so, the lower Courts would have been right in decreeing the suit, because it was not proved that the tenure was transferable. But Babu Srinath Dass, who appears for the appellant, informs us that the defendant alleged that the tenure was held under the defendant's zemindari only. In that view the question of transferability does not arise. The

(1) 9 C. 367. (2) 10 W.R. 15.

1886 APRIL 14. — APPELLATE CIVIL. — 13 C. 101.

8-annas share of the disputed land being found to be part and parcel of the zemindari, and the claim not being barred by limitation, there is no defence to the suit.

The lower Courts were therefore right in awarding a decree in favour of the plaintiff. We dismiss the appeal with costs.

K. M. C. *Appeal dismissed.*

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13 C. 104 (F. B.).

[104] FULL BENCH.

Before Sir W. C. Petheram, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice O'Kinealy.

BANI MADHUB MITTER (*Plaintiff*) *v.* MATUNGINI DASSI AND OTHERS (*Defendants*).

KALI SHUNKAR DASS (*Plaintiff*) *v.* GOPAL CHUNDER DUTT (*Defendant*).* [5th May, 1886.]

Limitation Act (*XV of* 1877), *s.* 12, *sch. II, art.* 152—*Exclusion of time between delivery of judgment and signing decree—Civil Procedure Code* (*Act XIV of* 1882), *s* 205.

Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under s. 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal.

[Commented on, 23 B. 442 (445); Diss., 12 A. 461 (F.B.) = 10 A.W.N. 149; 13 C.P. L.R. 78 (79); 3 L.B.R 62 (63) (F.B.); U.B.R. (1905), Civil Procedure, 24; R., 12 A. 79 (81) = 10 A.W.N. 25; 25 C. 100 (111); 23 B. 442 (445); 1 O.C. 184 (185): 15 C.W.N. 787 = 10 Ind. Cas 542; D., 39 C. 766 = 15 Ind. Cas. 59; 1 C.W.N. 93.]

THE question raised in these two appeals was, whether or no they were filed within time. The cases came on for hearing before Mitter and Macpherson, JJ., who, considering that the case of *In re Chowdhry Mohendro Narain Roy* (1) conflicted to some extent with the case of *Ramey* v. *Broughton* (2), referred the question to a Full Bench.

With reference to the points raised the following facts are material:—

In Special Appeal No. 2065 of 1884 the date of the Munsif's judgment was the 17th July 1883.

The date on which the original decree was signed was the 23rd July 1883.

The date on which the application for copy of the decree was made was the 3rd August 1883.

The date on which the copy of the decree was ready for delivery was the 11th August 1883.

[105] The date on which the appeal was filed was the 30th August 1883.

In Special Appeal No. 534 of 1885 the date of the Munsif's judgment was the 27th February 1884.

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* Full Bench on Special Appeals, Nos. 2065 of 1884 and 534 of 1885, from the decisions of the Judge of Zillah 24-Pergunnahs, dated respectively 22nd July 1884 and 26th February 1885, affirming the decrees respectively of the First Munsif of Baraset and the Third Munsif of Alipur, dated respectively the 17th July 1883 and 27th February 1884.

(1) 18 W.R. 512. (2) 10 C. 652.

The date of application for a copy of the decree was the 29th February 1884.

The date on which the original decree was signed was the 4th March 1884.

The date on which the copy was ready and delivered was the 7th March 1884.

The date on which the appeal was filed was the 7th April 1884, the 6th April being a Sunday.

Babu *Bhobani Charan Dutt* for the appellant in Special Appeal No. 2065.—The question is what is the meaning of the words "time requisite for obtaining a copy" in s. 12 of the Limitation Act. As to this *see Chowdhry Mohendro Narain Roy, in re* (1), where the time between the date on which judgment was pronounced and that on which the decree was signed was allowed; that decision was under Act VIII of 1859, s. 333. Subsequent provisions for the limitation of appeals have been re-enacted in the Limitation Acts, which contain words to the same effect as those in s. 333. If the Legislature had not approved of Phear, J.'s decision in *Chowdhry Mohendro Narain Roy's case*, some alteration would have been made. Article 152 of the Limitation Act of 1877 declares that limitation shall run "from the date of the decree appealed against," but nowhere in that Act is the date of the decree defined to be the date on which the decree comes into existence. I submit the "date of the decree" in art. 152 means the date on which the decree was actually prepared and signed.

Babu *Guru Das Banerjee* (with him Babu *Aubinash Chunder Banerjee*), for the respondent.—Section 205 of Act XIV of 1882 defines "the date of the decree." The language of s. 12 of the Limitation Act of 1877 supports my contention that time runs from the date of the judgment—*see Ramey* v. *Broughton* (2). Article 152 of the Limitation Act must be read subject to s. 205 of the Code.

[106] Baboo *Dwarka Nath Chuckerbutty*, for the appellant in special appeal 534.

Baboo *Jogendro Chunder Ghose*, for the respondent.

OPINION.

The opinion of the Full Bench was delivered by

PETHERAM, C.J.—The reference in these two cases involves the question of the construction of s. 12 of the Limitation Act read along with art. 152 of the second schedule of the same Act.

Article 152 limits the time for an appeal under the Code of Civil Procedure to the District Judge to 30 days from the date of the decree or order appealed against; and the question is, from what date is this period to be computed?

The first question is, what is the date of the decree, and for the purpose of ascertaining that, it is necessary to look at s. 205 of the Code of Civil Procedure. By that section it is provided that a "decree shall bear date the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree," so that whatever may be the day on which the actual signature is made, the date of the decree, for all purposes, is to be the date on which the judgment was pronounced.

(1) 18 W. R. 512. (2) 10 C. 652.

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Bearing that in mind, and also bearing in mind that under s. 541 of the Code of Civil Procedure, it is necessary that the Memorandum of Appeal shall be accompanied with a copy of the decree, it would be unfair to compute the period of limitation, in all cases, from the date on which the judgment was delivered, because it is obvious that things may intervene so as to prevent the decree being signed until after the expiration of the whole period of 30 days allowed for preferring the appeal, and so the appeal may be rendered impossible without any fault of the parties; and therefore s. 12 of the Act provides that in computing this period of thirty days, the time requisite for obtaining a copy of the decree appealed against shall be excluded; and the question really in this case is, what is the meaning of these words.

The facts are (taking Special Appeal No. 2065 first) that the judgment was pronounced on the 17th July 1883, and [107] consequently that is to be taken as the date of the decree. The decree was not in fact signed until the 23rd July, so that until that day the appellant could not have obtained the necessary materials, the copy of the decree, to enable him to appeal. He applied for a copy on the 3rd August and obtained it on the 11th idem, so that he is under s. 12 of the Limitation Act entitled to have these days excluded in computing the time taken in presenting his appeal. The appeal was presented on 30th August, and the period of limitation prescribed—thirty days from the date of the decree—is exceeded even after excluding eight days from the 3rd to 11th August (if it is calculated from the date of the decree itself). But in our opinion the fact that the decree was not in existence, that is, signed by the particular Judge, and could not therefore be copied until 23rd July, that is, six days after the date that it bears, entitles the appellant to ask us to deduct those six days in addition to the eight days, and thus to hold that under s. 12 the appeal has been presented within the prescribed period.

In this case the appellant obtained a copy of the decree (having made his application earlier) on the 11th August 1883, and he filed the appeal on the 30th idem, and was therefore well within time.

As to the other case the law of course is the same; and at first sight it looks as if the appeal were beyond time, but, on examining the facts, it appears that the last day of the period of limitation was a Sunday, and therefore the time was extended to Monday, the 7th of April; consequently in this case also the questions must be answered in the affirmative, and the appeal must be taken to have been filed in time.

MITTER, J.—The judgments therefore of the lower appellate Court in these cases will be reversed, and the cases will be remanded to that Court to hear the appeals on the merits.

T. A. P.

13 C. 108.

1886
MAY 27.

CRIMINAL REFERENCE.

13 C. 108.

[108] CRIMINAL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

IN THE MATTER OF THE CORPORATION OF THE TOWN OF CALCUTTA *v.* MATOO BEWAH AND OTHERS.* [27th May 1886.]

Beng. Act IV of 1876, *s.* 248—*Conviction for keeping animals without license—Continuing offence between date of summons and date of conviction—Second prosecution for same offence on different date.*

Under s. 248 of Bengal Act IV of 1876, a milkman, who has been convicted and fined for keeping an animal without a license, cannot again be prosecuted for the continuance of the same offence before conviction, nor can he be separately prosecuted for the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction.

In a summons taken out on the 27th March against a milkman for an offence under s. 248, Bengal Act IV of 1876, the offence was stated to have been committed on the 16th March; the case was fixed for the 8th April, when the defendant was convicted and fined by the Magistrate. Another summons had been taken out against him on the same day (27th March) for a similar offence stated to have been committed on the 25th March : *Held* : that he could not be convicted on the second charge.

THE facts stated in the reference were as follows :—

The defendants who are milkmen were prosecuted under a summons taken out by Mr. Rebeiro, overseer, on the part of the Corporation of Calcutta on the 27th March last, under s. 248 of Beng. Act IV of 1876. The application stated that the offence was committed on 16th March, and the case was fixed for hearing on the 8th April, when it came on for hearing before the Presidency Magistrate who convicted them and fined them Rs. 8, Rs. 12 and Rs. 15 respectively.

Prior to the trial of this case a summons was also taken out against them on the same date, *i.e.*, 27th March, by Mr. George, Inspector, on the part of the Corporation, under the same section.

The application stated that the offence was committed on 25th March, and the case was fixed for hearing on 10th April. When the case came on for trial before the Honorary Magistrate, he [109] entertained doubt as to whether the defendants could be tried on the second summons taken out against them, pending the first summons and before its disposal. It was contended on behalf of the Corporation that these were two distinct offences, one committed on the 16th March and the other on the 25th, and that the conviction on the first summons was no bar to the trial of the defendants under the second summons. The Honorary Magistrate, however, was of opinion that s. 243 contemplated one substantive offence for keeping animals without license, and the fine not exceeding Rs. 100 covered the offence committed up to the date of conviction, and that the defendants could not be prosecuted for the same offence committed between the date of the first summons and the conviction on it ; but at the request of the Corporation he referred for the opinion of the High Court the following questions :—

1. Whether, under s. 248 of Beng. Act IV of 1876, a milkman who keeps any animal without such license as is mentioned therein, and who has been convicted and fined under that section by the Magistrate, can again

* Criminal Reference No. 2 of 1886 made by Baboo Aushootosh Dhur, one of the Justices of the Peace for the Corporation of the Town of Calcutta, dated the 16th April 1886.

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be prosecuted for the continuance of the same offence before the date of such conviction.

2. Whether, under s. 248 of Beng. Act IV of 1876, a milkman who keeps any animal without such license as is mentioned therein, can be separately prosecuted for the same offence for each day the offence is continued, as a separate and distinct offence under that section before conviction.

The parties were not represented on the hearing of the reference by the High Court.

The opinion of the Court (PIGOT and MACPHERSON, JJ.) was as follows :—

OPINION.

We are of opinion that both questions should be answered in the negative. The section contemplates one offence and one prosecution, a conviction upon which is to involve a liability to fine not exceeding Rs. 100 and to a further fine not exceeding Rs. 20 for each day during which the offence is continued.

In *Garrett* v. *Messenger* (1) the offence was the keeping a house for public dancing, &c., without a license, and the section under which the prosecution was instituted provided that **[110]** "every person keeping such house, &c., without such license as aforesaid, shall forfeit the sum of £100 to such person as will sue for the same." Two actions were brought under the Act by common informers, each to recover a penalty of £100. A verdict was taken in the first, and in the second, Wills, J. held that the penal powers of the Act were exhausted by the recovery of one penalty : the full Court concurred in this view, Bovill, C.J., saying that, if the Legislature had intended that there should be more than one penalty, that intention would no doubt have been expressed in clear and unequivocal terms. That case was referred to in *Milnes* v. *Bale* (2), where the distinction is pointed out between cases where a penalty is imposed in respect of a complex and continuous act, and those where it is imposed in respect of a simple uncomplicated offence which is complete.

In this case, the keeping of animals without a license is, as in the case of *Garrett* v. *Messenger*, the keeping a house of entertainment without a license was, a comprehensive offence to be proved by many acts, all of which constitute only one offence for which only one penalty is recoverable —that penalty being a fine not exceeding Rs. 100, and such further fine as may be imposed ; those of the acts done which are committed after summons and before conviction must be treated as part of it.

We therefore answer both questions submitted to us by the Magistrate in the negative.

J. V. W.

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(1) L. R. 2 C. P. 583. (2) L. R. 10 C. P. 595 and 597.

13 C. 110.

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CRIMINAL REVISION.

13 C. 110.

CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Macpherson.

IN THE MATTER OF THE PETITION OF RAM DAS MAGHI AND ANOTHER.* [20th May, 1886.]

Judgment—Form and contents of judgment—Criminal appeal to Magistrate-Criminal Procedure Code, 1882, *ss.* 367, 424.

A Magistrate, after hearing an appeal from the Deputy Magistrate, gave the following judgment: "I see no reason to distrust the finding of the lower [111] Court. The sentence passed, however, appears harsh. I reduce the term of imprisonment to fifteen days. The fines and terms of imprisonment in default will stand." *Held,* following the decision in *Kamruddin Dai* v. *Sonaton Mandal* (1), that it was not a judgment within the meaning of ss. 367 and 424 of the Criminal Procedure Code.

[F. 22 C. 241; 15 B. 11; Expl., 20 C. 353; 8 A.W.N. 280; R. 19 A. 506 (F.B.); 8 N.L.R. 84 = 15 Ind. Cas. 975 = 13 Cr. L J. 559.]

THIS case merely followed the decision in *Kamruddin Dai* v. *Sonaton Mandal* (1), holding on the authority of that case that the judgment given by the Magistrate was not a judgment in accordance with ss. 367 and 424 of the Code. The Court ordered the judgment to be set aside and directed that the appeal should be reheard.

Babu *Iswar Chandra Chakrabati,* for petitioners.

Baboo *Durga Mohun Das,* for opposite party.

J.V.W.

13 C. 111.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

O. STEEL & Co. (*Decree-holders*) *v.* ICHCHAMOYI CHOWDHRAIN AND ANOTHER (*Judgment-debtors*).† [18th March, 1886.]

Appeal—Order staying execution of Decree—Civil Procedure Code, 1882 *ss.* 2, 243, 244—*Decree.*

An order under s. 243 of the Civil Procedure Code staying execution of a decree determines a question relating to the execution of the decree within the meaning of s. 244, and is therefore a decree within the meaning of s. 2; an appeal therefore lies from such order

[F., 10 A. 389 (391); 20 M. 366 (367); R., 3 O. C. 42 (43); 8 C.W.N. 257 (260).]

IN proceedings in execution of a decree the judgment-debtors applied for stay of execution on giving security, on the ground that they had, in the same Court in which the execution proceedings were being carried on, brought a suit against the decree-holders for possession and mesne profits of the land in connection with the suit in which the decree under execution had been obtained. The Subordinate Judge made an order on the

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* Criminal Revision No. 192 of 1886, against the order passed by A. Boruah, Esq., Magistrate of Bogra, dated the 24th of March 1886, modifying the order passed by A. C. Chatterji, Esq., Deputy Magistrate of Bogra, dated the 19th of March 1886.

† Appeal from Order No. 384 of 1885, against the order of Baboo Ram Coomar Pal Chowdhuri, Subordinate Judge of Sylhet, dated the 3rd of September 1885.

(1) 11 C. 449.

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application that the execution proceedings should be stayed, but as the day the [112] application was filed was the very day fixed for the execution sale, and the decree-holder had been put to considerable cost in enforcing the decree, the Subordinate Judge ordered the judgment-debtor to pay Rs. 300 in part satisfaction, as well as to give security for payment of the remaining amount.

From this order the decree-holders appealed, and a preliminary objection was taken that no appeal lay.

Mr. *Adkin*, for the appellants.

Baboo *Jogesh Chundra Roy*, for the Respondents.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

This is an appeal against an order passed under s. 243 of the Civil Procedure Code. A preliminary objection has been taken that no appeal will lie against an order made under that section, and we have been referred to a decision to that effect in *Nihal Chand* v. *Rameshari Dasse* (1). We are not disposed to follow that decision, partly because we think that, under the definition of decree in s. 2 of the Civil Procedure Code, the order made under s. 243 did determine a question mentioned or referred to in s. 244, *viz.*, a question relating to the execution of the decree ; that is to say, the order determined the question whether the decree should be executed or whether execution should be stayed. In support of this view we find several reported decisions—*Kristomohiney Dassee* v. *Bama Churn Nag Chowdhry* (2), *Luchmeeput Singh* v. *Sitanath Doss* (3), and *Ghazidin* v. *Fakir Baksh* (4). We are also aware of other decisions to the same effect which have not been reported. On the other hand, the case to which we have been referred is, so far as we are aware, the only one to the opposite effect, and the reasons given therein do not altogether commend themselves to us. Then, on the merits, it appears that the decree in this case was on account of costs which were decreed to the appellants in consequence of the respondent's failure in a previous suit in respect of the same matter. The respondent was allowed liberty to bring a fresh suit, and the costs of the previous proceedings were given against [113] him. But apparently by some oversight it was not made a condition, as it usually is in such cases, that payment of the costs should be a condition precedent to the institution of the fresh suit We think, however, that this was a case in which it was incumbent upon the Court to see that the costs were paid within a reasonable time, and not a case in which further time should be given merely because a fresh suit has been instituted. We, therefore, set aside the order of the lower Court staying the execution proceedings, and direct that these proceedings do proceed. The appellants will be entitled to their costs in this Court.

J.V.W. *Appeal allowed.*

(1) 9 C. 214. (2) 7 C. 733. (3) 8 C. 477. (4) 7 A. 73.

13 C. 113.

1886 MARCH 25.

APPELLATE CIVIL.

13 C. 113.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Agnew.

BHOBANI MAHTO (*Plaintiff*) *v.* SHIBNATH PARA (*Defendant*).*
[25th March, 1886.]

Registration Act (*XX of* 1866), *s.* 17, *cl.* 4—Zur-i-peshgi *lease*—"*Leases not exceeding one year,*" *Meaning of.*

Leases which were exempted from the operation of s. 17, cl. 4, Act XX of 1866, were leases the term of which was one year certain.

Where a *zur-i-peshgi* lease was granted for one year, but with a stipulation that unless the loan were repaid within that time it should continue in force, *held*, that such a lease came within the words of s. 17, cl. 4, Act XX of 1866, "leases of immoveable property for any term exceeding one year" of which registration was compulsory.

[**Diss.** 17 C. 548 (556) ; **R.** 9 C.P.L R. 88 (89).]

THIS was a suit for arrears of rent. The plaintiff based his claim upon an unregistered *zur-i-peshgi* lease which, though it purported to be for the term of one year, contained a stipulation that the lease should remain in force until the loan was repaid. Both the lower Courts agreed in holding that the document was one of which registration was necessary under s. 17, cl. 4, Act XX of 1866, and refused to admit it in evidence.

On appeal to the High Court it was contended that the lease did not require to be registered.

[114] Baboo *Rajendra Nath Bose,* for the appellants.

Baboo *Dwarka Nath Chuckerbutty* for the respondent.

The judgment of the Court (MITTER and AGNEW, JJ.) was as follows :—

JUDGMENT.

The question raised in this case is whether the *zur-i-peshgi* lease upon which the plaintiff relied is a lease which required registration. It was executed in September 1866. The Registration Act then in force was Act XX of 1866. Section 17 says: "Instruments next hereinafter mentioned will be registered." And the 4th clause is to this effect: "Leases of immoveable property for any term exceeding one year." The question before us is, whether the lease in this case was for any term exceeding one year. The lease was a *zur-i-peshgi* lease granted on the advance of a loan, and it is stipulated therein that it was in the first place to remain in force for one year ; but then it goes on to provide that if the loan is not repaid it will continue in force ; and the question therefore for our consideration is, whether a lease of this description comes within the words "leases of immoveable property for any term exceeding one year." We think it does. It appears to us that the leases which were intended to be excluded from this 4th clause were leases the term of which was one year certain. In this case the condition was that if the *zur-i-peshgi* money was not repaid the lease was to continue in force until the money was repaid, and therefore the term

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*Appeal from Appellate Decree No. 2021 of 1885, against the decree of Moulvie Mahomed Nurul Hossein, Subordinate Judge of Sarun, dated the 6th of August 1885, reversing the decree of Baboo Harihar Churn, Munsif of Chuprah, dated the 1st of December 1884.

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might exceed one year. The lease might, in fact, be in force for many years. So long as the money is not repaid it would not come to an end.

We think, therefore, that the Subordinate Judge was right in holding that the lease upon which the plaintiff relies required registration under Act XX of 1866.

We dismiss this appeal with costs.

K. M. C. *Appeal dismissed.*

13 C. 115.

[115] ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

CARRISON (*Plaintiff*) *v.* RODRIGUES AND OTHERS (*Defendants*).*
[21st April, 1886.]

Compromise—Compromise made notwithstanding dissent of client—Counsel's powers to compromise—Consent decree set aside.

Where Counsel, after consulting with his attorney and client as to the advisability of compromising a case, and after receiving instructions from the attorney " to do the best he could for his client," compromised the case, notwithstanding the express prohibition of the client ; and the client before the consent decree was drawn up notified her dissent to the other side : *Held* that the consent decree must be set aside.

[R., 14 C. 835 (838) ; 22 M. 538 (547) ; 15 C.P.L.R. 73 (76).]

THIS was an application to set aside a compromise.

The suit, which was one for the construction of a will and for certain other relief, was, after the first day's hearing on which one issue was disposed of, and after an adjournment of two weeks, compromised, and a decree passed in accordance with such compromise, both sides being represented by Counsel.

On the day following the compromise the plaintiff's attorney wrote to the Registrar of the Court desiring him not to draw up the decree, as the plaintiff dissented from the compromise, and five days later, but at a time when no decree was drawn up, direct notice was given to the defendant's attorney of the plaintiff's dissent.

The affidavit filed by the plaintiff in support of her application stated the following facts, omitting matters which are immaterial to this report :—

That on the second day's hearing, on the 11th March, the defendant's attorney suggested certain terms of settlement to plaintiff's Counsel, to which terms the plaintiff declined to agree, expressing her intention to fight out the case ; that on the 30th March the case appeared in the peremptory board, and was called on for hearing, when it was suggested by defendant's Counsel that the learned Judge presiding might possibly assist at effecting a compromise ; that the learned Judge and Counsel on both sides retired to the Judge's room, and discussed certain terms of settlement; [116] that on the termination of their consultation, the plaintiff's counsel strenuously advised the plaintiff to settle the case ; that the plaintiff protested against certain of the terms, and that the plaintiff's attorney shortly after joined the consultation, and sided with his Counsel in endeavouring to get the plaintiff to consent to the compromise ; that the

*Original Civil Suit No. 391 of 1885.

plaintiff, however, refused to consent, and that on the attorney instructing Counsel "to do his best for the plaintiff," the plaintiff again explained to her Counsel that she refused to compromise; that after this consultation Counsel went back to the private room of the learned Judge, and, after some consultation, the learned Judge and Counsel returned to Court, when a written paper was handed up to the Court, which purported to compromise the case, the plaintiff however not having seen the paper or having had it explained to her; and that an order was made in terms of the settlement put in. That subsequent to the compromise, the plaintiff, after learning the terms thereof, still expressed her unwillingness to be bound thereby; and on the day following appeared in Court, and informed the Court that she disapproved of the manner in which the case had been disposed of.

Mr. *Pugh* and Mr. *Garth* appeared for the defendants.

Mr. *Pugh*.—The attorney had power to instruct Counsel as he did. The compromise cannot be set aside by this application. On the authority of attorneys to settle, see *Pritswick* v. *Poley* (1), where it was held that, in the absence of a distinct prohibition from the client, he may settle. In *Fray* v. *Voules* (2), it is held that an attorney cannot compromise when expressly forbidden to do so, even if it be for the benefit of the client; but that if he does so, the compromise, although perhaps binding as between him and third parties, is *ultra vires* as between him and client. In *Butler* v. *Knight* (3), the client expressly told the attorney not to compromise and he did so notwithstanding. On the other hand, *Strauss* v. *Francis* (4) lays down that Counsel can compromise notwithstanding dissent of client unless the dissent is brought to [117] notice of the opposite party at the time. In *Swinfen* v. *Swinfen* (5) it was held that Counsel, if instructed by attorney, can consent to a compromise, and the Court will not inquire into the existence or extent of his authority, even though the client repudiate Counsel's authority to consent. In that case affidavits were made by all the Counsel engaged in the case and by the plaintiff's attorney; here the lady's attorney has made no affidavit.

Holt v. *Jesse* (6) is against me as showing that a consent given by Counsel in presence of the client may be withdrawn before the order is drawn up, if given through inadvertence [TREVELYAN, J.—There the Court found that Mr. Jesse expressly consented to the order, see p. 182]. I don't suggest that the plaintiff in this case consented, but I say, she through her attorney instructed Counsel to do his best in regard to a compromise.

Mrs. *Carrison* appeared in person and stated that she had never given her consent to the compromise.

ORDER.

TREVELYAN, J.—This is an application to set aside the decree made by consent on 30th March 1886. The facts on which I must act are contained in an affidavit made by the plaintiff and also by Mrs. Westcott, her daughter. I am bound to say at the outset that it is somewhat extraordinary, considering the terms of the affidavit, that the attorney on the record, who was perfectly cognizant of the facts alleged, did not support it. But I do not think that this circumstance, although one would have expected the attorney to come to the assistance of the Court, would justify me in refusing to act. The case came on for hearing for the second

(1) 34 L.J.C.P. 189.
(2) 28 L.J.Q.B. 232=1 E. and E. 839.
(3) L.R. 2 Ex. 109.
(4) L.R. 1 Q.B. 379.
(5) 26 L.J.C.P. 97.
(6) L.R. 3 Ch. D. 177.

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time on the 30th March, 1886. On a previous occasion I had decided a particular issue, and held that the plaintiff under her husband's will was entitled to the property for life.

When the case was called on, Counsel for the defendant, seeing that a continuance of the litigation would involve the disappearance of the property in suit, suggested that I might assist in a compromise. I felt that it was clearly a case which the parties out to settle. But there was nothing to compel a settlement, and the parties were entitled to a decision if they desired it.

Counsel on both sides then came to my room and we discussed the terms of settlement, which were to a great extent [118] suggested by me, and which appeared to me to be extremely reasonable. So far as I recollect, when we had discussed the terms, Counsel for the plaintiff left the room to get his client's consent, and I impressed on him the necessity of his getting her consent. Counsel came back, having explained the matter to his client, and having, as I thought, obtained her consent. Terms were put in and signed by Counsel on both sides.

The next day the plaintiff's attorney wrote and repudiated the settlement. (The Court here read Mr. Lewis's letter of the 31st March, to the Registrar of the Court.) As I understand it, it is not disputed that this dissent was communicated the same day to the defendants. At any rate on the 5th April 1886, six days after the consent decree, express notice of this application was given to the defendants and their attorney, and at that time no decree had been drawn up. Had the decree been drawn up and sealed, it would have been impossible to deal with the case, A long affidavit has been put in; in it Mrs. Carrison says that she declined a settlement throughout, and there can be no doubt that this statement is correct. (Here followed portions of that affidavit.)

Several cases have been cited to me, and I think that I must decide in favour of the plaintiff. It may be very hard on the defendants that, when a settlement was formally drawn up by both sides, the matter should be re-opened; but on the other hand, it would be hard to insist upon the plaintiff being bound by a compromise to which she was not an assenting party.

I will cite in passing the remarks of Vice-Chancellor Malins, in *Holt* v. *Jesse* (1) a case in which Jesse was actually in Court at the time of settlement.

"Now I can only say that this is an order which, if Mr. Jesse did not consent to, he ought to have consented to most cheerfully and thankfully; but I am satisfied that he did consent to it. He was present in Court and throughly understood it, and he is not, in my opinion, at liberty to withdraw the consent then given." (The plaintiff in the case before me swore that she never at any time consented to any settlement.)

"But as much has been said in the course of the argument, [119] and authorities have been cited about the general principles of the Court in withdrawing consents given to orders, I beg to express my opinion, which I believe is in conformity with all the cases that have been cited, that, if it shall turn out that by the inadvertence of Counsel, by the careless consent of the plaintiff or defendant himself, not fully knowing or considering what he is about, an order given by consent has prejudiced him in a manner which neither he nor his advisers could have anticipated at the time, such as in the case of *Swinfen* v. *Swinfen* (2) where Counsel

(1) L.R. 3 Ch.D. 177 (182). (2) 2 De. G. and J. 381 = 26 L.J.C.P. 97.

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was instructed to do one thing and consented to a totally different thing; that is, for instance, being instructed to make a claim to an estate in fee simple, he consented that the claimant should have a life estate only, or a tenancy for life; that is entirely beyond his authority, and nothing could be more reasonable than that his client should not be bound by such a consent inadvertently given."

The case of *Strauss* v. *Francis* (1), cited by Mr. Pugh and much relied on, is cited by Malins, V. C., in *Holt* v. *Jesse*. If the proposition of Vice-Chancellor Malins is correct, *a fortiori* the suitor is bound here. Here there is no consent at all, but a careful dissent. It is difficult to say how it came about that Counsel consented.

In the case *Strauss* v. *Francis* (1), the principle is laid down by Blackburn, J.:—"We are all agreed that there clearly ought to be no rule. The plaintiff by no means makes out that there was any express dissent on his part to withdrawing a juror; there is nothing on the affidavits to show that the client absolutely withdrew all authority, nor is there anything to show that Counsel had done so unprofessional a thing as to undertake the conduct of a cause giving up all discretion as to how he should conduct it; still less is there anything to show that there was the slightest knowledge on the part of the other side that the apparent general authority of Counsel had been in fact limited."

It is true that in this case the defendants had not, at the exact moment of the decree being made, any knowledge that the [120] authority of the plaintiff's Counsel had been limited by the plaintiff, but they obtained this knowledge almost immediately, and before the decree was drawn up; for the plaintiff took steps the next day and wrote to the Registrar not to draw up the decree. So far as I can see the plaintiff has repudiated the consent within the time she was entitled to do so. I, therefore, think that I cannot exclude her from going on with her case.

I must allow this case to be re-tried.

T. A. P. *Consent decree set aside.*

Attorney for plaintiff: Mr. *G. Lewis*.

Attorney for defendant: Mr. *Fink*.

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13 C. 121.

[121] APPELLATE CRIMINAL.

Before Mr. Justice O'Kinealy and Mr. Justice Agnew.

ADYAN SINGH *v.* QUEEN-EMPRESS.* [30th June, 1886.]

Discharge of accused—Further enquiry and order of commitment passed simultaneously by Sessions Judge—Depositions not read over to accused—Oral evidence—Statement of Mooktear as to faulty record—Criminal Procedure Code (Act X of 1882), *s.* 360—*Evidence Act* (*I of* 1872), *s.* 91.

A Sessions Judge, after hearing a general statement made by a Mooktear engaged in the case, considered that the depositions of certain witnesses taken in the Magistrate's Court did not conform with the requirements of s. 360 of the Code of Criminal Procedure, and refused to admit the depositions as evidence, and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions

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* Criminal Appeal, No. 331 of 1886, against the decision of T M. Kirkwood, Esq., Sessions Judge of Patna, dated the 29th March 1886.

(1) L.R. 1 Q.B.D. 379.

1886 JUNE 30.

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13 C. 121.

on behalf of the Crown; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held*, on appeal, that the conviction and sentence must be set aside.

ON the 31st December 1885, one Adyan Singh was alleged to have inflicted a severe wound on the arm of one Budhun from which he subsequently died.

The Assistant Magistrate who held an enquiry into the case discharged the accused under ss. 209 and 253 of the Criminal Procedure Code.

The wife of the deceased then applied to the Sessions Judge to have the order of discharge set aside.

The Sessions Judge, on the 11th February, passed the following order: "I think the commitment of the accused on a charge of culpable homicide not amounting to murder should be ordered, but before so ordering, notice should be given to Adyan to show cause why such order should not be passed; if it is passed, I shall also direct the examination of the Inspector, Sub-Inspector, Assistant Surgeon, and Sub-Deputy Magistrate." On the hearing of this rule the Sessions Judge passed the following order: "I direct the commitment of the accused; it should be made at once, after taking the additional evidence referred to in my proceedings of the 11th instant in the presence of the accused if possible."

[122] During the course of the trial before the Sessions Judge, Counsel for the accused attempted to contradict the witnesses for the prosecution by putting to them questions as to statements made by them in the Court of the Assistant Magistrate, and tendering their depositions in that Court as evidence against them. The Sessions Judge refused to admit these depositions on the ground, apparently, that a Mooktear, who appeared for the defence and who had conducted the case before the Assistant Magistrate, had told him (the Sessions Judge) that the Assistant Magistrate had not read these depositions over to the witnesses, and that it was the constant practice of the Assistant Magistrate to overlook this provision of s. 360 of the Criminal Procedure Code. Counsel for the accused thereupon applied that the Assistant Magistrate might be examined as a witness in the case, but this application was refused on the ground that oral evidence by the Assistant Magistrate as to what was stated to him by the witnesses could not be received, the recorded depositions being the only proof of those statements under s. 91 of the Evidence Act.

At the conclusion of this trial the Sessions Judge, accepting the opinion of the majority of the jury, convicted the accused of grievous hurt and sentenced him to three years' rigorous imprisonment.

The prisoner appealed.

Mr. *G. Gregory* (with him Baboo *Omirtonauth Bose*), for the appellant, contended (1) that the order of commitment by the Sessions Judge simultaneously with the order for fresh evidence to be taken by the Assistant Magistrate was illegal; and on this point cited an unreported case of *In re Dahoo Singh*, decided by Prinsep and Grant, JJ., dated 4th March 1886, Criminal Motion Number 96 of 1886, in which Mr. Kirkwood, the same Sessions Judge, had directed further enquiry to be made after the accused had been discharged by the Magistrate, and at the same time directed the accused to show cause why he should not be committed by the Sessions Court; and on the hearing of the rule, ordered the commitment of the accused and directed the Magistrate to take the depositions of two fresh witnesses. On the case coming up before

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Prinsep and Grant, JJ., they set [123] aside the order of commitment remarking: "It seems to us that the Sessions Judge's order amounts to simultaneously directing further enquiry into the alleged offence, and to ordering commitment of the accused. Before the accused could be properly committed, it would be necessary to consider the value of the entire evidence against them, including the evidence which is now to be taken. Under these circumstances we think the order of commitment was premature; it must accordingly be set aside. The Deputy Magistrate will proceed to carry out the orders of the Sessions Judge regarding further enquiry, and pass such orders thereon as may seem to him proper on consideration of the evidence to be taken, and on consideration of the evidence previously taken by him." (2) That the judge was wrong in not accepting the depositions in evidence; that s. 91 of the Evidence Act did not apply; that if the depositions could not be considered as the depositions of these witnesses by reason of the omission of the Magistrate, then it followed that there was no written record of what the witnesses actually said, and parol evidence was therefore receivable. (3) That the statement of the Mooktear should not have been received by the Judge.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

The Court (O'KINEALY and AGNEW, JJ.) passed the following order:—

ORDER.

In this case the prisoner has been convicted of causing grievous hur and sentenced to three years' rigorous imprisonment and a fine of Rs. 200. On his trial before the Sessions Judge of Patna, whilst certain of the witnesses were under cross-examination, their depositions before the committing officer were tendered in evidence in order to contradict what they were then saying.

No objection was taken to the reception in evidence of these depositions by the Crown; but the Sessions Judge, because a Mooktear in Court, who is said to have conducted the case in the lower Court on behalf of the accused, made a general statement that the committing officer was not in the habit of reading over depositions to the witnesses, himself raised the objection, and [124] refused to receive the evidence tendered on behalf of the prisoner. We think that he was wrong in doing so. There was no ground on which he could refuse the depositions. Further, we think that if he had refused them rightly, the prisoner should not have been debarred from calling the Assistant Magistrate for examination.

We set aside the conviction and sentence and direct that the prisoner be re-tried.

Let the depositions, if tendered in evidence, be received.

T.A.P. *Conviction set aside.*

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PRIVY COUNCIL.

PRESENT:

Lord Blackburn, Lord Monkswell, Lord Hobhouse and Sir R. Couch.

[*On appeal from the Special Court of British Burmah.*]

NAN KARAY PHAW AND OTHERS (*Plaintiffs*) *v.* KO HTAW AH (*Defendant*).

BY APPEAL.

KO HTAW AH (*Defendant*) *v.* NAN KARAY PHAW AND OTHERS (*Plaintiffs*).

BY APPEAL.

KO HTAW AH (*Defendant*) *v.* NAN KARAY PHAW AND OTHERS (*Plaintiffs*).

BY CROSS APPEAL.

[11th, 13th, 14th and 16th February, 1886.]

Account—Set off—Cross appeal.

Of two appeals heard together, the first was brought on the dismissal of a suit in which the representatives of one, now deceased, of two parties claimed for his estate an account against the other; their suit having been dismissed on failure to prove the contract between the parties, and the second appeal was from a decree between the same parties, for damages for the detention of property which had belonged to the estate of the deceased In the first, the plaintiffs appealed; and in the second the defendant, who also, by cross appeal, claimed a sum which, as he alleged, would have been found due to him had accounts on both sides been taken on the first of the above suits.

Held, that as the first suit was for an account only, and not for the recovery of money, rendering it at least doubtful whether a set-off could be pleaded in defence; and as, also, no issue had been framed, or even asked for, on the question, it was not open to the defendant to raise it on this cross appeal.

[R., 6 Bom. L.R. 790 (798) = 30 B. 173 (178).]

[125] APPEALS and cross appeal consolidated and heard together under orders in Council (5th March and 13th June 1885) from two decrees (28th and 8th August 1883) of the Special Court of British Burmah, reversing in one suit, and confirming in another, decrees of the same date (24th April 1882) made in two suits by the Judge of Moulmein.

Two suits, giving rise to the present appeals and cross appeal, were brought on the 11th March 1881 by the representatives, widow and children, of Phatadah, deceased in 1879, who had been in his lifetime a Karen forester employed in cutting timber in the forests of Upper Burmah and the owner of elephants used in "ounging" teak timber to the tributaries of the Salwin River to be floated down to Moulmein. The defendant in both suits was Ko Htaw Ah, a Burmese of Moulmein, trading in teak timber. The case alleged was that money having become due to Phatadah, who had sent down timber to Moulmein under contracts with the defendant, payment was refused in 1879; and that Phatadah having died in that year, his elephants and other effects had been unlawfully detained by the defendant through his agent in the forests, Bo Galay.

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The first suit, valued at Rs. 2,38,190, was for an account of proceeds of sales of timber alleged to have been sold by the defendant in Moulmein, in which sales Phatadah, who had sent down the timber from the forests, was interested jointly with the defendant, under two several contracts : the earlier in date of the two having reference to logs cut by Phatadah, and hammer-marked, in the Thoungyeen forest ; the latter contract having reference to other timber cut by Phatadah, and hammer-marked differently, in another forest, Mai Gnet.

Both these contracts were denied by the defendant, who also denied that he was Phatadah's agent, alleging, on the contrary, that he was his employer, and had largely over-paid him for the work done. He also preferred a counter-claim upon the estate of the deceased to the amount of Rs. 55,360.

The Judge of Moulmein, in the first instance, found that the contracts had been made as alleged, and the timber sent down by Phatadah, who had not been fully paid. He decreed an [126] account in the first suit, issuing a commission under s. 394 of the Civil Procedure Code, 1877.

In the second suit, in which the plaintiffs sued Ko Htaw, the same defendant, and Bo Galay his agent, for the detention of property, the Court of first instance found that the defendant had taken possession of thirty-one elephants that had belonged to Phatadah, the other defendant being merely a servant, and disallowed the defence attempted to be made that this had been done either under a contract or in virtue of a custom in the forests. The value of the elephants, found to be Rs. 43,765, and damages for their detention, Rs. 24,800, were decreed payable to the plaintiffs.

The Special Court of British Burmah (Jardine and Wilkinson, JJ.) reversed the decree in the first, or timber, suit, finding that the contracts were not proved, and that the plaintiffs were not entitled to an account.

In the second, or elephant, suit, the same Court (J. Jardine and Egerton Allen, JJ.) affirmed the decree of the lower Court. In giving judgment in the second suit, the Court thus disposed of a question as to the over-payment alleged by the defendant in his defence to the first suit :—

"A contention has been raised that the defendants were entitled to set off the amount they claim as balance due to them by Phatadah. Mr. Vertannes argued that s. 111 of theCode of Civil Procedure gave his client that right. But this section narrows the area which the words of Act VIII of 1859, at first sight, appear to allow to cross claims in the same suit ; and clearly, and in express words, allows claims to set off ascertained sums of money, and by implication disallows such claims where the sum has not been ascertained. In the present case there has been no ascertainment, in fact the present plaintiffs brought a separate suit to get an account made ; and the present claim to set off is on all fours with those held to be inadmissible in the cases collected by Mr. Broughton under s. 111 of his edition of the Code of Civil Procedure, and Illustration D, on which Mr. Vertannes has relied, does not apply, because the set-off stated in the answers of defendants is not the amount of the promissory notes but the balance said to be due after allowing interest on one [127] side and payments on the other, other payments in the jungles also coming into the account. The amount demanded by defendant not having been ascertained, we cannot treat it as a cross claim in the present case, which is altogether different in its nature to the suit brought by the same

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plaintiffs against the defendant for the taking of an account and payment of whatever balance might be found due to them."

The first suit having been dismissed and the second decreed, the plaintiffs on the one side, and the defendant on the other, filed these appeals. After their registration, the defendant, in 1885, applied for special leave to file a cross appeal to be heard at the same time.

The application was granted, Mr. *J. T. Woodroffe* appearing for the petitioner, opposed by Mr. *A. Agabeg*. The principal ground was that the defence in the first suit having alleged the debt of Rs. 55,360 from Phatadah's estate partly on account of advances made to enable Phatadah to purchase elephants and fell timber, partly on account of money paid in protection of a lien on the timber, and partly in regard to promissory notes alleged to have been made by Phatadah to the amount of Rs. 32,565, it had been made a ground of special appeal to the special Court that the lower Court ought to have fixed an issue as to these liabilities. But the appeal having resulted in the dismissal of the first, or timber, suit, the defendant had, in the second, been held liable to pay more than would have been found due from him had the counter-claim, arising out of these transactions, been considered.

On these appeals,—

Mr. *R. V. Doyne* and Mr. *A. Agabeg* appeared for the representatives of Phatadah.

Mr. *A. Phillips* (with whom was Mr. *A. Scoble*, Q.C.) appeared for Ko Htaw Ah.

For the appellants in the first suit it was argued that the evidence had established the making of the two contracts, and the performance of his part under them by Phatadah, who was entitled to an account of the timber sold. For the same parties as respondents in the second appeal, it was argued that there [128] was no ground for interfering with the concurrent decisions of the two Courts in Burmah. And for the same, as respondents in the cross appeal, it was argued that there had been no issue fixed on the question now sought to be raised, which should have been the subject of a suit (if any part of the cross-claim was not barred by limitation); moreover, the evidence had not established it.

Mr. *A. Phillips* for Ko Htaw Ah, as respondent in the first suit, contended that the suit had been rightly dismissed, the contracts not having been proved. He argued for the same party as respondent in the second suit that, even assuming that the detention had been correctly found, the damages had not. For him also, as cross appellant, the contention was that for all the timber which arrived he had credited Phatadah, against whom there would have resulted a debit on the taking of a general account. And this counter-claim, if not covered by the issue as to what the plaintiffs were entitled to claim, might, at all events, be regarded as a set-off within ss. 111 and 116 of the Code of Civil Procedure. The dismissal of the first suit by the special Court would not prevent the defendant from insisting on this set-off. A defendant, denying a plaintiff's claim, might allege also a set-off, and might obtain a decree for it although the plaintiff did not succeed in establishing any sum to be due to him—*Haiyat Khan* v. *Abdulakhan* (1).

Mr. *R. V. Doyne* replied on the whole case.

On a subsequent day (February 16th) their Lordships' judgment was delivered by

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(1) 6 B. H. C. R. 151.

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JUDGMENT.

LORD MONKSWELL.—These are two appeals from judgments of the Special Court of British Burmah, in both of which the widow and children of one Phatadah were plaintiffs, and Ko Htaw Ah, a Burmese merchant, was defendant; in the second case an agent of his being joined as a co-defendant with him. In the first case, which may be conveniently called the timber case, the court of Moulmein gave judgment for the plaintiffs. The judgment was reversed by the Special Court of British Burmah, by which judgment was given for the defendant and the suit dismissed. From this judgment the plaintiff appeals, [129] and there is a cross appeal by the defendant on the ground that he has a cross-claim which makes Phatadah to have been his debtor. In the second case, which may be called the elephant case, both Courts concurred in finding for the plaintiff, and the defendant only appeals.

It will be convenient to deal with the cases separately; but in order to make them intelligible, a short statement is necessary.

On the banks of the Salwin River and its tributaries are extensive forest, partly, it would appear, in the Burmese territory, and partly in the territory of a neighbouring semi-barbarous tribe called the Karens. A large timber trade is carried on in these forests, timber being cut, and as it is called, ounged—that is, dragged or pushed by elephants into the creeks or adjoining rivers and streams, and left to find its way, apparently without assistance, down to Moulmein. Near Moulmein there is a station called Kadoe, where the timber is intercepted, chiefly for the purpose of the revenue being collected upon it; and it appears that Burmese merchants, who were in the habit of buying timber from the Karens (the Karens for the most part confining their operations to the forests), or employing the Karens to cut timber for them, and of sending it to float down to Kadoe, used certain marks for its identification, which marks were registered by a Government official at Kadoe. It has not been very distinctly explained what the regulations were under which those marks were registered but their Lordships collect (what appears to be sufficient for the present purpose that the existence of the mark of a merchant on timber was sufficient *prima facie* to constitute some title on his part to it, and also some title of the Government to revenue to be paid by him for it.

The late husband of the plaintiff was a Karen. He seems to have been a leading man among the Karens, to have had some capital and a number of elephants, and before the transaction which forms the subiect of this action, to have been in the habit of cutting timber in these forests and of selling it there. He was in no sense a merchant conveying timber from the forests to Moulmein, and he had consequently no registered marks. The defendant is a timber merchant carrying on extensive transactions, [130] having considerable capital, and the lessee of one of the forests in which the timber was felled which formed the subject of the action.

The plaint in the suit states the plaintiff's cause of action clearly and succinctly. She says she is the widow of Phatadah, who died in 1879. "That in or about the year 1871 Phatadah entered into an agreement with the defendant, whereby he was to send to Moulmein timber marked" with the "*pin-byit*" mark—which may be shortly described as three circles with crosses within them—"worked and purchased by him in the Thoungyeen forests, and defendant was, as Phatadah's agent, and for and

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on his behalf, to dispose of the same and render an account of the proceeds of the sales effected by him. That between July 1871 and January 1879 the defendant received and entered at Kadoe 5,226 logs of timber bearing the said mark, which he disposed of. That subsequently, that is to say, about six years ago, the said Phatadah agreed with the defendant to work and send timber down from the Mai Gnet forests to Moulmein, which timber was to be marked by him with the mark "Ko Lan," and that the defendant should sell the same for Bhatadah as his agent and account for the proceeds of the sales effected by him. That between November 1879 and July 1880 the defendant received and entered at Kadoe 1,183 logs of timber bearing the said mark, and disposed of the same." The plaint then states that the defendant paid Phatadah Rs. 30,000 on account, but that he has rendered no account of the sales. Then the plaint prays for an account of the sales against the defendant.

The defendant, in his written statement, denies having entered into either of the alleged agreements. He says that the "*pin-byit*" mark is his own, but registered by him in his son's name, and that the timber which came from the Thoungyeen forest was his own, purchased by him there out of his own moneys. He further says that, "with regard to the timber marked Ko Lan (which is the defendant's own registered hammer-mark), defendant begs to state that, in the year 1238, Phatadah, who had for several years previously been working on his own account in the Maipain forests, came to him and asked him to assist **[131]** him with some money to buy elephants, and to permit him to work in the Mai Gnet forests. That in accordance with his request defendant lent him Rs. 17,555 on the understanding that he should work for defendant in Mai Gnet forests on the following terms:—Phatadah was to cut and oung with his elephants as much timber as he could, and make it over to defendant in the Salwin River, at the rate of Rs. 17 per log for full-sized logs, and Rs. 5 for under-sized logs, defendant paying the revenue due to the Chief of Zimmay on all timber so delivered. Phatadah was, in accordance with the prevailing custom of foresters working in other people's forests, not to remove his elephants from the Mai Gnet forests as long as he was indebted to the defendant." The plea then states that, in accordance with the above arrangement, Phatadah worked in the defendant's forests until his death, during which time he took several further advances from the defendant; and that, at the time of his death, Phatadah was indebted to defendant in the sum of Rs. 40,234, which, with further payments and interest, amounted to a cross-claim of Rs. 55,360 against the estate of Phatadah.

The evidence was extremely conflicting and unsatisfactory. Their Lordships think that no good purpose would be served by going through it in detail, and it will be enough to indicate some of its leading features. The plaintiff, the widow, speaks of the original contract in these terms. After saying that her husband was a headman among the Karens, she says: "I know the defendant; he came to my house at May Too village 12 years ago. He entered into an arrangement with my husband as follows: 'Let us form friendship and drink each other's blood.'" It seems that there is a custom among the Karens, if they make a solemn contract, for each party to drink the blood of the other. "The defendant told the deceased to cut down timber and send it to Moulmein, and he, that is, defendant, would sell it. Defendant said,—'friend, this is your mark' (exhibit A., a marked hammer, identified). Defendant produced this and

gave it to Phatadah. My husband worked timber after defendant went up for five years at Thoungyeen. He came down to Tsin-yo." Then she says: "After arrival at Tsin-yo I came with my husband [132] to Kaw Nhat, where defendant was residing, to ask for the price of the 6,000 logs of timber sent down from Thoungyeen." It is represented by this lady and several of the witnesses that Phatadah sent down as many as 6,000 logs of timber from Thoungyeen. Then she says: "The defendant said 'friend, do not be alarmed about the money; keep it here until you build a substantial house.'" Then she speaks of the second contract about working timber at Mai Gnet. "My husband said he was getting old and could not do it. Defendant said: 'You are acquainted with the Karens, and if you work timber can be obtained.' Phatadah was to send down the timber; defendant was to sell it and pay him. I was present and heard this. My husband was present and went up to the Mai Gnet forests. He never got any money from defendant," and so on. She also says in her evidence that Phatadah was to become security, with the other Karens, for the defendant; and that that was the consideration on which the defendant agreed to act for him. She says, subsequently, in respect of the second contract: "The defendant agreed to sell Phatadah's timber at the second agreement out of gratitude, as he had stood security for him." She calls four coolies, all of whom declare themselves to have been present on this occasion, and to have witnessed the drinking of the blood, and all of whom speak in substance, though some what vaguely, of the transaction, namely, that Phatadah was to cut timber and send it down, and that the defendant was to sell it for him in consideration of friendship, and of his having gone security for him with certain Karens. It may be observed that there is no proof in the case of his having "gone security," whatever that expression may mean.

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It may be observed here that, according to this lady's evidence, herself and a number of her witnesses were entertained by a person of the name of Ma Bwin, a rich lady, who seems to have maintained the suit, the defendant suggests out of ill-will to him on account of his having obtained possession of a forest which she wanted; and there also seems to have been some written agreement between the widow and her witnesses that, in the event of her succeeding in establishing her case, they were all to receive something.

[133] The coolies also speak of Phatadah having, during five or six years, sent down as many as 1,000 logs a year: so that, on the whole, some 6,000 logs of timber were sent down, according to their account, from the Thoungyeen forest to Kadoe, to be sold for the plaintiff by the defendant. There is also some further evidence to the effect that Phatadah bought some logs of timber, about 500, and that he put, or caused to be put, his "*pin-byit*" marks upon some timber which he sent down; further that he demanded payment of defendant and was put off with excuses. Further, the hammer which is said to have been delivered to him by the defendant is put in, by which it appears that, although the circles remained, the crosses had been, in a great measure, intentionally defaced; that is, in substance, the case of the plaintiff.

The defendant denies the contracts. He admits that he received a large number of logs amounting to 5,000 in round numbers at Kadoe, some bearing the "*pin-byit*" mark and others bearing the mark of the circles without the crosses, *i.e.*, the "*pin*" mark only, and he accounts for it in this way. He says that he made an agreement

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in 1870 or 1871 with one Tsit Paw, a Karen (who is dead), to buy of him 3,500 logs, and that he put this circle and cross mark upon all of those. He further says that, upon the conclusion of his transaction with Tsit Paw, he bought a number of other logs, some 1,500 and afterwards some more, from Ko Nan Gay, and that, in order to prevent confusion between his purchases from Tsit Paw and his purchases from Ko Nan Gay, he caused the crosses on all the hammers he had (he appears to have had several) to be obliterated ; so that, according to his story, there ought to have arrived from Tsit Paw some 3,500 logs with the "*pin-byit*" mark and Tsit Paw's mark ; and there ought to have arrived from Ko Nan Gay, who had no mark of his own, a certain number with the pin mark without the cross. This is what happened. It seems from the record which is kept at Kadoe that 3,318 logs with the "*pin-byit*" mark and Tsit Paw's mark arrived in the course of two or three years, which certainly is confirmatory of the defendant's story, as far as it goes, and 1,607, or somewhere about that number, came with the plain pin mark, together with some [134] other marks which, though Ko Nan Gay had no mark of his own, might have been impressed upon them by persons with whom he dealt. This is also confirmatory of defendant's story. He goes on to say that, with respect to the subsequent alleged agreement in 1876, the forest of Mai Gnet was his own, and he puts in his lease. He insists that it is highly improbable that he should have given Phatadah his own timber and consented only to act as agent for him. He says that what he really did was to employ Phatadah to cut and oung timber for him in his own Mai Gnet - forest ; and that he made him a considerable advance—some Rs. 17,000 odd—for the purpose of enabling him to do all that was necessary for that purpose. It should be said that, with regard to the former alleged contract, having reference to the Thoungyeen forest, he said that he did employ Phatadah to oung four thousand logs at eight annas a log ; he further says, with respect to the Mai Gnet forest, that he made subsequent advances, and that he got promissory notes for them. He maintains that Phatadah was largely in his debt.

The first question is whether the plaintiff has proved her case. In the first place, we have to deal with a supposed contract made 12 years before the trial, entirely by word of mouth, and on which the evidence is that of the plaintiff herself and the coolies—evidence of a very loose description, which appears to their Lordships not satisfactory. Further, the contract alleged bears a great deal of improbability on the face of it. Phatadah was a Karen with some, but not a large capital. Before this transaction, he had confined his dealings to cutting and selling timber in the forests. It does not seem very probable that he should have entered upon transactions of the magnitude alleged, whereby he sent down some 6,000 logs, the price of which would for exceed a lac of rupees. Again it seems improbable that the defendant, a merchant, and a considerable capitalist, should have consented to reverse positions with Phatadah, to make Phatadah the principal and himself the agent, and to agree to account to Phatadah. That becomes still more improbable when we consider that he is alleged to have done this without any commission such as would ordinarily be given on the sale of timber, but simply out of friendship—[135] signified by the drinking of blood—and a supposed promise to become security which was not proved to have been performed.

It appears therefore to their Lordships, without going more in detail into the evidence, that on the whole the two contracts alleged by the

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plaintiff—the first as to the Thoungyeen forest, and the second as to the Mai Gnet forest—are not sufficiently proved. They regard the account which the defendant gives of the transactions the more probable; and they may further observe that the production by the plaintiff of the marked hammer, on which a great deal of reliance has been placed, seems to bear against her. The defendant states that he obliterated the crosses, and why he did so; the hammer is shown, and the crosses appear to be obliterated so far that, though traces of them remain, they would not be sufficient to impress the cross mark upon timber. That would indicate that the hammer must have been in the possession of the defendant for some time, and does not accord with the case of the plaintiff that Phatadah continued in possession of it from the time of receiving it. The obliteration of the crosses agrees with the defendant's account, and disagrees with that of the plaintiff, who appears to have had no knowledge of the obliteration, and whose case is that all the timber which was sent down was marked with the full mark of the circles and the crosses, and with no other. On these grounds it appears to their Lordships that the Court of appeal was right in holding that the plaintiff had not proved her case.

With respect to the cross claim on the part of the defendant, the first question which arises is whether it is admissible under the pleadings. The claim is not for the recovery of money, but for an account, and it is, at all events, doubtful whether a set-off could be pleaded in answer to such a claim. It must further be observed that no issue was framed or even applied for on this question. It appears to their Lordships, therefore, that it is not open to the defendant to raise it. That being so, it is not necessary to go into the question of whether the alleged promissory notes are or are not genuine. Their Lordships, however, cannot help observing that the evidence of the cross claim is highly unsatisfactory.

For these reasons their Lordships will humbly advise Her **[136]** Majesty in this case that the judgment of the Special Court of British Burmah be affirmed, and that both appeals, the plaintiff's appeal and the cross appeal, be dismissed. The appeal will be dismissed with costs; and the cross appeal without costs, save those which were incurred by Nan Karay Phaw in opposing the petition for special leave to enter a cross appeal.

The second suit is a suit by the widow for the purpose of obtaining, as against the defendant, certain elephants of Phatadah which he has detained, or the price of those elephants; and further for damages for the detention and use of those elephants by the defendant for two years. The defendant seeks to justify the detention of the elephants on the double ground, first of a contract with Phatadah, by which he was entitled to detain them, and secondly of a custom of the forest. Both these contentions are negatived by both Courts, and being questions of fact, must be treated as decided. The amount of damages on which a question was raised falls under the same rule. No set-off has been pleaded in this case. The judgment therefore of the Special Court will be affirmed, and the appeal dismissed with costs, and their Lordships will humbly advice Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellants in the first suit, respondents in the second, and cross-respondents: Messrs. *Bramall & White.*

Solicitors for the respondent in the first suit, appellant in the second, and cross-appellant: Messrs. *Sanderson & Holland.*

C. B.

1886 MARCH 30.

PRIVY COUNCIL.

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13 C. 136 (P.C.)=13 I.A. 77=10 Ind. Jur. 350=4 Sar. P.C.J. 713.

PRIVY COUNCIL.

PRESENT:

Lord Blackburn, Lord Hobhouse, and Sir R. Couch.
[*On appeal from the High Court at Calcutta.*]

JADULAL MULLICK (*Defendant*) *v.* GOPALCHANDRA MUKERJI AND ANOTHER (*Plaintiffs*). [17th and 30th March, 1886.]

Right of way—User of twenty years to support servitude—Extent and mode of user—Calcutta Municipal Act (*Bengal Act IV of* 1876).

As establishing his right of way over the defendant's passage, the plaintiff relied upon a user of it, several times in the year, for twenty years prior to the defendant's interruption of it, by mehters for the purpose of removing the contents of a cess-pool connected with a privy belonging to the plaintiffs' house.

[137] The facts indicated by way of limit to the user of the passage only showed that it must be a reasonable user for the above purpose. There was no agreement specifying times or occasions of access, and the inference was that, if the plaintiffs had thought fit to use the passage more frequently than they did, they were at liberty to do so.

In and after 1876, instead of the plaintiffs' mehters, those employed by the Municipality came and went upon the passage, not at distant intervals, but daily, the plaintiffs under bye-laws, in conformity with Bengal Act IV of 1876, being bound to give them access, and the system being to clean the place daily.

Held, that the above was neither a discontinuance by the plaintiffs of their user, nor an aggravation of the servitude. Also, that, although a servitude gained for one purpose cannot be used for another, the purposes before and after 1876 being identical, the user proved prior to that year supported a right in the plaintiffs to use the passage for giving access to the servants of the Municipality, for the above purpose, at reasonable and convenient times.

[R., 19 Ind. Cas. 984 (985).]

APPEAL from a decree (27th January 1883) of the High Court (1) reversing a decree (14th March 1882) made in its Ordinary Original Jurisdiction.

The decree, from which this appeal was preferred, declared that the plaintiffs, who now were the respondents, as owners of the house No. 66, Pathuria Ghat Street in Calcutta, were entitled to use a passage belonging to the defendant, now appellant, for the purpose of having a privy of the said house cleaned out by mehters at all proper and convenient times, and an injunction was awarded restraining the defendant from interfering to prevent such user.

The parties to the suit were owners of adjoining houses. The plaintiffs claimed a right of way along a passage belonging to the defendant, and the defence was that the right claimed had not been established by open and continuous user for the period of prescription. The purpose of the right claimed was to give access to mehters to empty the cess-pool of the plaintiffs' privy. It was not disputed, however, that, after the enactment of Bengal Act IV of 1876 (The Calcutta Municipal Act, 1876), the mehters employed by the Municipal authorities of Calcutta alone used the passage for the above purpose. This day did much more frequently than the plaintiffs' mehters had done; in fact daily [138] instead of several times in the year, the new system requiring that the cleaning out should take place daily.

(1) 9 C. 779.

The Court of Original Jurisdiction (WILSON, J.) found that the plaintiffs had not shown that they had exercised for twenty years the right now claimed. The suit was, therefore, dismissed.

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On appeal the High Court (GARTH, C.J., and CUNNINGHAM, J.) found, on the contrary, that there was sufficient evidence of the plaintiffs having used the passage, for the purpose alleged, for twenty years before the interruption by the defendant. As to the extent of the user, the Court held that the plaintiffs had been entitled to the use of the passage for the above purpose, as might be required; and the purpose for which the right was now claimed was identical with the original purpose of the user. The only alteration was that the right was now more frequently exercised than formerly. A decree accordingly was made in favour of the plaintiff.

The judgments of the appellate Court are reported in I. L. R., 9 Calc. 779.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *A. Phillips.* appeared for the appellant.

Mr. *J. Rigby, Q. C.* and Mr. *J. D. Mayne*, for the respondents.

For the appellant it was argued that a continuous user of the passage in dispute had not been established. Even if a right of occasional user of the passage, for the limited purpose described, had existed in the plaintiffs before the new drainage system of the Calcutta Municipality had come into operation, the change in 1876 was such that a discontinuance of the user had taken place, extinguishing the formerly existing right. The evidence showed that, under what might be called the cess-pit system, there had been a user of the passage, for the purpose described, a few times in the year. This could not be, for the purpose of carrying out another system, enlarged into a daily user. The right now claimed was not identical with the formerly subsisting one, and could not be so treated without aggravation of the obligatian upon the owner of the servient tenement. The right of way [139] now claimed whether it might, or might not, rest upon the provisions of Bengal Act IV of 1876, could not rest upon the original user.

Reference was made to *Wimbledon and Putney Commons' Conservators* v. *Dixon* (1); Bengal Act IV of 1876, ss. 235, 238, and 340.

For the respondents, Mr. *J. Rigby, Q.C.* and Mr. *J. D. Mayne* contended that the user had been established as the appellate Court had found. The altered mode of user had not operated as a discontinuance, and there had been no aggravation of the servitude. The extent of the user was a mode, no doubt, whereby the extent of the right was indicated; but the purpose for which the right was exercised was the main point for consideration. As to this, the evidence showed that the user, since the alteration of the system, had not been extended beyond the identical purpose for which the original servitude had all along existed.

It could not be considered possible that all easements of this class in the town of Calcutta were destroyed by the legislation of 1876 having compelled an increased number of clearings. Reference was made to *Daud* v. *Kingscote* (2) as showing that, even under a grant, a right was not necessarily confined to such modes of exercise as were in use at the time of the grant—Goddard on Easements, Chapter III, s. 2; *The Corporation of London* v. *Riggs* (3).

Mr. *R. V. Doyne* replied.

(1) L.R. 1 Ch. D. 362. (2) 6 M. & W. 177. (3) L.R. 13 Ch. Div. 798.

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On a subsequent day (March 30th) their Lordships' judgment was delivered by

JUDGMENT.

LORD HOBHOUSE.—The plaintiffs below who are the respondents here, and the defendant who is the appellant, occupy contiguous houses and premises in Calcutta, with a southern frontage in Pathuria Ghat Street. The plaintiffs' house lies to the eastward of the defendant's. Adjoining the north side of the defendant's premises lies a piece of ground also belonging to him, and fronting northwards to a street called apparently by various names, of which Jorabagan is one. At a point between the two streets the defendant's property juts out a few feet to the [140] eastward, and to that extent overlaps the property of the plaintiffs, and lies to the north of it.

The following facts are common to the case of both parties: that an open drain used to run along the eastward boundary of the defendant's property from the point where it juts eastward into Jorabagan; that at the same point there communicated with this drain one of the drains of the plaintiffs' house leading directly from one of their privies; that at the point of communication there was a doorway in the plaintiffs' wall; and that in the year 1876 the drain was filled up, and has never again been opened.

The plaintiffs brought evidence to show further that their house was constructed with a double wall so as to form a narrow passage from the privy to the doorway; that periodically, some three or four times a year, scavengers hired by the plaintiffs, or their predecessors, entered the drain at Jorabagan and made their way up it to the doorway; that the doorway was furnished with a door which was kept locked, but was opened by the plaintiffs' durwan on these occasions; that the scavengers came through the doorway, passed along the plaintiffs' drain between the double walls, and so reached the privy, from which they carried the refuse away through the doorway and down the defendant's drain into Jorabagan. Certainly one of the witnesses, and probably another, deposes to the continuance of this practice from dates more than 20 years prior to the defendant's interruption of it, which was in December 1880. The suit was instituted in June 1881.

Against this evidence the defendant has produced nothing at all except that he never saw the plaintiffs' scavengers at work, and that he and Mr. Edwards, a surveyor, say that it was impossible for the scavengers to go where several witnesses saw them go. And, in cross-examination, the defendant admitted that the doorway could only lead to the drain.

Indeed in this part of the case the defendant appears to have relied mainly upon imperfections in the plaintiffs' evidence. Mr. Justice Wilson, who presided in the Original Court, thought that the plaintiffs had failed to show user for 20 years. But it is observable that he says there is only one witness, *viz.*, Tarrabullub Chatterjee, who professes to carry his memory back to 20 years at all. He does not notice Dwarka Nath Bonnerjee, who had [141] known the privy and drain for upwards of 25 years, and who speaks of the action of the plaintiffs' scavengers, apparently, for the note of the evidence is not perfectly clear, for that space of time. Neither does he notice the probability afforded to the plaintiffs' story by the construction of their walls and of their doorway, both of which date more than 20 years before the interruption.

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Mr. Justice Wilson dismissed the suit. On appeal the High Court took a different view, and gave the plaintiffs a decree establishing their right to use the passage in dispute for the purpose of carrying away their night-soil at all proper and convenient times in the year. Their Lordships concur in the view which the appellate Court has taken of the evidence and think that the user on which the plaintiffs rely is sufficient, unless it has been interrupted or altered in character by the events which took place in and after the year 1876.

In that year the Legislature of Bengal passed an Act for the more efficient Municipal Government of Calcutta. Under the powers conferred by that Act, the Town Commissioners made bye-laws to regulate the removal of refuse. It is not to be discharged in any other way than as the Commissioners direct. The servants of the Municipality are to cleanse daily the privies of every house, on account of which a night-soil fee is levied, and for that purpose every occupier of a house is to give free access to his privy. An occupier of land on which a privy is situated and to which such free access is denied, is not to allow night-soil or filth of any kind to accumulate for more than twenty-four hours. Under these regulations the open drain bordering the defendant's land was, as before stated, filled up, and the surface has been used by the scavengers of the Municipality ever since to gain access to the privy of the plaintiffs for the purpose of removing the refuse. This they do daily.

Mr. *Doyne* has argued for the defendant that the change of system thus brought about operates as a breach of the user by the plaintiffs, and so destroys their title by prescription. But their Lordships cannot see that the change of system works any discontinuance of the prior user. In point of frequency the user is much more active than before. The purpose is still [142] the purpose of cleansing the privy. The mode of access from Jorabagan to the privy is not altered, except that the scavengers, instead of walking in the drain, walk on the surface of the earth that fills it. And it cannot make any difference that the plaintiffs no longer use the passage to admit their own scavengers, but use it to admit those of the Municipality, to whom they are bound to afford free access.

It is then argued that the change from the practice of cleansing at long intervals to the practice of cleansing daily is so great that the servitude gained by user is materially aggravated, indeed that it is applied to a new purpose, which the plaintiffs have no legal right to do.

But it is difficult to see how the servitude is aggravated, even in the sense of causing more annoyance to the defendant. In order to afford the requisite access only three or four times a year, the passage must be kept open and unobstructed. That being so, it cannot be much more onerous to the defendant that a small quantity of refuse should be removed daily than that a large quantity should accumulate and be removed at long intervals of time.

The real question, which is not free from difficulty, is whether the user proved prior to 1876 is one which sustains the right affirmed by the decree under appeal. A servitude gained for one purpose cannot lawfully be used for another. What then is the servitude which the plaintiffs have acquired over the defendant's land? There is no agreement specifying times or occasions of access. The defendant has never till now interfered with the access, or claimed to exercise any control over it. The servants of the plaintiffs came and went at their own discretion, or at the discretion of their employers. What is the inference to be drawn? It is difficult to suppose that if they thought fit to use the passage twice as

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often, or four times as often, as they actually did use it, they were not at liberty to do so. There is nothing in the proved facts to indicate a limit to the user of the passage, except the limit that it must be a reasonable user for the purpose of cleansing. It seems to their Lordships that if, without any action on the part of the Municipality, the plaintiff had chosen to cleanse out their privy every morning, they might have used the [143] passage, at a convenient hour for that purpose. If so, they may now use it for giving access to the servants of the Municipality at reasonable and convenient times. And in a legal sense they are not aggravating the servitude at all, for this is the servitude to be inferred from the proved facts.

The result is that, in their Lordships' opinion, the decree appealed from is right, and this appeal should be dismissed. They will humbly advise Her Majesty to that effect. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Sanderson & Holland.*

Solicitors for the respondents: Messrs. *Wrentmore & Swinhoe.*

C. B.

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13 C. 143.

CIVIL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Norris.

SHERE ALI AND ANOTHER (*Plaintiffs*) *v.* C. L. PRENDERGAST AND ANOTHER (*Defendants*).* [5th March, 1886.]

Army Act (44 *and* 45 *Vict., c.* 58), *s.* 148—*Courts of Requests, their jurisdiction—Court of Small Causes, power of—Construction of s.* 151, *cl* 1 *of the Army Act.*

The Army Act (44 and 45 Vict., c. 58) gives jurisdication to a Court of Small Causes in all actions of debt and personal action against persons subject to military law (other than soldiers in the regular forces) over which such Court would ordinarily exercise jurisdiction, and provides a Court of Requests (s. 148) for those cases only where an action of the value of Rs. 400 or under has to be brought against such persons at a place lying beyond the jurisdiction of any Small Cause Court.

Held, also, that the words "within the jurisdiction" in s. 151, cl. 1, referred to "action" and not to "persons."

THIS was a reference from the Court of Small Causes at Patna under s. 617 of the Civil Procedure Code. Sheik Shere Ali and another brought a suit in the Court of Small Causes at Patna against Major C. L. Prendergast, Deputy Judge Advocate-General, residing in Rawalpindi, and Shiva Gobind living at Dinapur, within [144] the local limits of the Patna Small Cause Court, for recovery of the value of goods sold and delivered at Dinapur, and on August 13th, 1883, obtained an *ex parte* decree. In execution of the decree, an order having been issued on the Military Paymaster of the Punjab Circle for the attachment of Major Prendergast's salary, an objection was taken to the effect that the proper Court which could take cognizance of the case was a Court of Requests composed of officers under s. 148 of the Army Act (44 and 45 Vict., c. 58) and not the Patna Court of Small Causes.

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* Civil Reference No. 1A of 1886, made by Baboo Troilokya Nath Mitter, Judge of the Small Cause Court, Patna, dated the 15th December 1885.

The Judge was of opinion that, in s. 151, cl. 1, "in India all actions of debt and personal actions against persons subject to military law other than soldiers of the regular forces, within the jurisdiction of any Court of Small Causes, shall be cognizable by such Court to the extent of its powers" the words "within the jurisdiction" referred to "actions" and not to "persons," and that, under the section, actions of debt and personal actions against military men over which any Small Cause Court would ordinarily exercise jurisdiction should be cognizable by such Court to the extent of its power; and when such an action of the value of Rs. 400 and under had to be brought against a military man (other than soldiers of the regular forces) at a place lying beyond the jurisdiction of any Small Cause Court, then and then only it should be triable by a Court of Requests."

The following question was referred to the High Court: Whether, under the circumstances, the Patna Court had jurisdiction to try the suit.

The opinion of the Court (MITTER and NORRIS, JJ.) was as follows:—

OPINION.

We are of opinion that the view taken by the Judge of the Small Cause Court, Patna, of s. 151 of the Army Act (44 and 45 Vict., c. 58) is correct; and we are of opinion that Major Prendergast's pay may properly be attached in execution of the decree obtained against him.

K. M. C.

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13 C. 145 = 11 Ind. Jur. 105.

[145] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

GRISH CHANDRA (*one of the Defendants*) v. KASHISAURI DEBI (*Plaintiff*) AND BROJO SUNDARI DEBI (*Pro forma Defendant*).*
[15th April, 1886.]

Transfer of Property Act (IV of 1882), s. 135—Transferee of a claim for smaller value—Recovery of full amount of debt.

It is not the object of s. 135 of the Transfer of Property Act absolutely to prevent a transferee, who has purchased a claim at a smaller value, from recovering the full amount of debt due from the debtor.

[Diss., 9 A. 476 (479); 13 A. 102 (107); 13 M. 225 (F.B.); 5 C.P.L.R. 13; F., 10 M. 289 (290); 15 C. 436 (437); 18 C. 510 (513); 23 C. 713; Appr., 19 B. 290 (292); 21 C. 568 (F.B).]

BROJO SUNDARI DEBI claimed the sum of Rs. 540 as her maintenance allowance under the terms of a registered *ekrar* executed in her favour by her step son Grish Chandra Moitra. She sold her claim to Kashisauri Debi for a consideration of Rs. 344. The transferee brought a suit against Grish Chandra for the recovery of the full amount of Rs. 540, as principal and Rs. 110 as interest. The defendant in his written statement denied the title of the purchaser and pleaded payment to Brojo Sundari.

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* Appeal from Appellate Decree No. 2338 of 1885, against the decree of G.G. Dey, Esq., Judge of Pubna and Bogra, dated the 10th of July, 1885, reversing the decree of Babu Bepin Beharee Mukerji, Munsif of Pubna, dated the 16th of February 1885.

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The Munsif dismissed the suit on the ground of a flaw in the deed of sale. The District Court decreed the claim. On appeal to the High Court, it was contended that the plaintiff was not entitled to recover anything beyond the amount for which she purchased the claim.

Babu *Lal Mohun Das*, for the appellant.

Babu *Ishwar Chunder Chuckerbutty*, for the respondent.

The judgment of the Court (Mitter and Grant, JJ.) was as follows:—

JUDGMENT.

Mitter, J.—The only point which we think it necessary to notice is that raised in the third ground of the petition of appeal, *viz.*, "that the plaintiff is not entitled to recover anything beyond the amount for which she purchased the claim."

[146] The plaintiff is the transferee of a debt due to one Brojo Sundari Debi from the appellant before us. The claim is to recover Rs. 650, made up of Rs. 540 principal and Rs. 110 interest. This actionable claim was admittedly purchased by the plaintiff for Rs. 344; and it is contended before us for the first time in second appeal that, under s. 135 of the Transfer of Property Act, which applies to the transaction under which the plaintiff became entitled to this actionable claim, the plaintiff is only entitled to recover the price which she paid, and the incidental expenses of the sale, although the third ground does not admit that she is entitled to those expenses.

We are of opinion that this contention is not valid. Section 135 does not say that a transferee is *not entitled* to recover from the debtor the full amount of the debt due from the latter. It simply says that the *debtor would be wholly discharged by paying* to the buyer the price and the incidental expenses of the sale with interest on the price from the date the buyer paid it. In this case the debter did not pay to the plaintiff the amount mentioned in the section, nor is it alleged that he offered to pay that amount, and that the plaintiff refused to accept it. The section, therefore, is not applicable to the present case. Clause (*d*) of that section also points out that, even if the debtor had offered to pay the amount mentioned in the section after the decree in the lower Court, he would not have been discharged, because that clause says that the former part of the section will not apply where the judgment of a competent Court has been delivered confirming the claim. We are, therefore, of opinion that this objection is not valid.

We dismiss the appeal with costs.

K.M.C. *Appeal dismissed.*

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[147] APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

LOKE NATH SURMA AND OTHERS (*Plaintiffs*) v. KESHAB RAM DOSS AND OTHERS (*Defendants*).* [19th April, 1886.]

Multifariousness—Misjoinder of causes of action—Civil Procedure Code, 1882, *s.* 28—*Suit for declaratory decree—Specific Relief Act* (*I of* 1877), *s.* 42.

The plaintiffs having obtained a decree for the possession of certain lands and having received formal possession thereof, brought a suit against 86 persons holding distinct and separate tenures in those lands, on the allegation that, "on the plaintiffs attempting to measure the lands, and calling on the tenants to pay rent, ten of the defendants described as *prodhans* or headmen formed a combination and gained over the other defendants with a view to injure the plaintiffs; that through their help and endeavour the remaining defendants failed to recognize the plaintiffs as landlords, and declined to pay any rent or to allow them to measure the lands, driving away an amin who went to measure the lands on behalf of the plaintiffs, and thereby preventing the plaintiffs from exercising their proprietary rights; that the plaintiffs brought suits for rent against some of the defendants, and in those suits the defendants denied the plaintiffs' title as landlords, whereupon the plaintiffs, seeing the necessity of instituting a suit for declaring the defendants tenants of the land, withdrew the suits for rent." They stated their cause of action to "be the defendants' act of not recognizing us as their landlord, and thereby preventing us exercising our proprietary rights in respect of the land in suit, and not allowing us to make a measurement of that land, and also withholding the payment of rent;" and prayed for a decree establishing their proprietary right and declaring the defendants to be their tenants. *Held*, that there was but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property they had purchased; and that the suit was not multifarious within s. 28 of the Civil Procedure Code. *Held* also, that the declaratory decree prayed for could be made, notwithstanding the plaintiffs might have asked for possession of the lands.

[Cons. 18 Ind. Cas. 852 (853); R., 18 A. 131 (134); 15 Ind. Cas. 552; 18 Ind. Cas. 633 (635) = 17 C.L.J. 30 (33).]

THE judgment appealed from in which the facts are fully stated was as follows:—

"The plaintiffs are the proprietors of two taluks—No. 5, Mahomed Nazim and No. 3, Mahomed Aufar. In the year 1877 they brought a suit against one Nasrat Raja, proprietor of taluk No. 8, for the recovery of certain lands claimed as appertaining [148] to taluks Nos. 5 and 6, and alleged to be held by the defendant. That suit was decreed by the Subordinate Judge on the 21st June 1877, and it is said formal possession was delivered to the plaintiffs in execution by a Civil Court Amin deputed for the purpose. The plaintiffs now, specifying the boundaries of certain lands aggregating a total area of 65 hals 10 kears, bring the present suit against the tenants of those lands, 86 in number, on the following allegations:—

"(1) That the lands in the possession of the defendants were included in those delivered in execution of the decree against Nasrat Raja; that defendants or their predecessors were at that time in possession as the tenants of Nasrat Raja, and were all aware of the proceedings in execution of the plaintiffs' decree.

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* Appeal from Appellate decree No. 807 of 1885, against the decree of J. Kelleher, Esq., Judge of Sylhet, dated the 9th February, 1885, reversing the decree of Baboo Ram Kumar Pal, Rai Bahadur, Subordinate Judge of that district, dated the 4th of July, 1884.

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"(2) That in Pous 1285 B. S. December 1878), plaintiffs attempted to measure the lands in suit, and called on the jotedars (tenants) to pay the rents of those lands; but ten of the defendants, who are described as *prodhans* or headmen, formed a combination, and gained over the other defendants with a view to injure the plaintiffs; and then through their help and endeavour the remaining defendants failed to recognise plaintiffs as their landlords, and declined to pay any rent or to allow the plaintiffs to make the measurement. It is further alleged that they drove away an Amin who went to measure on behalf of the plaintiffs, and thereby prevented plaintiffs from exercising proprietary rights in respect of the lands and suspended plaintiffs' possession.

"(3) The plaint then proceeds to state that plaintiffs brought several rent suits against the defendants or some of them in the Munsif's Court; but that in those suits the defendants denied plaintiffs' right by raising the question of title. Whereupon plaintiffs, seeing the necessity of instituting a civil suit for declaring the defendants tenants of the land, withdrew the rent suits mentioned.

"In paragraph 5 of the plaint the cause of action is stated as follows: "The defendants' act of not recognising us as their landlords, and thereby preventing us to exercise our proprietary right in respect of the land in suit, and not allowing us to make a measurement of that land and also withholding the payment of rent."

[149] 'The plaintiffs, therefore, 'pray for a decree establishing the proprietary right of the plaintiffs in respect of 65 hals 10 kears 1 powa of land being under the jote and possession of the defendants, and declaring the defendants as tenants under the plaintiffs, so that the plaintiffs may be enabled to exercise all sorts of proprietary rights in respect of the said property against the defendants,' or for such other relief as the Court should think fit.

"Five of the defendants appeared and objected to the suit on the grounds (1) that it was untenable under the provisions of Act I of 1877; (2) that it was barred by limitation; (3) that it was bad because different causes of action against different defendants separately were joined in a single suit; and (4) that it was bad for non-joinder of parties, because certain persons, alleged to be the actual landlords and in possession and receipt of rent from the defendants were not made parties. Into the other defences set up it is unnecessary to go more into detail. Defendants denied that the lands held by them were ever included in the suit between plaintiffs and Nasrat Raja, or that they (the defendants) ever paid any rent to Nasrat Raja. They allege that the lands in their tenancy really appertained to taluk No. 2, Korban Raja; that they were themselves owners to the extent of 10 annas, having purchased an 8-anna share from one Ammal Khair Bibi, and a 2-anna, share from one Kala Chand Roy; that as regards the remaining 6-annas, they were tenants and paid their rents to the proprietors, who ought to have been joined as parties to the suit

"At the trial before the Subordinate Judge, a copy of the decree in plaintiffs' case against Nasrat Raja was admitted in evidence against the defendants. Four of the witnesses examined for Nasrat Raja in that suit happened to be included amongst the defendants in the present suit, but they did not appear. However, copies of their depositions in Nasrat Raja's suit were admitted in this suit as evidence, not only against the four defendants themselves, but against the remaining 82 defendants on the record, and his judgment

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was in a great measure influenced by the former decree and the admissions contained in those depositions. I may here note that the tenancies of the 86 defendants are altogether distinct and separate. It will be observed that, in deciding the sixth issue, the Subordinate Judge relied mainly [150] on the admissions contained in the depositions above-mentioned. "Those persons," he adds, "have not been bold enough to make a reply in the present suit, inasmuch as they bound themselves by giving their depositions in the previous suit; but it has been proved by the evidence adduced in this suit that they are in a combination with the defendants who appeared in this suit, and the circumstances of the suit also go to support shat," and so of course any admissions made by the witnesses as to their own tenancies became at once evidence with respect to the remaining 82 tenancies. Again in his decision on the seventh issue, the Subordinate Judge refers to those documents and to the admissions contained in the depositions of the four persons examined as witnesses in Nasrat Raja's case.

In the result the suit was decreed in favour of the plaintiffs, and it was ordered that "the plaintiffs' title to, and possession of, the land in suit be established, and it be declared that the defendants are the plaintiffs' jotedars in respect of that land," and the defendants who appeared were ordered to pay the plaintiffs' costs.

"The objections taken in appeal are substantially the same which were urged before the lower Court. It is contended that the suit is one for which no sanction is to be found in the Procedure Code, and that it is expressly excluded by the provisions of s. 28; that the plaintiffs being able to seek further relief than a mere declaration of title, and having omitted so to do, cannot have a declaration under s. 42 of the Specific Relief Act; that the suit was bad for non-joinder of the proprietors of the 6-anna share; that it was barred by limitation; that the decree in Nasrat Raja's case and depositions of the witnesses already mentioned were not admissible in evidence at the trial of this suit, and that in no way could the admissions in those depositions be made evidence against the other defendants to the suit. It was also contended that, if plaintiffs were resisted in their measurement, they had a special remedy provided for them by s. 38, Beng. Act VIII of 1869.

"On the merits of the question of title, the case was argued at length with reference to maps and boundaries and the oral evidence bearing on those points.

[151] "Under s. 28 of the Procedure Code, only those persons may be joined as defendants against whom the right to any relief is alleged to exist 'in respect of the same matter.' In the course of the argument I asked plaintiffs' pleader how the relief against the several defendants could be said to exist in respect of the same matter, and his reply was: 'When I sent my own men to measure the lands, they resisted and denied my right to measure and thereby my proprietary right.' When the plaintiffs are driven to resort to a mere fiction of that sort as a ground of jurisdiction, their case must be very weak. The plain facts are that there are 86 tenants of distinct and separate lands who refuse to pay rent to the plaintiffs, have never paid them any, and deny their title to recover any such rents. The case of each particular defendant is entirely distinct and separate in its subject-matter from that of the other defendants. The provisions of the Procedure Code bearing on this question will be found discussed in a Full Bench decision of the Allahabad High Court—*Narsing*

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Das v. *Mangal Dabi* (1), and it is unnecessary for me to say more on the subject. I hold that this suit ought to have been dismissed, because different causes of action against different defendants separately were joined, for which procedure no sanction is to be found in the Code.

"Even if that objection were not fatal to the suit, I should be prepared to hold that a declaration of the nature prayed for, without further relief sought, could not be made under s 42 of the Specific Relief Act.

"In the above view of the case it is unnecessary to go into the other questions raised by the appeals. It is to the advantage of the parties themselves that the questions at issue between them should be left for decision on legal evidence in suits properly framed for the purpose.

"The decree of the lower Court will accordingly be reversed with costs of both Courts and interest at 6 per cent. per annum."

From this decision the plaintiffs appealed.

Mr. *Woodroffe* and Babu *Joygobind Shome*, for the appellants.

Munshi *Serajul Islam*, for the respondents.

[152] The judgment of the Court (McDONELL and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The circumstances of this case are fully set out in the decision of the lower appellate Court.

It is contended in second appeal that the District Judge is wrong in law: (1) in dismissing the suit on the ground that different causes of action against different defendants separately have been joined together; and (2) in holding that a suit for a mere declaration of title without further relief is not maintainable under s. 42 of the Specific Relief Act.

In deciding the first point, the Judge has relied upon the Full Bench decision of the Allahabad High Court in the case of *Narsing Das* v. *Mangal Dabi* (1), in which it was held that, where several distinct causes of action are alleged against distinct acts of defendants who are not jointly liable in respect of each and all of such causes of action, a suit against all the defendants jointly is bad in law.

In the present case, however, it is contended that the cause of action alleged against all the defendants is one and the same, *viz.*, a conspiracy on the part of all the defendants to keep the plaintiffs out of possession of their property; and we have been referred to the case of *Gajadhur Pershad Narain Singh* v. *Saheb Roy* (2), where a number of ryots were held to have been properly sued in one and the same suit, on the allegation that they had fraudulently used a forged *jamabandi* paper with the view to support certain *mokurari* claims which they put forward, and thereby to oust the plaintiff from the full enjoyment of his proprietary right.

In the present case, the cause of action is said to have accrued in consequence of the defendants not admitting the plaintiffs to be their landlords, not allowing them to exercise their *maliki* rights to the disputed lands, not paying them the rents, and not allowing them to measure the lands (see para 5 of the plaint). And this cause of action is said to have arisen on the dates on which the written statements were filed in the rent suits which the plaintiffs brought against some of the defendants

[153] The allegation in the plaint is that some of the defendants *and the predecessors of others* combined to prevent the plaintiffs from measuring

(1) 5 A. 163. (2) 19 W.R. 203.

the lands, and further that some of the defendants, who were sued for rent, put in answers denying the plaintiffs' title.

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These statements are somewhat vague, and do at first sight give rise to the impression that several distinct causes of action against different sets of defendants are being joined in one and the same suit; but on the whole of the pleadings, we think it must be taken that there was really but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property which they had purchased.

Only 5 out of the 86 defendants appeared, and their defence was that they had a *maliki* right to a 10-anna share of the lands in suit. This defence was apparently put forward on behalf of the other defendants as well as themselves, though it was at the same time alleged that some of the defendants were acting in collusion with the plaintiffs. The District Judge says:—

"The plain facts are that there are 86 tenants of distinct and separate lands who refuse to pay rent to the plaintiffs, have never paid them any, and deny their title to recover any such rents." But the mere fact that these tenants hold distinct and separate lands affords no sufficient reason why they should not be joined as co-defendants in the same suit, if, as the Judge finds as a fact, they have combined to keep the plaintiffs out of possession.

Section 28 of the Code allows all persons to be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or, in the alternative, in respect of the same matter. In the present suit it is alleged that the right to a declaration of the plaintiffs' title exists against *all* the defendants, inasmuch as they all deny the plaintiffs' right to receive the rents of the land in dispute.

The section in question goes on to say that "judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities without any amendment" of the plaint. And s. 31 of the Code provides **[154]** that "no suit shall be defeated by reason of the misjoinder of parties," but that "the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

By s. 45 a plaintiff is allowed, subject to certain conditions, to join several causes of action against the same defendant, or the same defendants jointly; and if it appears that such causes of action cannot conveniently be tried together, the Court is not to dismiss the entire suit but to order separate trials thereof, or make such other order as may be necessary or expedient for their separate disposal.

We think then that, under the circumstances of the case, this suit ought not to have been dismissed on the ground of misjoinder. In this view we are supported by the decision in *Omur Ali* v. *Weylayet Ali* (1).

Nor in our opinion was the suit liable to be dismissed on the ground that the declaration prayed for could not be made under s. 42 of the Specific Relief Act.

It is contended that the plaintiffs, being out of possession, should have sued to recover possession, and not merely have sued for a declaration of their title. We think that this was unnecessary. The plaintiffs were not seeking for khas possession, but merely for possession by receipt of rent from the defendants. Under these circumstances, even if the

(1) 4 C.L.R. 455.

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plaintiffs had sued for and obtained a decree for possession of the property, that possession could only have been delivered by notifying the declaration of the plaintiffs' title as prayed for. We think, therefore, that the omission to sue for possession was immaterial, and that the suit was not liable to be dismissed on this ground.

Under these circumstances, we reverse the decree of the lower appellate Court and remand the case to that Court under s. 562 of the Code for trial of the appeal on its merits.

J.V.W. *Appeal allowed and case remanded.*

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13 C. 155.

[155] APPELLATE CIVIL.

Before Mr. Justice Porter and Mr. Justice Agnew.

TORAB ALI KHAN AND OTHERS (*Two of the Defendants*) *v.* NILRUTTUN LAL AND OTHERS (*Plaintiffs*).* [15th May, 1886.]

Limitation Act (*XV of* 1877), *sch. II, arts.* 61, 115, 120—*Money which plaintiff was obliged to pay in consequence of acts of defendants.*

On the 29th May 1873 one *T* drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person his heirs sued the shroff to recover the sum deposited, and on the 30th January 1878 obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February 1884 the shroff sued *T*, the heirs of the third party, and another person (who owned to having received sum of the money from *T*), to recover the sum he had been compelled to pay under the decree of 1878.

Held, that the plaintiff's cause of action arose at the time when he actually paid down the money on the 15th January 1883, and that the suit therefore was not barred by limitation.

[F., 31 P.R. 1904; R., 9 M.L.T. 212=8 Ind. Cas. 1102; 16 B. 1 (10); 30 M. 209 (211)=17 M.L.J. 194.]

ON the 26th January 1871 one Torab Ali Khan deposited a sum of Rs. 1,329 with the firm of Nilruttun and Co. to the credit of the account of one Asgar Hossein, receiving from the firm a receipt for that sum. On the 20th July 1871 one Chuni Lal (a servant of one Mussamut Bhikhan, an aunt of Asgar Hossein) presented the receipt to the firm of Nilruttan and Co. and received payment of Rs. 200, which payment was endorsed upon the receipt, and was also entered in the books of the firm. Subsequently further payments were made personally to Chuni Lal on production of the receipt, and on the 29th May 1873 Torab Ali Khan himself produced the receipt to the firm and drew out the balance of the money, with the interest due thereon, and returned the receipt.

Subsequently to the death of Asgar Hossein, his widow, sons, and daughters brought a suit against the firm of Nilruttun and Co. to recover the sum deposited in the name of their father; and, on the 31st January 1878, obtained in such suit a decree.

[156] On execution of this decree issuing, some of the judgment-creditors, *viz.*, the widow and sons of Asgar Hossein, voluntarily gave up their portions of the sum ordered to be paid under the decree, but as regarded the share in the decree belonging to the daughters (who were

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* Appeal from Order No. 327 of 1885, against the order of T. Smith, Esq., Judge of Gya, dated the 7th of September 1885, reversing the decree of Baboo Dinesh Chunder Roy, Subordinate Judge of that district, dated the 20th November 1884.

minors) execution was taken out and the sum due was deposited in Court by Nilruttun and Co. on the 15th January 1883.

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Nilruttun and Co. then demanded from Torab Ali Khan the sum which he had received from them, and he admitted that he had made it over to Mussamut Bhikhan, who also refused to repay the amount she had received. Thereupon Nilruttun and Co., on the 5th February 1884, brought a suit against Torab Ali Khan, Mussamut Bhikhan, and the minor daughters of Asgar Hossein, the minors being represented by their elder brother as guardian, to recover the sum paid by him on their account, dating their cause of action from the 15th January 1883.

Torab Ali pleaded limitation, and contended that, inasmuch as he was not a party to the suit in which the decree of the 30th January 1878 was obtained, he could not be made liable in this suit.

Mussamut Bhikhan pleaded limitation, and contended that she was not a necessary party to the suit.

The minors put in no written statement.

The Subordinate Judge found that, when Torab Ali received the money, he impliedly, if not expressly, promised the plaintiffs to pay the money to the persons entitled thereto without delay; and that inasmuch as he had not done so, he as well as the persons to whom he paid the money had acted fraudulently towards the plaintiffs, and that the plaintiffs' cause of action against them arose as soon as the fraud was discovered, which was, when the decree in the first suit was obtained, *viz.*, the 30th January 1878. He, therefore, held that the suit was barred by art. 115 of the Limitation Act, even allowing that the plaintiffs were entitled under art. 95 to extend the period of limitation so as to allow time to run from the time that the fraud became known to the plaintiffs.

The plaintiff's appealed to the District Judge, who held that the breach of the contract by Torab Ali was a continuing [157] breach, and that, therefore, on the authority of *Imdad Ali* v. *Nijaput Ali* (1) the suit was not barred.

The defendants appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Moulvi *Mohomed Yusuf*, for the appellants, contended that there being no contract, the suit did not fall under art. 115 of the Limitation Act; but that it would either fall under art. 96 or 120; and relied upon the case of *Raghumoni Audhikary* v. *Nilmoni Singh Deo* (2).

Mr. *W. M. Das* and Baboo *Rash Behari Ghose*, for the respondents, were not called upon.

The judgment of the Court (PORTER and AGNEW, JJ.) was as follows:—

JUDGMENT.

The plaintiffs' case is that, on the 26th of January 1871, the defendant Torab Ali opened a banking account with their firm in the name of one Asgar Hossein; that on the 29th of May 1873 Torab Ali drew out the amount of the balance at the credit of Asgar Ali, and made it over to the defendant Mussamut Bhikhan; and that, on the 30th of January 1878, a decree was made against the plaintiffs for the refund of this amount at the suit of the heirs of Asgar Hossein. The plaintiffs further state that some of the heirs executed a release to them for the amount of their shares, and that they were obliged to pay the sum of Rs. 930-0-6 to the other heirs on the 15th of

(1) 6 A. 457. (2) 2 C. 393.

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January 1883. They now sue for this sum and for Rs. 125-15-6 for interest. The suit was instituted on the 5th of February 1884, the plaintiffs alleging that their cause of action accrued on the day when they had to pay the sum of Rs. 930-0-6. The first Court held that the suit was governed by art. 115 of the second schedule to the Limitation Act, and that it was barred, having been instituted more than three years from the date when the fraud was discovered. This decision was reversed on appeal, the Judge holding that the defendant Sorab Ali's breach of an implied contract, which was the cause of action, was a continuing breach, and that the suit was not barred. It has been argued for the appellant that [158] either arts. 95, 96 or 120 of the second schedule to the Limitation Act apply to the case, and that the cause of action accrued either on the 29th of May 1873 when Torab Ali drew the balance, or, if not then, on the date when the plaintiffs first became aware of the alleged fraud, and in either case more than six years before the suit was instituted. There does not appear to be any article which applies precisely to this case; the article which appears most applicable is, we think, art. 61, which provides, a period of three years' limitation from the date when the money is paid, for a suit to recover money payable to the plaintiffs for money paid for the defendant. We do not think that either art. 95 or art. 96 apply. The suit is not to obtain relief on the ground of fraud or mistake but to recover a specified sum of money which the plaintiffs have had to pay in consequence of the act of the defendant, Torab Ali. Until that money was paid, the plaintiffs did not suffer any loss. The mere demand by the heirs of Asgar Hossein did not give the plaintiffs a cause of action against the defendants, nor did the institution of the suit. The demand might have been abandoned, or the suit might have been dismissed. And even supposing that the plaintiffs had admitted their liability to the heirs, they would not have suffered any loss until they actually paid the amount claimed; and that is shown by what actually happened in this case when some of the heirs released the plaintiffs from their claims. The plaintiffs do not pretend to say that they are entitled to recover more than what they actually had to pay. We think, therefore, that the cause of action accrued on the 15th of January 1883, the date when the money sued for was paid, and that the suit is not barred by limitation, and we dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

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13 C. 159.

[159] APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

GOWRI PROSAD KUNDU AND OTHERS (*Plaintiffs*) *v.* RAM RATAN SIRCAR AND OTHERS (*Defendants*).* [19th April, 1886.]

Limitation Act, 1877, *art.* 13—*Suit for refund of sale-proceeds paid in accordance with order for distribution under s.* 295, *Civil Procedure Code,* 1888—*Multifariousness.*

In execution of a decree against six persons the plaintiffs had certain property brought to sale, the proceeds of which were brought into Court. The defendants

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* Appeal from Appellate Decree, No. 1844 of 1885, against the decree of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 26th of May 1885, affirming the decree of Baboo Krishna Chunder Chatterji, Subordinate Judge of the district, dated the 28th of June 1884.

who held five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, applied to have the amount in Court, rateably distributed; and in accordance with an order of the Court, dated 13th September 1880, this was done, the proceeds being distributed in proportion to the amounts of the decrees. In a suit brought on 24th August 1883 against the defendants, on the allegation that the plaintiffs were entitled to the whole of the proceeds, or in the alternative for distribution on a different principle: *Held* the suit was one to set aside the order, and not having been brought within one year from the date of the order was barred by limitation under art 13, sch. II of Act XV of 1877. *Ram Kishan* v. *Bhawani Das* (1) distinguished.

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Held, also, that there was no misjoinder of causes of action by reason of all the defendants being included in one suit.

[Diss., 15 B. 438 (440); 65 P.R. 1895; 1 Bom. L. R. 795; R., 2 C. W N. 429 (432); 3 O. C. 84 (86); U.B.R. 1904, Limitation, sch. II, 13, p. 1 (3).]

THE plaintiffs obtained a decree against six persons, in execution of which decree certain properties were sold, and a sum of Rs. 2,164 brought into Court as the proceeds of the sale. Meanwhile the defendants had obtained five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, and applied to have the amount in Court rateably distributed between themselves and the plaintiffs. This was done by the Munsif who, on 13th September 1880, ordered that Rs. 1,178 should be allotted to the plaintiffs, and the balance to the defendants in sums proportionate to the amounts of their decrees. The plaintiffs, on the 24th August 1883, brought the present suit against the defendants under the last clause of s. 295 of the Civil Procedure Code, alleging that they were entitled to [160] have the entire fund paid over to them. The plaintiffs asked for a decree for the amount received by the defendants, or, if the Court should be of opinion that the defendants were entitled to some share of the proceeds, that the distribution should be made with reference to the extent of the judgment-debtor's share.

The Subordinate Judge found that the suit was, if it was a suit to set aside the order passed under s. 295, barred by limitation, or if not, it was bad for misjoinder of causes of action.

The Judge on appeal held on the authority of *Ram Kishan* v. *Bhawani Dass* (1), that the suit was not one to set aside the order under s. 295, and was not barred by limitation; but that it was bad for misjoinder. He, therefore, dismissed the appeal.

The plaintiffs appealed to the High Court.

Baboo *Girja Sunker Moozoomdar* and Baboo *Guru Dass Banerjee*, for the appellants.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Rash Behary Ghose*, for the respondents.

JUDGMENT.

The judgment of the Court (McDONELL and BEVERLEY, JJ.), after stating the facts, continued as follows:—

On appeal the Additional Judge held that the suit was not barred by limitation, but that it was bad on the second ground.

Against this latter finding, the plaintiffs have preferred a second appeal, and the respondents seek to uphold the decree of the lower appellate Court on the ground of limitation. It is contended that they are not at liberty to do this, not having given notice to the other side under the provisions of s. 561 of the Code; but we think that, under

(1) 1 A. 333.

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the terms of that section, it was not necessary to give the appellants notice.

The Judge has disposed of the question of limitation relying on the authority of the case of *Ram Kishan* v. *Bhawani Dass* (1); but the circumstances of that case were different [161] from those of the present, and the decision is, therefore, not applicable. In that case it was held that a suit to recover the sale proceeds paid away under an order of the Judge, which was made without jurisdiction, was not a suit to set aside that order, inasmuch as the order itself was a nullity. But in the present case, the order of distribution was made by a Court fully competent to make it, and was a good order until set aside.

Moreover, it is not easy to see how any relief could be granted to the plaintiffs without setting aside that order, and in fact the plaintiffs virtually ask to have it set aside, because they ask as an alternative prayer in their plaint that, if they are found to be not entitled to the whole of the assets, those assets may be distributed on a principle different from the adopted by the munsif.

We have been referred to two cases decided under Act VII of 1859—*Gogaram* v. *Kartick Chander Singh* (2) and *Woomamoyee Burmonya* v. *Ram Buksh Chetlangee* (3), which decided that a suit brought to obtain a refund of sale proceeds paid away by the Court in contravention of the provisions of s. 270 of that Code must be regarded as a suit to set aside the order of the Court. The fourth clause of s. 295 of the present Code runs as follows :—

"If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets."

Assuming that such a suit may be brought by one of the parties to the distribution as effected by the order of Court, we think it must be regarded as a suit brought by him to set aside that order, and therefore it must be brought within one year from the date of the order. The present suit not having been instituted within that period, we are of opinion that it is barred by limitation under art. 13, sch. II, of the Limitation Act.

On the other point we are clearly of opinion that the suit should not have been thrown out for misjoinder of parties. In [162] the case of *Brojo Nath Chuckerbutty* v. *Baney Madhub Dischit* (4), it was held that, in a suit brought to set aside an order under s. 270 of Act VIII of 1859, all the parties to the distribution ought to be made parties to the suit. We find that a similar view was expressed in a recent decision by a Divisional Bench of this Court in Appeal from Original Decree 291 of 1884, decided on 8th September 1885, in respect of suit under s. 295 of the present Code. In this case, it was absolutely necessary that the Court should have before it all the parties to the distribution if it was to decide whether that distribution had been effected upon a proper principle.

Moreover, under ss. 28, 31 and 45 of the Code, it would seem that the suit should not have been dismissed on this ground. As we have held, however, that the suit is barred by limitation, the appeal is dismissed with costs.

J. V. W. *Appeal dismissed.*

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(1) 1 A. 333.
(2) B. L. R. Sup. Vol. 1022=9 W.R. 514.
(3) 16 W. R. 11.
(4) 23 W.R. 434.

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APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Grant.

AHMED MIRZA SAHEB AND ANOTHER (*Plaintiffs*) v. A. THOMAS, EXECUTOR TO THE ESTATE OF THE LATE MR. J. P. WISE AND OTHERS (*Defendants*).* [27th May, 1886.]

Court Fees Act (*VII of* 1870), *sch. I and sch. II, art.* 7, *cl* 3—*Suit after rejection of claim to attached property*—Ad valorem *Stamp.*

In execution of a decree by the defendant, certain property was attached as being that of the judgment-debtor. The plaintiff preferred a claim, but his claim was disallowed, and the property ordered to be sold. In a suit to have it declared that the property belonged to the plaintiff : *Held* it was a suit in which consequential relief was asked for, and that the *ad valorem* duty prescribed by sch. I of the Court Fees Act was payable on the plaint, and not that provided by sch. II, art. 17.

Jalaluddin Mahomed v. *Shohorullah* (1) followed.

[**Diss.**, 1 L. B. R. 1 (2) ; **R.**, 20 B. 736 (741) ; U. B. R. (1897—1901), Vol. II, 216 (220); U. B. R. (1897—1901), Vol. II, 355 (359); 31 C. 511 (514) ; 31 B. 73=8 Bom. L.R. 885 (888) ; **D.**, 15 C. 104 (106).]

IN execution of a decree obtained by the defendants against the plaintiffs' father Mahomed Mirza, certain properties were attached, to a share of which the plaintiffs alleged they were [163] entitled, and to which they accordingly preferred a claim ; that claim was struck off the file for default in prosecution. The plaintiffs petitioned for a review of the order striking off the claim, but the application was rejected. The plaintiffs then brought this suit to establish their right and title to the share they claimed in the disputed properties. The prayer of the plaint was : "(1) that a decree may be passed declaring the shares of the properties under claim to be the property of the plaintiffs ; (2) that a decree may be passed for costs of Court with interest ; (3) that the Court may be pleased to grant any other relief which it may deem the plaintiffs entitled to according to equity."

The plaint bore a Court-fee stamp of Rs. 10. The Subordinate Judge was of opinion that the plaint should be stamped according to the value of the properties in dispute, and gave the plaintiffs time to affix the proper stamp ; and on the order not being complied with, he dismissed the suit. On appeal this decision was affirmed by the Judge. The plaintiffs appealed to the High Court.

Baboo *Durga Mohan Dass*, for the appellants.

Baboo *Rash Behari Ghose*, for the respondents.

The following cases were cited : *Chunia* v. *Ram Dial* (2) ; *Gulzari Mal* v. *Jadaun Rai* (3) ; *Fatima Begam* v. *Sukh Ram* (4) ; *Manraj Kuari* v. *Radah Prasad Singh* (5) ; and *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (6) in favour of the appellants; and *Jalaluddin Mahomed* v. *Shohorullah* (1) for the respondents.

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* Appeal from Appellate Decree, No. 2533 of 1885, against the decree of J. F. Bradbury, Esq., Judge of Backergunge, dated the 3rd of September 1885, affirming the decree of Baboo Beni Madhub Mitter, First Subordinate Judge of that district, dated the 24th of April 1885.

(1) 15 B. L. R. Ap. 1=22 W. R. 422. (2) 1 A. 360. (3) 2 A. 63.
(4) 6 A. 341. (5) 6 A. 466. (6) 9 B. 20.

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CIVIL.

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The judgment of the Court (GHOSE and GRANT, JJ.) was as follows:—

JUDGMENT.

The only question we have to decide in this appeal is whether the lower Courts were right in holding that the plaint was insufficiently stamped, because the stamp duty payable was not Rs. 10 under cl. 3, art. 17, sch. II of the Court Fees Act, but the *ad valorem* fee as prescribed by sch. I of the said Act.

[164] It appears that, in execution of a certain decree obtained by one Thomas against Mahomed Mirza, the property in suit was attached as belonging to the judgment-debtor. The plaintiff preferred a claim, but his claim was disallowed, and the property in question was ordered to be sold. Thereupon, the plaintiff brought the present suit to have it declared that the property belonged to him and not to Mahomed Mirza.

It seems to us that this was a suit where consequential relief was asked for. It was a suit which was brought for the purpose of establishing the plaintiffs' right to the property in question, and with a view to free the property from the attachment which had been put upon it, and to protect it from being sold as the property of Mahomed Mirza. In this view of the matter, we are of opinion that the suit would not fall within art. 17 of the sch. II of the Court Fees Act, and that the *ad valorem* duty as prescribed by sch. I was payable upon the plaint.

Our attention has been called to certain decisions of the Bombay and Allahabad High Courts. No doubt these decisions are in favour of the view taken by the appellant, but they are opposed to a ruling of this Court—*Jalaluddin Mahomed* v. *Shohorullah* (1), and from enquiry we have made upon the subject it appears, that this ruling has been for several years followed in this Court in taxing and levying Court-fees payable upon petitions of appeal. We agree in the principle laid down in the said ruling, and accordingly dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

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13 C. 164.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Macpherson.

SUNGUT LAL (*Plaintiff*) *v.* BAIJNATH ROY AND OTHERS (*Defendants*).* [17th June, 1886.]

Interest—Interest at increased rate—Penalty—Contract Act, ss. 60, 74—*Appropriation of payments.*

In consideration of an advance of Rs. 118, the defendants executed in favour of the plaintiff a mortgage bond, dated 3rd November 1879, by which [165] it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first class rates, and

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* Appeal from Appellate Decree, No. 631 of 1886, against the decree of Baboo Bolae Chand, Subordinate Judge of Bhagulpore, dated the 26th of December 1885, modifying the decree of Baboo Kali Kumar Bose, Munsif of Beguserrai, dated the 30th of December 1884.

(1) 15 B. L. R. Ap. 1=22 W. R. 422.

in case the same is not paid in kind, it will be paid, principal with interest, from the date of execution at one anna per cent. per mensem in cash in the month of Baisakh, 1287 F.S. (April 1880).'' The defendants admitted execution of the bond, and pleaded payments in grain to the amount of Rs. 136, which they failed to prove. It was found that the plaintiff had received payments in grain to the extent of Rs. 71, more than half of which, however, he claimed to be entitled to appropriate to the payment of other antecedent debts which were due to him by the defendants. It was not stated at the time of payment towards which debt the payments were to be applied ; but all the payments were admittedly made in kind : *Held*, that the plaintiff was not entitled to appropriate the payments to the antecedent debts, inasmuch as, within the meaning of s. 60 of the Contract Act, there were "other circumstances" indicating that the payments were made in liquidation of the amount of the bond. *Held*, also, that the increased rate of interest being made payable from the date of the bond, and not only from the breach of the contract, must be taken to be in the nature of a penalty and only to be taken into consideration as a basis upon which damages for the breach of contract were to be estimated. The principle on this subject laid down in the case of *Mackintosh* v. *Crow* (1) approved of.

1886 JUNE 17.

APPELLATE CIVIL.

13 C. 164.

[F.. 39 P.R. 1899 ; Appr., 12 M. 161 (164) ; Cons., 15 A. 232 (F.B.).]

THIS suit was brought for the recovery of Rs. 464-14, being the amount of principal and interest due on a registered mortgage bond, dated the 4th Kartick 1287 F. S. (3rd November 1879), alleged to have been executed by the defendants Baijnath Roy and Nunku Roy in favour of the plaintiff for Rs. 118-1. The condition in the bond was that the amount was to be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first-class rates, and, in case the same is not paid in kind, it will be paid, principal with interest, from the date of execution at one anna per cent. per mensem in cash in the month of Bysack 1287 F. S. (April-May 1880), by the defendants, and the mortgage will be thereby redeemed."

The plaintiff admitted having received Rs. 33-7 in grain towards the payment of the debt.

The defendants admitted execution of the bond, but stated that they had paid in grain Rs. 136 from time to time in re-payment **[166]** of the amount borrowed ; they also pleaded that the plaintiff ought not to recover interest at the rate claimed, which was inserted in the bond as a penalty and imposed to obtain the speedy realization of the money covered by the bond.

On the evidence it appeared that the plaintiff had received payments in grain to the amount of Rs. 71 from the defendants, but had appropriated all but Rs. 33-7 to other debts which were undisputedly due from them to him. The Munsif held that he was justified in doing this, and that the defendants had failed to prove their payments of Rs. 136. He held also that the interest was at a penal rate to which the plaintiff was not entitled. He gave a decree for the principal Rs. 118 and the same amount for interest, making Rs. 236, with costs in full and interest at 6 per cent. per annum. From this decision the defendants appealed and the plaintiff preferred a cross appeal. The defendants contended that the decision was wrong in not allowing their alleged payments to be credited, and in awarding costs at the full amount. The plaintiff questioned the decision of the Munsif in respect of the award of interest at a lower rate than that stipulated for.

The Subordinate Judge held that the defendants were entitled to be credited with the Rs. 71 admitted by the plaintiff to have been paid, inasmuch as the plaintiff was not entitled under the circumstances to

(1) 9 C. 689.

1886 JUNE 17. — APPELLATE CIVIL. — 13 C. 164.

appropriate the payments to other debts, without showing, as he had failed to do, that the payments were actually made in respect of the other debts. He said : " As according to the terms of the bond the defendants were to pay a penalty in default of paying grain as stipulated, it must be held that what they paid was towards the satisfaction of the bond, unless the contrary was shown, and that it could in no way be justifiable to allow the plaintiff to credit the grain paid by the defendants to some other account, and make the defendants pay a penalty at a heavy rate of interest on the ground of default which they actually did not make."

The Subordinate Judge gave a decree for Rs. 47, the amount of principal after deducting Rs. 71, with costs on the proportionate sum decreed and 6 per cent interest. He refused to allow any of the interest claimed on the bond, being of opinion, [167] for the reasons stated by them above, that the plaintiff had not been dealt fairly by the defendants.

The plaintiff appealed to the High Court.

Baboo *Nilkant Lahory*, for the appellant.

Baboo *Kishorey Lali Goswami*, for the respondents.

The following cases were cited in argument.

For the appellant,—*Peetamber Chatterjee* v. *Kalle Churn Roy* (1) ; *Rashesur Surmah* v. *Kaleekanath Surmah* (2) ; *Shah Mahkanlal* v. *Srikrishna Singh* (3); *Sobodra Beebi* v. *Deendyal Lall* (4); *Kemble* v. *Farren* (5); *Omda Khanum* v. *Brojendra Coomar Roy Chowdhry* (6) ; *Brojokishore Roy* v. *Madhub Pershad Misser* (7); *In the matter of the petition of Nobocoomar Bose* (8); *Mackintosh* v. *Crow* (9); *Balkishen Das* v. *Run Bahadur Singh* (10) ; *Behary Lall Dass* v. *Tej Narain* (11).

For the respondent,—*Bichook Nath Panday* v. *Ram Lochun Singh* (12); *Boley Dobey* v. *Sideswar Rao Babu Roy Kur* (13); *Muthura Persad Singh* v. *Luggun Kooer* (14).

The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows :—

JUDGMENT

We are of opinion that this appeal should be dismissed.

Two grounds have been taken by the learned pleader for the appellant. In the first place, he complains that the Court below was wrong in not allowing his client, the plaintiff, to allocate [168] the money value of the grain payments made by the defendants to him towards the extinction of certain debts due from the defendants to the plaintiff, before the execution of the mortgage bond upon which this suit is brought ; and he based his contention upon s. 60 of the Contract Act. That section says : "Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits."

It is impossible to say that there are here "no other circumstances" indicating to which debt the payment was to be applied. There is not only

(1) 11 B. L. R. 137 note=14 W. R. 436.
(2) 11 B. L. R. 138 note=11 W. R. 445.
(3) 2 B. L. R. P. C. 44.
(4) 11 B. L. R. 438 note.
(5) 3 M. & P. 425=6 Bing. 141.
(6) 12 B. L. R. 451=20 W. R. 317.
(7) 12 B. L. R. 456 note=17 W. R. 373.
(8) 12 B. L. R. 457 note=17 W. R. 431.
(9) 9 C. 689.
(10) 10 C. 305.
(11) 10 C. 764.
(12) 11 B. L. R. 135=19 W.R. 271.
(13) 4 B.L.R. Ap. 92.
(14) 9 C. 615.

no evidence on the record to show that there had been an agreement between the parties that the antecedent debt or debts should be liquidated by payments of grain, but there is specific evidence that this one debt—the debt upon this bond—should be liquidated by payments in kind and not in money. We think, therefore, that the Courts below were abundantly right in disallowing the plaintiff's claim to allocate these grain payments towards the extinction of the debts due before the execution of this bond.

The second ground upon which the learned pleader relies is this, that the Courts below are in error in having treated the interest mentioned in the bond as a penalty and not as liquidated damages.

The exact terms of the bond are not set out in the plaint : they have been read to us ; they amount to this, that there is a present advance of Rs. 44-1, and bygone debts amounted to Rs. 73-15, and the mortgage was in consideration of Rs. 118. There was a stipulation that, if the whole mortgage debt was not repaid by deposit of crops by Bysakh 1287, then one per cent. per mensem as interest should be charged, not from the breach of the contract, that is to say, not upon the failure to deliver any of the specified quantities of the grain at the specified time, but the interest was to run from the date of the bond. A great many cases as to whether this, under the circumstances, is to be considered as penalty or liquidated damages have been cited before us. [169] The case which the learned pleader for the appellant has relied upon most strongly is the case of *Behary Lall Dass* v. *Tej Narain* (1). That case was decided by Mr. Justice Tottenham and myself, and though in that case no reference is made to a good many of the cases, which have been cited here, and though the distinction which is drawn by Mr. Justice Wilson in the case of *Mackintosh* v. *Crow* (2) is not there taken, yet the distinction does, as a matter of fact, exist, and though it is not the *ratio decidendi* in that case, it none the less exists. In the case of *Behary Lall Dass* v. *Tej Narain* (1) the increased rate of interest became due upon the breach of covenant and not from the date of the original bond. Now, the distinction seems to be, as we think, perfectly well drawn by Mr. Justice Wilson. In giving judgment in the case of *Mackintosh* v. *Crow* (2), he points out that practically s. 74 of the Contract Act has done away with the distinction between a penalty and liquidated damages, which, he says, "must be borne in mind in dealing with cases decided before the Contract Act, many of which turned upon this distinction. Under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated much as a penalty was before as the maximum limit of damages."

Then he proceeds to point out the distinction between the increased rate of interest to be paid from the date of breach and the increased rate of interest to be paid from the date of the bond. We think that distinction is a well-founded one, and, upon the strength of that distinction, we ought to hold that this interest is in the nature of a penalty and only to be taken into consideration as a basis upon which damages for breach of contract are to be estimated. That being so, we see no reason to interfere with the rate of damages at which the lower appellate Court has arrived. We, therefore, think that this appeal ought to be dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) 10 C. 764. (2) 9 C. 689.

1886
JULY 10.

CIVIL REFERENCE.

13 C. 170.

13 C. 170.

[170] CIVIL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Porter.

FAJALEH ALI MIAH (*Plaintiff*) *v.* KAMARUDDIN BHUYA (*Defendant*).*
[10th July, 1886.]

Compromise of suit—Compromise extending beyond the terms of the suit—Civil Procedure Code (Act XIV of 1882,), *s.* 375*—Compromise, Modification of terms of.*

The only compromise which a Court can in any case be bound under s. 375 of the Code of Civil Procedure to enforce, is one which adjusts wholly or in part, the suit; matters going beyond the suit cannot, if included in a compromise, be so enforced.

A Court refusing to grant a decree on a compromise going beyond the suit, cannot however grant a decree modifying the terms of the proposed compromise, but must leave the parties to proceed with the suit as they may be advised.

[**Diss.**, 18 M. 410 (414); **Cons.**, 24 C. 908 (**F.B.**) = 1 C.W.N. 597; **R.**, 1 C.L.J. 388 (399).]

REFERENCE under s. 615 of the Code of Civil Procedure.

The plaintiff sued on a bond executed by the defendant under which the latter had borrowed from the former Rs. 10 agreeing to pay interest at the rate of nine pie per mensem, or Rs. 56 four annas per cent. per annum. The total amount of principal and interest due under the bond at the time of suit amounted to Rs. 29.

On the day of hearing, the defendant entered into a compromise with the plaintiff, whereby he bound himself to pay Rs. 22 in satisfaction of the whole claim including costs, agreeing to pay such amount on the 5th Magh 1292, B.S., or on failure so to do, to pay interest at the rate of Re. 1 per diem on the whole amount. A petition embodying these terms was filed, and the Court passed a decree in accordance therewith, contingent on the opinion of the High Court as to (1) whether the Civil Courts can take cognizance of a compromise entered into by parties in a pending case whereby one of such parties agrees to pay a usurious rate of interest, and whether a decree can be passed thereon under s. 375 of the Code of Civil Procedure; and (2) whether the Civil Courts have power to refuse to grant [171] a decree upon such a compromise granting, however, a decree modifying such terms.

No one appeared on the reference for either party.

The opinion of the Court (WILSON and PORTER, JJ.) was as follows:—

OPINION.

The only compromise which a Court can in any case be bound under s. 375 of the Civil Procedure Code to enforce is one which adjusts the suit wholly or in part—not one which goes beyond the suit.

The compromise proposed in the present case embodies a new contract, much wider in its scope than the mere adjustment of the claim in suit. We think, therefore, that the Small Cause Court Judge is not bound to enforce it, and, if not so bound, he is certainly right to refuse.

He cannot, however, modify it. He must leave the parties to proceed with the case as they may choose.

T. A. P.

* Civil Reference No. 2 A of 1886, made by Baboo Khetra Mohan Mitra, Munsif of Begamgunge, dated the 18th of January 1886.

1886
MAY 28.

APPEL-
LATE
CIVIL.

13 C. 171.

13 C. 171.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Agnew.

CHAIRMAN OF THE NAIHATI MUNICIPALITY (*1st Party, Claimant*) *v.* KISHORI LAL GOSWAMI (*2nd Party, Claimant*), AND THE COLLECTOR UNDER ACT X OF 1870.* [28th May, 1886.]

Bengal Municipal Act (Beng. Act V of 1876), s. 32—*Municipal Corporations—Commissioners—Right of way—Compensation—Land Acquisition Act X of* 1870.

Section 32 of Act V of 1876, the Bengal Municipal Act, enacts that "all roads, bridges, embankments, tanks, ghats, wharves, jetties, wells, channels and drains in any Municipality (not being private property), and not being maintained by Government or at the public expense, now existing, or which shall hereafter be made, and the pavements, stones and other materials thereof, and all erections, materials, implements and other things provided therefor, shall vest in, and belong to, the Commissioners."

Held, that the word "roads" in this section does not include the soil beneath the roads.

[R. 20 C. 732 (739); 25 M. 635 (647); 4 C.L.J. 343 (355) = 10 C.W.N. 1044 = 33 C. 1290.]

[172] THIS was an appeal from an order of reference made by Baboo Radha Binod Bisha, Special Deputy Collector, under s. 15 of Act X of 1870 to the Judge of the Court of the district of the 24-Pergunnahs in respect of certain lands acquired for the East Indian Railway Company, for purposes in connection with the Hooghly Bridge. The grounds of the reference are thus stated by the Deputy Collector: "The question for adjudication in this case is one of title to land. The Naihati Municipality, having acquired good title to the land both by adverse possession of more than twelve years, as also under s. 32 of Beng. Act V of 1876, claims through its Chairman, the ownership of the land and the amount of compensation awarded for it. But the intervenor, Kishori Lal Goswami, opposes the claim, and demands the compensation for the land, on the allegation that the land being situated in Mouzah Garifa, appertaining to his revenue-paying estate Habilishahar, towzi No. 1193, it forms part and parcel of his estate."

In giving judgment on the reference the District Judge said: "This is an apportionment case, the contest being between the zemindar of Garifa and the Naihati Municipality. It is admitted in the letter of reference and cannot be denied that the land in dispute is part of Kishori Lal Goswami's zemindari. It is included in his village of Garifa, and the plots are marked in the survey map of the village. The zemindar has also proved by his naib that the land is in his zemindari. The claim of the Naihati Municipality is based on the ground that the land in dispute forms part of a public road within the Municipality. The land taken up was over a road leading from the village to the river bank, and is known as the Senpara Bathing Ghat Road. The Municipality thereon found a claim to be the owner of the soil, and asserts that they have been holding the land for twelve years adversely to the zemindar. But it is plain that they have no right to the land, they have no grant for it, nor did they acquire it under the Land Acquisition Act or in any other way. The road-way was theirs, but the soil remained with the zemindar. It is only a very few years ago

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* Appeal from Original Decree No. 292 of 1884, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 2nd of August 1884.

1886 MAY 28. — APPELLATE CIVIL. — 13 C. 171.

that they took possession of the road and repaired and widened it; no doubt the public used the road before that, and possibly the [173] public acquired a right of way, but this would not give the public or the Naihati Commissioners a right to the land."

The District Judge found that the Municipality had got Rs. 300 compensation in respect of their right of way over the road, and he held that the zemindar was entitled to the remainder, namely, Rs. 230. The Naihati Municipality appealed to the High Court.

Baboo *Unnoda Pershad Banerjee*, for the appellant.

Dr. *Troilokya Nath Mitter*, for the respondent.

The judgment of the Court (O'KINEALY and AGNEW, JJ.) was as follows:—

JUDGMENT.

This is an appeal from the decision of the Judge of 24-Pergunnahs on a reference under the Land Acquisition Act, X of 1870.

The Municipality claimed compensation for the whole soil on the ground that they have a title to the property under s. 32 of Act V of 1876. The zemindar claims the money on the ground that the soil is his. Therefore what we have to decide is, whether, under s. 32 of Act V of 1876, the Municipality got all the sub-soil under the public way. Section 32 runs as follows: "All roads, bridges * * * * and the payments, stones and other materials thereof, and all erections, materials, implements, and other things provided therefor, shall vest in and belong to the Commissioners."

If therefore the word "road" carried with it all the soil, all the materials, and all the erections on it, this enumeration in express words, of "pavements," "stones," &c., would be unnecessary. Clearly then there must be some limitation to the word "road." It does not mean everything above and below the road; and we think, looking at the case of *The Vestry of St. Mary, Newington* v. *Jacobs* (1) that the sub-soil did not belong to the Municipality.

We therefore dismiss the appeal with costs.

P.O'K. *Appeal dismissed.*

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13 C. 174.

[174] APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

JODOONATH MUNDUL (*Decree-holder*) *v.* BROJO MOHUN GHOSE (*Judgment-debtor*) AND RAJ NARAIN GHOSE (*Auction-purchaser*).*
[20th May, 1886.]

Appeal—Sale in Execution of Decree—Civil Procedure Code, s. 294—Application for leave to bid=Decree-holder.

No appeal lies from an order passed under s. 294 of the Civil Procedure Code refusing permission to a decree-holder to bid at a sale in execution of his decree.

[R., 38 C. 717=15 C.W.N. 862 (P.C.)=14 C.L.J. 241=13 Bom. L.R. 694=8 A.L.J. 117=1911 M.W.N. 449.]

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* Appeal from Order No. 73 of 1886, against the order of Baboo Gopal Chunder Banerji, Munsif of Bonegram in Jessore, dated the 28th of December 1885.

(1) L.R. 7 Q.B. 47.

1886 MAY 20. — APPELLATE CIVIL. — 13 C. 174

In this case Jodoonath Mundul obtained a decree for arrears of rent against Brojo Mohun Ghose and others, and in execution of that decree he attached certain property belonging to the judgment-debtor, Brojo Mohun Ghose, and obtained an order for sale. He then applied to the Court executing the decree for permission to bid at the sale, but his application was rejected. From the order rejecting his application the decree-holder appealed to the High Court.

Baboo *Nil Madhub Bose*, for the appellant.

Baboo *Bhubun Mohun Dass*, for the respondents.

JUDGMENT.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was delivered by

PRINSEP, J.—This is an appeal against an order passed by the Munsif refusing to give the decree-holder permission to purchase at a sale held in execution of a decree.

In our opinion no appeal lies against such an order. The appellant's pleader contends that an appeal lies under s. 588, cl. 16, but that clause seems to us to allow an appeal only against an order under s. 294 confirming or setting aside or refusing to set aside a sale of immoveable property, and not against an order refusing to give a decree-holder permission to bid. The appeal must therefore be dismissed with costs.

P. O'K. *Appeal dismissed.*

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13 C. 175.

[175] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Grant.

GOLUCK CHANDRA PAL AND OTHERS (*Petitioners*) *v.* KALI CHARAN DE (*Opposite party*).* [30th April, 1886.]

Criminal Procedure Code, s. 145—Penal Code, s. 188—Disobedience to order of Public Servant—Inquiry as to possession—Parties to inquiry.

In May 1883 the District Magistrate of Tipperah held an inquiry as to the possession of certain lands claimed by *A* and *B*, and having found on the evidence taken by him that *A* was in possession, he passed an order on the 21st of May 1883, declaring that *A* was entitled to hold possession of the disputed land until evicted in due course of law, and forbidding *B* and all others to disturb *A's* possession until such disturbance should be effected in due course of law. Previously to November 1885, *B* sold an eight-anna share of his interest in the disputed land to *C*, who at the time of his purchase had notice of the order of the 21st of May 1883. In November 1885 *B* and others went to the disputed lands, and attempted to turn *A* out of possession by force, and to compel the tenants of the lands to pay rent and give kabuliats to *B* and *C*. At the time that *B* and his companions went to the disputed land, the latter were aware of the order of the 21st of May 1883, though none of them was a party to the inquiry then made by the District Magistrate. In December 1885, they were all tried and found guilty of disobedience to an order duly promulgated by a public servant. *Held*, that the conviction was right.

Semble, that a reference by a Magistrate to a Police report which clearly sets out the probability of a breach of the peace is a sufficient statement of the reasons for the Magistrates being satisfied of the existence of a dispute likely to cause a breach of the peace, within the meaning of s. 145 of the Code of Criminal Procedure.

[F., 33 C. 252=2 C.L.J. 259=9 C.W.N. 1065 (1073) (F.B.); R., 14 C.W.N. 78=5 Ind. Cas. 40.]

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* Criminal Revision No. 72 of 1886, against the order passed by Baboo Sarat Chandra Das, Deputy Magistrate of Tipperah, dated the 22nd of December 1885.

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——
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REVISION.
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13 C. 175.

IN this case one of the accused, Bukshi Shonar, was tried and convicted under s. 157 of the Penal Code for harbouring persons hired for an unlawful assembly, while the others were tried and convicted for disobedience to an order duly promulgated by a public servant under s. 188 of the Penal Code. The facts of the case are as follows :—

Early in 1883 a dispute arose between Kutubudin, one of the accused, and rival zemindars, named Nag, as to the ownership [176] of a certain piece of land of which both parties claimed to be in possession. In May 1883, the District Magistrate, Mr. Hopkins, in consequence of certain reports which he had received from the Police, held a proceeding under s. 145 of the Code of Criminal Procedure, and having come to the conclusion on the evidence that the Nag zemindars were in possession of the disputed lands, he recorded an order declaring that the Nag zemindars "are entitled to retain possession of Jowar Nilakhi," the disputed land, "until evicted in due course of law, and all parties, Kutubudin and all others, are forbidden to disturb such possession until such disturbance is effected in due course of law." This order was passed on the 21st of May 1883. Kutubudin applied to the Sessions Judge to cancel the order of the District Magistrate, but the application was rejected.

Some time before November 1885, Kutubudin sold a moiety of the disputed land to one Abdul Baree, who purchased with full knowledge of the order of the 21st of May 1883, and on the 21st of November 1885, one Kali Charan De, the tahsildar of the Nag zemindars, complained to the District Magistrate that Kutubudin and the other accused had gone in a body to Nilakhi armed with *latties* and spears, and had by force extorted money from the ryots of that place, and forced them to sign kabuliats in favour of Kutubudin and Abdul Baree. The District Magistrate made over the case to the Deputy Magistrate, who found that all the accused, with the exception of Bukshi Shonar, had, with full knowledge of the order of the 21st of May 1883, gone to Nilakhi for the purpose of supporting the claims of Kutubdin and Abdul Baree ; he found the charge made by the tahsildar proved as against all but Bukshi Shonar, whom he found guilty of harbouring the others, knowing that they had been employed to become members of an unlawful assembly, and he sentenced them some to imprisonment and some to pay a fine. These findings and sentences were upheld by the District Magistrate on the 7th of January 1886. Thereupon the accused applied to the High Court under the provisions of s. 439 of the Code of Criminal Procedure, and obtained a rule calling upon the other side to show cause why the convictions should not to be aside.

[177] Mr. *Evans* for the petitioners argued (1) that the order of the 21st of May 1883 was not directed to any of the accused ; and (2) that order was not a legal one, and the accused were not bound by it. He referred to *Chunder Madhub Ghose* v. *Juggut Chunder Sen* (1) and *Kunund Narain Bhoop's case* (2).

Mr. *Gasper* and Baboo *Ambica Charan Bose*, for the opposite party.

The judgment of the Court (PRINSEP and GRANT, JJ.) was as follows :—

JUDGMENT.

This is an application made on behalf of twenty-four persons, one of whom, Bukshi Shonar, has been convicted under s. 157 of the Indian

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(1) 4 C.L.R. 483. (2) 4 C. 650.

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Penal Code and the others under s. 188. As regards Bukshi Shonar, it is sufficient to state that there is evidence which has been believed by the Deputy Magistrate and by the District Magistrate in appeal, which is sufficient for his conviction. There are no grounds for interfering as a Court of Revision in respect of this person.

It appears that in 1883 an order was passed by the Magistrate under s. 145 of the Code of Criminal Procedure in a dispute between certain members of the Nag family and Kutubudin, in which it was decided that the former were in possession of certain lands, and it was declared that they were entitled to retain possession thereof until evicted in due course of law, all disturbance of such possession until such eviction being forbidden.

The petitioners are in the service of Kutubudin and one who has purchased a small share of his property which adjoins the land in dispute, or have been engaged by those who represent these persons in the immediate neighbourhood of this land. They have now been convicted under s. 188 of the Indian Penal Code of having disobeyed an order passed in 1883 under s. 145 of the Code of Criminal Procedure, knowing that by this order they were directed to abstain from interfering with the possession of the Nag family.

The first objection raised is that, inasmuch as the order was not directed to them, they have not been properly convicted under s. 188.

[178] The order in question was no doubt passed in a proceeding to which none of the petitioners were parties, but it was a general order and had the effect of notifying to all concerned in the dispute then under adjudication that, as between those persons and the Nags, the Nags were to be maintained in possession. The petitioners are either servants of Kutubudin, the unsuccessful party in that case, or the purchasers of a share in his estate, and the attempt made to disturb the possession of the Nag family is exactly on the same grounds as set up in that case. That the petitioners were aware of the Magistrate's order is clear, and the only question therefore is whether they can properly be punished for direct disobedience to it. That order not only forbade all disturbance with the possession of the Nag family, but referred the opposite party to the Civil Court for determination of the claim to possession set up by him. It is in consequence of an assertion of this very same claim that the present proceedings were instituted. The facts found show that these petitioners at the instance of Kutubudin have attemped to disturb the possession of the Nags in disobedience of the Magistrate's order, and they are therefore liable for the consequences as much as Kutubudin. We are accordingly of opinion that on the facts found by the lower Courts the petitioners have been rightly convicted.

It is next objected that the order in question was not a legal order, and that therefore the petitioners were not bound to obey it.

It appears that instead of putting on the record of this trial as an exhibit the order itself, the Magistrate has made part of that record the whole of the previous record. This we remark was a most unusual and unnecessary proceedings, since the only portion of that record which was relevant to this trial was the order itself. Mr. Evans accordingly claimed the right to refer to all these proceedings, and contends that there is *nothing* to show that the Magistrate recorded a proceeding setting out the grounds upon which he considered that a breach of the peace was imminent, such as would authorize his interference between the parties ; and he further contends on the authority of certain cases decided in this

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High Court, that the proceedings are bad for want of jurisdiction, and that consequently the order was without authority and cannot be enforced.

[179] The cases on this point are, we observe, contradictory, and if it really arose we should feel bound to refer the matter for settlement by a Full Bench; but on examination of the record we find no valid ground for this objection. The Magistrate refers to a Police report which clearly sets out the probability of a breach of the peace, and we must regard that report as forming part of, and incorporated with, the Magistrate's proceeding.

We accordingly see no sufficient grounds for interfering as a Court of Revision.

The rule is discharged.

P. O'K. *Rule discharged.*

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CRIMINAL REVISION.

Before Mr. Justice O'Kinealy and Mr. Justice Agnew.

ANUND MOYI DABIA (*Petitioner*) *v.* SHURNOMOYI (*Opposite Party*).*
[28th June, 1886.]

Criminal Procedure Code, s. 145—Julkur right—Tangible immoveable property—Dispute regarding a julkur.

A dispute concerning a *julkur* right is not a dispute concerning "tangible immoveable property" within the meaning of s. 145 of the Code of Criminal Procedure, and cannot be inquired into by a Magistrate under the provisions of that section.

IN this case the petitioner, Rani Anund Moyi Dabia, and the Maharani Shurnomoyi each claimed to be in possession of the fishery of a *chora* or abandoned bed of the river Dhurla, which is commonly called the *Dasherhat chora.* The Maharani based her claim on a decree which she had obtained against the predecessors of the petitioner in the year 1867, and on the fact that in 1282 B. S. she had leased the fishing to her jotedar, Baboo Lukhi Kanto Sirkar, who had all along remained in possession. Rani Anund Moyi Dabia claimed to be in possession of the fishery by her ijaradar, Chandro Canto Manjhi. The Deputy Magistrate of Kurigram held a proceeding under s. 145 of the Criminal Procedure Code, and having come to the conclusion on the evidence that the Maharani Shurnomoyi was in possession, passed the following order on the 10th of March 1886:—

"Under these circumstances" (referring to the evidence of the disputes between the parties), "it appearing to me on the grounds [180] duly recorded that a dispute, likely to induce a breach of the peace, existed between Maharani Shurnomoyi, zemindar of Pergunnah Bahirbond, and Rani Anund Moyi, zemindar of Pergunnah Pangah, concerning the fishery known as the *Dasherhat chora* situate within the local limits of my jurisdiction, all the said parties were called upon to give in a written statement of their respective claims as to the fact of actual possession of the said fishery, and being satisfied by due inquiry had thereupon, without reference to the merits of the claim of either of the said parties to the

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* Criminal Revision No. 220 of 1886, against the order passed by T. J. Mendes, Esq., Deputy Magistrate of Kurigram dated the 10th of March 1886.

legal right of possession, that the claim of actual possession by the said Maharani Shurnomoyi from Kowalipara Ghat down to the river Dhurla as marked in the plan is true, I do decide and declare that she is in possession of the said fishery from G. to H. marked in the plan, and entitled to retain such possession until ousted by due course of law, and do strictly forbid any disturbance of her possession in the meantime."

Rani Anund Moyi Dabia presented a petition to the High Court under s. 439 of the Criminal Procedure Code, to set aside the order of the Deputy Magistrate.

Mr. *Evans* (Baboo *Grija Sunkur Mozoomdar* with him) for the petitioner contended that the subject of dispute, being merely the right to a fishery and not the right to possession of tangible immoveable property, the Deputy Magistrate had no jurisdiction to pass any order under s. 145 of the Code of Criminal Procedure. He referred to *Promotha Bhusana Deb Roy* v. *Doorga Churn Bhuttacharjee* (1) and to *Krishna Dhone Dutt* v. *Troilokia Nath Biswas* (2).

Baboo *Srinath Das*, for the opposite party.

JUDGMENT.

The judgment of the Court (O'KINEALY and AGNEW, JJ.) was delivered by

O'KINEALY, J.—We are of opinion that this rule should be made absolute.

The only point that we have to decide is whether the Deputy Magistrate, in dealing with the case, dealt with it merely as a [181] case of dispute regarding a julkur right, or a case of dispute for possession of land covered with water. If it were a case of possession of land covered by water, and the right to fish was the ordinary right of a person who owned the land, clearly the Magistrate would have jurisdiction. On the other hand, if what he has decided was merely the right to fish and nothing more, the cases in this Court go to show that the Magistrate could not decide the case. Therefore, as I have already said, what we have to decide is, whether the Magistrate tried this as a case for possession of land covered with water, or simply as a dispute about the right to fish.

The Magistrate says: "I do decide and declare that she is in possession of the said fishery from G. to H." * * * *; and there is nothing to show that the Magistrate tried this case as for possession of land covered with water.

That being so, we must set aside the order of the Deputy Magistrate.

P. O'K. *Order set aside.*

(1) 11 C. 413.

(2) 12 C. 539.

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PRIVY COUNCIL.

PRESENT:

Lord Blackburn, Lord Monkswell, Lord Hobhouse, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

DHARANI KANT LAHIRI CHOWDHRY (*Plaintiff*) *v.* KRISTO KUMARI CHOWDHRANI AND ANOTHER (*Defendants*).
[7th and 18th February and 6th March, 1886.]

Benami transaction—Purchase in the name of Hindu wife.

The question for decision was whether a purchase in 1842, in the name of a Hindu wife, of an interest in part of her husband's ancestral estate, was for herself or for her husband, her name being used *benami* for him.

The High Court, at the hearing in appeal, considered certain previous decisions in cases arising out of *benami* transactions. But in arriving at its conclusion, which was that the property was the wife's, it proceeded entirely on the evidence in the particular case. The judgment of the Judicial Committee, which also went upon the evidence, was, on the contrary, that the husband was, in fact, the purchaser, the purchase being *benami*, in his wife's name.

[182] APPEAL from a decree (6th February 1882) of the High Court (1), reversing a decree (9th April 1880) of the Subordinate Judge of Mymensingh.

The decree of the High Court, against which this appeal was preferred, had the effect of maintaining the title of the principal defendant, Srimati Chowdhrani, in a three gundas share in zemindari lands in Pergunnah Sherpur, Zillah Mymensingh. She died pending this appeal; the respondents, who were entitled to any interest in the property that she might have, being substituted for her, under an order in Council of 22nd March 1884.

The object of the suit was to obtain a declaration of proprietary title (subject to an outstanding mortgage on part of the property), in the plaintiff to a three gundas share in the estate above named, formerly belonging to Goluck Nath Chowdhry, husband of Srimati Chowdhrani, the defendant. The plaintiff claimed as purchaser at an execution sale on 6th September 1871, at which sale he bought the right, title, and interest of Goluck Nath in a twelve annas share in the land. It was the plaintiff's case that such share included the three gundas share in suit, although the latter stood in the name of Srimati Chowdhrani, wife of Goluck Nath, having been bought in by him at the sale, and the conveyance taken in his wife's name.

The defendant Srimati Chowdhrani contended that she had, out of her own funds, purchased the three gundas share on the 9th of June 1842, when her husband's interest therein was sold at the suit of Government, in discharge of certain liabilities under which he had come.

The Subordinate Judge was of opinion that Goluck Nath had furnished the money for the purchase, using his wife's name for taking the conveyance, *benami*, for himself; and that he had afterwards remained in possession. He found that Srimati Chowdhrani was without funds of her own wherewith to make the purchase.

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(1) 8 C. 545; *Chowdhrani* v. *Tarini Kant Lahiri Chowdhry.*

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On appeal, the High Court (McDONELL and FIELD, JJ.) found that the evidence was in favour of there having been an actual purchase on behalf of Srimati Chowdhrani. The judgment, [183] which is reported in the volume of these reports for 1882, (1) refers to the decisions on the subject of the presumptions said to have arisen in cases somewhat analogous. The Court declined to recognise any rule that, in the absence of evidence showing the source of the purchase-money, there was a presumption that property purchased by a Hindu wife had been acquired with her husband's money. The question at issue was decided entirely upon the evidence in the particular case, and the judgment of the Court of first instance was reversed.

On this appeal—

Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne*, appeared for the appellant.

Mr. *H. Cowell*, for the respondent.

Reference was made to *Sreeman Chunder Dey* v. *Gopal Chunder Chuckerbutty* (2) ; *Raja Chunder Nath Roy* v. *Ramjai Mazumdar* (3), in regard to the burden of proof and the presumptions arising from the position of the parties.

On a subsequent day, 6th March, their Lordships' judgment was delivered by

JUDGMENT.

SIR R. COUCH.—At a sale on the 6th of September 1871, in execution of a decree against one Goluck Nath Chowdhry, the original appellant, Tarini Kant Lahiri Chowdhry, who has died during this appeal, became the purchaser, for Rs. 61,100, of whatever right, title, and interest Goluck Nath had in 12 gundas out of a share of 1 anna 15 gundas of the zemindary No. 144 of pergunnah Sherpur in zilla Mymensingh, and received the sale certificate of the Court, dated the 30th November 1871. It does not appear that he took any steps upon this purchase to obtain registration of his name, but upon Srimati Chowdhrani, the widow of Goluck Nath (he having died in the meantime), making an application, under Bengal Act VII of 1876, to the Deputy Collector of Mymensingh to have her name registered in respect of three gundas share of the 1 anna 15 gundas, he objected on the ground that she had no share in the estate, and was not [184] entitled to registration. The title of Srimati Chowdhrani was said to be founded on a purchase by her, at a sale on the 9th of June 1842, of the three gundas share, part of 12 gundas, of which her husband Goluck Nath was then the proprietor, by the Collector of Mymensingh, in satisfaction of a claim of the Government against Goluck Nath as surety for one Jugal Kishore Sen, who was employed in the Mymensingh Collectorate. The appellant contended that this purchase was a *benami* transaction, and that Goluck Nath was the real owner of the three gundas when the sale to him was made. The Deputy Collector rightly refrained from deciding that question. He found that Srimati, subsequently to her purchase, obtained registration of her name as proprietress jointly with the other proprietors, but did not find the date of it more precisely. He found that the ijardar, who will be referred to afterwards, was in possession for her, and that her name was in the previous register of proprietors, and ordered her to be registered as proprietress of what he described as equivalent to the three gundas share. This order was made on the 28th February 1878,

(1) 8 C. 547. (2) 11 M.I.A. 28. (3) 6 L.B.R. 303.

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and in consequence of it the present suit was instituted, on the 27th of February 1879, by the appellant against Srimati and her son Hurro Coomar Chowdhry. The plaint prayed that the plaintiff's title to the three gundas might be declared, and his name be directed to be registered in respect thereof. The written statement of Srimati stated that she made the purchase *bona fide*, and really for herself, with the money of her own funds and own *stridhan*.

Goluck Nath was the son of Rama Nath, one of five brothers, each of whom had a share of six gundas in the estate. On the death of Rama Nath, Goluck Nath became entitled to his six gundas. He afterwards inherited the six gundas of one of his uncles, and, being thus entitled to twelve gundas, became surety for Jugal Kishore Sen, and pledged one-fourth of his then share in the property. This fourth was the three gundas sold on the 9th of June 1842. Subsequently Goluck Nath inherited the share of another uncle, and he then sold a twelve gunda share to one Shib Dyal Tewari and, upon the same date, he and his wife Srimati executed, in favour of Shib Dyal Tewari, an ijara, or usufructuary mortgage, of a further six [185] gundas share for the period of 26 years. The date of this ijara is the 6th December 1859. Its not having expired when the suit was brought is the reason that the plaint prayed for a declaration of title only and not for possession. After this sale and mortgage Goluck Nath inherited the share of another uncle, and thus, at the time of the execution ~~sale in~~ September 1871, there were twelve gundas, of which Goluck Nath was clearly entitled to nine, and the remaining three are the subject of the present suit.

The certificate of the sale on the 9th of June 1842 states that the property was purchased by Doorga Pershad Roy, the mookhtar of Srimati Chowdhrani, of Girda, in pergunnah Sherpur, for the sum of Rs. 560; and that on payment of the earnest-money a proceeding was passed by the Dacca Commissioner, on the 15th July 1842, sanctioning the sale, and thereupon the said purchaser paid the whole amount of the purchase money into the public treasury. The evidence for the plaintiff was that Doorga Pershad Roy, who had died before the trial, was the servant of Goluck Nath and served him as naib, and was said by Hurro Coomar Chowdhry not to have been his mother's servant before the sale; that the earnest-money, about 100 or 125 rupees, was paid to Doorga Pershad by Goluck Nath; that Goluck Nath paid the purchase-money and borrowed it from Madari Lal Bajpai and gave a bond for it. Madari Lal who was living, and was said to have a house in Rae Bareli, was not called. A witness also deposed that Nobo Coomar Chowdhry, a cousin of Goluck Nath, who was present at the sale and purchased other properties, told Goluck Nath to keep this property. There were several sureties whose property was sold at the same time. The evidence of Srimati herself, who was examined as a witness, was that Doorga Pershad Roy purchased for her, and she paid the purchase-money; that she gave him Rs. 1,000 out of Rs. 3,000 which she had from presents on the occasion of her marriage and money her mother-in-law left her. She said that she did not tell her husband anything about the auction sale; she did not tell him she would purchase the property, and he did not tell her anything about the purchase of that property. She was about 23 or 24 years of age when her mother-in-law died, which was about a year [186] before. She was supported in this account of the transaction by twoof her witnesses. The Subordinate Judge, a Hindu, who found that the purchase was a *benami* one, said it was unlikely and incredible that she, a purdahnashin lady in a Hindu family,

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and the wife of a respectable zemindar, should herself bring the money and give it to an officer; that there should have been one or two unconnected persons present; and that they witnessed that fact. The High Court, on the contrary, were of opinion that the story told by the plaintiff's witnesses of the manner in which Goluck Nath supplied the money with which the purchase was made was "not in itself a very credible one," and they said that the impression which the evidence left upon their minds was that Srimati had funds of her own, and that with a portion of these funds this share in the property was purchased. In this conflict of opinions their Lordships are disposed to prefer that of the Subordinate Judge, who saw the witnesses, and would be better acquainted with the habits of Hindu ladies than the Judges of the High Court could be.

There is, however, an important fact which the High Court does not appear to have noticed. It has been seen that the sum paid for the three gundas was Rs. 560. Srimati in her deposition said that the income of the property purchased by her at the auction sale would be Rs. 700 or 800 a year, exclusive of the sudder rent. The defendants put in evidence an attested copy of a bond, dated the 21st of February 1855, by which Srimati mortgaged to Shib Dyal Tewari one gunda out of the three for a loan of Rs. 4,500, stated to be taken by Goluck Nath and herself. This would give to the three gundas at that time a mortgage value of Rs. 13,500. It appears to their Lordships that this mortgage is also some evidence that Goluck Nath was the real owner.

On the 30th March 1855 Shib Dyal Tewari obtained a decree upon this bond against Goluck Nath and Srimati for Rs. 4,936 for principal, interest, and costs. On the 12th of November 1859, Srimati executed a mokhtarnama, in which it is stated that having received Rs. 7,795, inclusive of costs and interest due to Shib Dyal Tewari on this decree, and Rs. 26,205 in cash for payment of the debts of other creditors, she appointed her son, [187] Hurro Coomar Chowdhry, mookhtar, on her behalf for the purpose of granting a temporary ijara, together with her husband, to the said Tewari, of her three gundas and three out of the six obtained by her husband by right of inheritance from his uncle, Gopinath Chowdhry, at an annual rental of Rs. 1,760 14 annas. This shows a value of the three gundas slightly in excess of that before given. The ijara was executed accordingly, and is dated the 16th December 1859, there being to it a schedule of nankar lands which were excluded from it. There is no evidence what the debts of other creditors were, whether of Goluck Nath or of Srimati. Their Lordships think it is improbable that if Srimati had become the owner of the three gundas as her *stridhan*, and had incurred debts which had to be paid by borrowing money, she would not have made a separate mortgage of her three gundas. If she were not a *benamidar*, the transaction is a singular one; if she were, it is explicable. It seems more probable that the debts were Goluck Nath's and Srimati joined in the mortgage because she was the apparent owner. The difference between the price paid for the three gundas in 1842 and the value is very significant. There is no evidence of what happened at the sale, what biddings there were, or how the property came to be sold for so small a sum. It appears to their Lordships incredible that Goluck Nath allowed this, which was a fourth of the ancestral property he then had, to be purchased by his wife on her own account, and to become her *stridhan*, with the incidents belonging to such property.

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As to the evidence of possession, the registry of Srimati's name, whenever it took place, is of no value, as it would follow the sale certificate; and rent suits would be properly brought in her name jointly with Goluck Nath, as was done in the suit, the decree in which is in the record. The witnesses to possession cannot be relied upon. The Subordinate Judge said that the evidence of some of the defendant's witnesses with regard to this was clearly tutored and false, and the High Court say they think there is as good evidence on one side as on the other.

It was argued for the respondents that the appellant claimed to be registered for the first time in February 1878, and he might have taken proceedings with regard [188] to the nankar lands before then. It does not appear that he could have been registered separately for those lands. The point was not taken in the lower Courts, where an explanation of his not doing so might have been given. As to the six gundas included in the ijara, it is clear, from the judgment of the Deputy Collector before noticed, that a claim to be registered in respect of those would have been unsuccessful. In fact, the appellant did not, in February 1878, claim to be registered. He only objected that Srimati was not entitled to registration. She admitted in her evidence that he was in possession of the other six gundas, but whether his name had been registered in respect of them did not appear.

Their Lordships have not been unmindful that this is an inquiry into the nature of a transaction which took place so far back as 1842, but until the appellant's purchase no occasion had arisen for the inquiry. There was not any opposition of interests between Goluck Nath and his wife, and the appellant brought his suit without substantial delay after he found his title challenged. Moreover, though some evidence has been lost which might have been material, there still exists one of the co-sureties, and what is more important Srimati herself was living, who, if her story be true, was the leading actor in the acquisition of the property by herself.

Their Lordships have to decide between the conflicting decisions of the lower Courts on a question of fact. They think the reasons given by the High Court for its decision are not satisfactory, and their consideration of the evidence in the case has brought them to the same conclusion as the Subordinate Judge. They will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to decree that the appeal to that Court be dismissed with costs. The respondent will pay the costs of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*
Solicitors for the respondent: Messrs. *Watkins & Lattey.*
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[189] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Agnew.

BENI RAM BHUTT AND OTHERS (*Plaintiffs*) *v.* RAM LAL DHUKRI AND OTHERS (*Defendants*).* [30th March, 1886.]

Minor, suit by—Minority, Objection on the ground of—Remand—Rejection of plaint—Civil Procedure Code, ss. 2, 53, 54, 422—*Decree, what it includes.*

Section 442 of the Civil Procedure Code refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor.

Where in a suit the plaintiffs described themselves as adults, and on the objection of the defendants an issue was raised and inquired into on the question of age :

Held, that the order passed under the circumstances, although it professed to have been made under s. 442 of the Procedure Code, must be treated as one rejecting the plaint or dismissing the suit, on the ground that the suit was instituted by persons who were established on the evidence to be minors, and was appealable as a decree within the meaning of s. 2 of the Code.

The words "rejecting the plaint" in s. 2 are not limited to the cases provided for in ss. 53, 54.

Held, also, that the defendants, not having taken an objection to the suit on the ground of the minority of the plaintiffs, whilst it was pending in appeal to the High Court, were precluded from raising it on remand.

[Cited, 13 B. 7 (11); R. 20 A. 162 (165) = 18 A.W.N. 9; 7 O.C. 234 (235); 19 M. 127 (138); 1 L.B.R. 38 (39); 11 O.C. 159 (162).]

THIS suit was instituted in the month of June 1880 by the four plaintiffs, who are brothers, *viz.*, Beni Ram Bhutt, Krishna Ram Bhutt, Hurry Ram Bhutt, and Mohun Ram Bhutt. The first two plaintiffs brought the suit on their own behalf as adults, and the last two plaintiffs, who were said to be minors, by their next friend, their eldest brother, Beni Ram Bhutt. The written statements in the suit were filed in September 1880, and in these written statements it was stated that all the plaintiffs were minors. In the month of March 1881 the issues were framed, and the second issue was " whether the plaintiffs Nos. 1 and 2 were majors or not." The suit was ultimately dismissed by the lower Court on the 20th of May 1881 on the [190] ground that no evidence was given by the plaintiffs in the case. An appeal was preferred against that judgment, and on the 30th April 1883 the High Court remanded the case in order to allow the plaintiffs an opportunity of adducing evidence. On the case going back an application was made by the plaintiff No. 1 to be allowed to represent the minor plaintiffs as their next friend. That application was granted by an order dated 30th July 1884. Then evidence was taken, and after the plaintiffs had closed their case, the Subordinate Judge decided the suit upon the ground that all the four plaintiffs were minors at the time of its institution, and upon that ground directed the plaint to be taken off the file under s. 442 of the Code of Civil Procedure, awarding a decree for the costs incurred by the defendants against one Gopal Lal, who was the mookhtar, who appointed the vakeel by whom the plaint was filed.

Against this order an appeal was filed to the High Court.

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* Appeal from Original Decree, No. 277 of 1884, against the decree of Baboo Kali Prosunno Mookerjee, Ral Bahadoor, Subordinate Judge of Gya, dated the 6th of August 1884.

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Baboo *Saligram Singh* and Baboo *Jogendra Chunder Ghose,* for the appellants.

Mr. *Twidale,* for the respondents.

The judgment of the Court (MITTER and AGNEW, JJ.) was as follows:—

JUDGMENT.

(Their Lordships, after stating the facts as above, proceeded):—It is contended on behalf of the respondents that no appeal lies against an order passed under s. 442, but we are of opinion that although the Subordinate Judge says that the order in question was passed by him under s. 442, it was not really an order under that section. Section 442 is to the following effect: "If a plaint be filed by or on behalf of a minor without a next friend the defendant may apply to have the plaint taken off the file with costs to be paid by the pleader or other person by whom it was presented. Notice of such application shall be given to such person by the defendant; and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit." That section refers to a case where, on the face of the plaint, it appears that it was filed by a person who was a minor. It does not contemplate any enquiry into the question of minority as in this case, where it is brought by persons professing them- [191] selves to be adults, and where the defendant objects to the suit on the ground that they are not adults but minors, and where, upon these conflicting allegations, an issue is raised for trial. In a case like this the order of the Court, if it finds that the defendant's allegation is correct, is not passed under s. 442. A case of this nature is not expressly provided for in the Procedure Code, but there are decided cases which show that in a case of this nature the former practice, which, not being abrogated by the present Code, must be considered to be in force, was to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend; but be that as it may, the order which has been passed in this case does not appear to us to be an order under s. 442. It is therefore not necessary for us to decide the question whether an order under s. 442 is appealable. The present order, although it professes to have been passed under s. 442, must be an order rejecting the plaint or dismissing the suit on the ground that the suit was instituted by persons who were established on the evidence to be minors. Whether considered as an order rejecting the plaint or dismissing the suit, it would be appealable because it comes within the meaning of the word *decree* as given in s. 2 of the Civil Procedure Code, and there is no reason why the words *rejecting the plaint* used in s. 2 should be limited to the cases provided for in ss. 53 and 54. We are of opinion that the preliminary objection taken before us must be overruled. Then, as regards the merits of the appeal, it seems to us that, even if we were inclined to agree with the lower Court that all the plaintiffs were minors at the time when the suit was instituted, still we should have held that the lower Court was not justified in dismissing the suit upon that ground. We have already referred to the practice that prevailed before the new Code of Procedure was passed, and we have already said that that practice has not been abrogated by any provision in the Civil Procedure Code. But in this case, taking the finding of the lower Court to be correct, yet, at the time when the trial took place, the plaintiff

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No. 1 was admittedly of age, and therefore it would have been unnecessary to suspend proceedings in order to allow him to appear by a next [192] friend. In fact, being an adult he was competent to proceed with the suit himself. Furthermore, we have referred already to the order of the 30th of July 1884, by which the plaintiff No. 1 was appointed next friend to the two minor plaintiffs. At that time he was of age, and we are at a loss to understand how, in the face of that order, the lower Court dismissed the whole suit upon the ground that all the four plaintiffs were minors at the time of the institution of the suit. So far as the plaintiffs Nos. 3 and 4, who were then admittedly minors, and who are now admittedly minors, are concerned, the suit was not liable to be dismissed, because they were represented by their eldest brother and next friend appointed by an order of the Court. We further find that, when the appeal was preferred to this Court by the plaintiffs, and on that appeal the Court directed the lower Court to allow them to adduce their evidence, no objection was taken by the respondents on the score of their minority. That being so, we are of opinion that they were precluded from relying upon that objection in the lower Court when the case was remanded to that Court for trial. If it were necessary to express any opinion upon the evidence given in the Court below, we should be inclined to hold that the conclusion to which the lower Court has come upon that evidence is not correct. The mother of the plaintiffs deposes that the plaintiff No. 1 was, at the time her deposition was taken, 23 years of age, and the Judge rejects this evidence, although it was supported by a horoscope filed and proved, upon the ground that it was the uncorroborated testimony of a single witness. He says, referring to the evidence of the mother: "The evidence of Munni Bohu, the mother of the plaintiffs, would indeed show the age of these persons to be more than what the other witnesses have stated; but the uncorroborated testimony of a single witness, especially when rebutted by the evidence on the same side, cannot be relied upon. Munni Bohu indeed is the mother of the plaintiff, but that is no reason why her testimony should be relied upon, when it is contradicted by the other evidence adduced on the plaintiffs' side." The other evidence to which the Subordinate Judge refers is merely the loose statements of some witnesses as to the ages of the [193] respective plaintiffs, and from their testimony it is quite clear that they could not speak with any degree of precision as to the ages of the plaintiffs. It is a matter of some surprise to find the Subordinate Judge saying that, because Munni Bohu is the mother of the plaintiffs, her testimony is not to be relied upon. A mother's evidence would be the best evidence upon the question of the age of her sons, especially when that testimony is supported by the evidence of a horoscope which has been produced and proved by a competent witness. The Subordinate Judge should have accepted that evidence as fully trustworthy.

Upon these grounds we think that the decision of the lower Court is erroneous. We set it aside, and as the defendants' evidence has not been taken, the case will be remanded to the lower Court.

Costs will abide the result.

K. M. C. *Case remanded.*

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APPEAL FROM ORIGINAL CIVIL.

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APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

J. N. MALCHUS (*Plaintiff*) *v.* BROUGHTON AND ANOTHER (*Defendants*).*
[27th February, 1886.]

*Will, Construction of—Charitable gift—*Cy pres, *Doctrine of—Lapse of legacy—Costs.*

Under the will of *A*, who appointed the Administrator-General of Bengal his executor, *B* had a life-interest in the residue of the testator's estate. *B* brought a suit against the Administrator-General to have it declared that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between *B* and the Administrator-General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed on appeal.

On the question of costs, *held* that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit.

APPEAL from the decree of Pigot, J., dated the 8th June 1885.

The suit was one brought by the plaintiff, who had a life-interest in the residue of the testator's estate, against the Administrator-[194] General of Bengal, for the construction of the will of one Nicholas Issac Malchus, so far as it related to the 5th paragraph of the said will, and for a declaration that a pecuniary legacy given thereunder had lapsed and fallen into the residue.

Prior to the hearing of this suit on the petition of the plaintiff and with the consent of the Administrator-General, the plaintiff was amended by adding the Venerable Archdeacon Atlay as a party defendant. Embodied in the consent order granting this application was the following: "And it is further ordered that the defendant, the Administrator-General of Bengal, do in any event, out of the estate of the said Nicholas Isaac Malchus, deceased, retain his own costs of and incidental to this suit, to be taxed by the taxing officer of this Court, and pay the costs of all the other parties of and incidental to this suit, to be taxed by the taxing officer of this Court to their respective attorneys."

The facts of the case will be found fully set out in I.L.R., 11 Calc. 591.

The learned Judge in the Court below, after argument, held that the gift in question did not lapse, being a charitable bequest, and that under the circumstances of the case the gift should be construed *cy pres*. As regards the question of costs, the learned Judge decided as follows: "The consent order is a binding order, and I cannot modify it. It appears that the plaintiff *ex abundantissima cautela* has provided that in any case he shall pay the costs of all parties; I observe that the plaintiff asks strangely enough for payment of the costs out of the residuary estate. That does not assist me in construing the order; all I can do is to construe the order strictly, but one thing I do hold, and that is, that it cannot operate upon the charity fund, and that, so far as I can judge, the only portion of the estate of Nicholas Isaac Malchus which was before the Court when that order was made, was that portion of the estate in

* Appeal No. 26 of 1885, against the decree of Mr. Justice Pigot, dated the 8th of June 1885.

which the plaintiff was interested. The order is one on the Administrator-General; he must construe it, but it appears to me that I must not, in dealing with the case, abstain from expressing this opinion, and if that construction be correct, the effect is that all the costs due up to decree will be paid by the plaintiff, otherwise I should of course have allowed the Administrator-General his costs out of the accumulations of [195] the charity fund. I am at liberty to add, though I cannot modify the order, so far as the Administrator-General's costs are concerned, if he be unable to obtain his costs out of that part of the estate which is affected by the order, he be at liberty to apply, that is to say, that the Court may have its hands free to allow his costs out of the charity fund."

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The plaintiff appealed on amongst others the following grounds:

(1) That the St. Paul's School, Calcutta, had ceased to exist at the death of the testator, and that the legacy had therefore lapsed, and had fallen into the residue.

(2) That the bequest was not a general charitable bequest; and that the *cy pres* doctrine was inapplicable thereto.

(3) That under the consent order it should have been held that the said bequest of Rs. 7,000 was part of "the estate of the said Nicholas Isaac Malchus, deceased," out of which the costs of all parties in the suit had been agreed to be paid.

Mr. *Kennedy* and Mr. *O'Kinealy*, for the appellant.

Mr. *Allen*, for the Administrator-General.

JUDGMENT.

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

WILSON, J.—This appeal raises a question as to the construction of the will of one Nicholas Issac Malchus. The 5th clause of that will says:—

"I direct my executor to invest the sum of Company's Rupees seven thousand in the purchase of Company's Papers and to stand possessed thereof in trust by names of the income of the sum to provide a fund for or towards the education of two or more boys at St. Paul's School, Calcutta, to be from time to time nominated for that purpose by the trustee for the time being of this my will, such boys to be natives of Calcutta, of poor and indigent parents or fatherless children of Armenian or other Christian religion, and such income to be paid to the Governors, Trustees or Managers of the school for the time being for the purpose of such education, and I direct that no boy shall be eligible for admission to the benefit of this provision at an earlier age than seven or at a later age than twelve, nor shall he continue the enjoyment thereof after [196] he shall have attained the age of seventeen, though entitled to its benefit up to then, and whenever a vacancy shall occur either by the removal of any such boy at the age aforesaid, his earlier death or from any other cause, the trustee for the time being of this my will shall fill up the vacancy by appointing some other boy of the character and qualification hereinbefore in that behalf stated, and each boy admitted to the school shall be subject to the government and discipline thereof."

It appears that during the life of the testator, St. Paul's School, Calcutta (which was a day school) was closed, and St. Paul's School, Darjeeling, opened in its stead, under the same management and with the aid of the same funds as the older school. The Darjeeling school is a boarding

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school, and therefore the cost of each pupil is much higher than that of the day scholars in Calcutta.

The plaintiff alleges that by reason of the closing of St. Paul's School, Calcutta, the trust in para. 5th of the will has wholly failed, and that the fund has become part of the residuary estate of the testator. The plaintiff having a life-interest in that residuary estate claims the fund accordingly.

We agree with the learned Judge who heard the case that the plaintiff's contention is quite groundless. The trust was not one for St. Paul's School, Calcutta. Had it been so, the question, whether the present school is sufficiently a continuation of the old to receive the gift might have been material. But the trust is for the education of boys to be chosen and sent to the school. If therefore the school has ceased to exist, another mode must be found of giving effect to the governing intention of the testator. If the old St. Paul's School can be said still to exist it has at any rate so far changed its character, that it would be difficult, if not impossible, to employ the trust funds in sending boys to it, as contemplated by the testator. The inquiry ordered is therefore necessary, and the decree made must stand.

The only other question is as to costs. Under ordinary circumstances the suit would simply have to be dismissed with costs. But there is an agreement embodied in a consent order to which effect must, if possible, be given. It was to the effect that the Administrator-General should retain his own costs, and [197] pay the costs of all other parties out of the estate of Nicholas Isaac Malchus.

The residuary estate of Nicholas Isaac Malchus is not before the Court, and the order cannot be construed as one dealing with that estate generally. If it were, effect could not be given to it.

We think on the whole the order should be construed as the learned Judge construed it—as an agreement between parties with reference to the residue, so far as they could properly dispose of it by agreement, that is to say, the plaintiff's interest in the residue.

We dismiss the appeal with costs; the costs to be charged as those in the first Court have been.

Appeal dismissed.

Attorney for appellant : Mr. *H. H. Remfry.*

Attorneys for respondent : Baboo *O. C. Gangooly* and Mr. *Carruthers.*

T. A. P.

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APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ASHANULLAH KHAN BAHADUR (*Plaintiff*) *v.* TRILOCHAN BAGCHI *and another* (*Defendants*).* [20th April, 1886.]

Road Cess Act (*Beng. Act* IX *of* 1880), *ss.* 52, 53—*Evidence Act, s.* 114—*Presumption.*

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person

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* Appeal from Appellate Decree, No. 979 of 1885, against the decree of Baboo Rajendra Coomar Bose, Subordinate Judge of Mymensingh, dated the 16th of February 1885, modifying the decree of Baboo Khettra Prosad Mukerji, Munsif of Atiah, dated the 26th of June 1884.

who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done.

Held, that the notice provided by s. 52 of the Road Cess Act did not come within the presumption of s. 114, cl. (*e*) of the Evidence Act, and must be proved.

[R., 1 O.C. 254 (261); 13 M.L.J. 479; D., 25 C. 725 (726); 28 C. 109 (112); 30 C. 1 (11)=6 C.W.N. 688.]

THIS was a suit for the recovery of cess against four defendants in respect of a lakheraj tenure.

[198] The defendants Nos. 2 and 3, in their written statement, denied holding any portion of the said tenure. The defendant No. 4 admitted that he held a portion of it, but stated that he was not in possession of the rest; he also alleged that the Collector had not assessed any cesses in respect of his lakeraj holding.

The defendant No. 1 did not enter appearance in the Court of first instance.

It appears from the Munsif's judgment that a single witness was examined on behalf of the plaintiff in support of his claim, and the Munsif was of opinion that the evidence of that witness was not satisfactory. He says, this witness is a dependant of the plaintiff, and is a man of no position or character. His evidence does not clearly prove that the defendants Nos. 2 and 3 are in possession. He therefore dismissed the suit as against the defendants No. 2 and 3, but decreed it as against the defendants Nos. 1 and 4.

Against this decree the defendant No. 4 appealed, and on that appeal the decree against the defendant No. 1 was reversed, and the decree against the defendant No. 4 was modified.

Against the defendant No. 4 a decree was made only at the rate admitted by him. The Subordinate Judge was of opinion that the plaintiff was not entitled to recover road cess from him at the rate stated in the valuation-roll, produced by the plaintiff, of the lakheraj tenure, because it was not shown that any notice under s. 52 of the Road Cess Act had been issued.

The plaintiff appealed to the High Court.

Baboo *Rashbihari Ghose*, for the appellant.

Baboo *Shama Churn Chuckerbutty*, for the respondents.

JUDGMENT.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J. (who, after stating the facts as above, continued).—It has been contended before us that the lower appellate Court ought to have presumed under cl. (*e*), s. 114 of the Evidence Act, that the Collector did issue a notice in accordance with the provisions of s. 52.

[199] We are of opinion that cl. (*e*) of s. 114 is not applicable to the present case, and that the lower appellate Court was right in not making any presumption in favour of the publication of the notice prescribed in s. 52.

Reading ss. 52 and 53 together, it appears to us that the object of the notice prescribed by s. 52 is to inform the tenure holder, who would be affected by the valuation-roll, of the amount assessed, so that he might come in and object, and have it altered if there be reasonable grounds for such alteration. This appears to be quite clear from s. 53. That being so, it seems to us that the publication of the notice was a condition precedent to the tenure-holder being bound by the valuation-roll prepared by the Collector.

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That being so, we are of opinion that no presumption ought to be made under clause (*e*) of s. 114 in favour of the condition precedent having been observed. Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption can be made in favour of the things prescribed by the Act having been done.

That being so, we are opinion that the lower appellate Court was right in holding that the defendant No. 4 is not bound by the valuation-roll prepared by the Collector, because it was not shown that any notice under s. 52 of the Road Cess Act had been duly issued. The appeal as against him must therefore be dismissed with costs.

As regards the defendant No. 1, unless the judgment of the Munsif proceeded upon a ground common to him and to the defendant No 4, the Appellate Court would have no power to reverse the decree against him (the defendant No. 1).

In this case, as I have said before, the defendant No. 1 did not enter appearance, and the Munsif's judgment against the defendant No. 4 proceeded upon his admission that he was in possession of a portion of the tenure mentioned in the plaint. Whatever therefore may have been the ground upon which the decree against the defendant No. 1 was based, it cruld not have [200] been the ground upon which the decree against the defendant No. 4 proceeded, because that was based on his admission, and that was a ground which could not apply to the defendant No. 1, who did not appear before the Munsif. It is, therefore, clear that the judgment of the Munsif did not proceed upon a ground common to the defendants No. 1 and 4.

That being so, the lower appellate Court had no power to set aside the decree against the defendant No. 1, on the appeal of defendant No. 4.

We, therefore, set aside the decree of the lower appellate Court so far as the defendant No. 1 is concerned, and restore the decree of the Munsif against him with costs.

K. M. C. *Decree modified.*

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APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ARJAN BIBI (*Plaintiff*) *v.* ASGAR ALI CHOWDHURI (*Defendant*).*
[20th April, 1886.]

Interest—Bond—Agreement—Penalty—Contract Act, s. 74—*Act XXVIII of* 1855 s. 2.

The stipulation in a bond was in these terms :—"I cannot pay Rs. 1,000 now, so I will pay it within two months and 15 days ; if I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month :" *Held*, that the stipulation was one for the payment of interest within the meaning of s. 2, Act XXVIII of 1855 and did not fall under s. 74 of the Contract Act.

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* Appeal from Appellate Decree No. 2038 of 1885, against the decree of R. H. Greaves, Esq., Judge of Chittagong, dated the 17th of June 1885, modifying the decree of Baboo Jiban Krishna Chatterji, Subordinate Judge of that District, dated the 28th of July 1884.

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Mackintosh v. *Crow* (1) approved.
Balkishen Das v. *Run Bahadur Sing* (2) considered.
[Diss., 10 C.W.N. 1020 (1023); R., 25 M. 343 = 11 M.L.J. 421; 14 C. 248 (254); 36 M. 229 (260) (F.B.) = 24 M.L.J. 135 = 13 M.L.T. 20 (42) = 18 Ind. Cas. 417.]

THIS was a suit for the recovery of a sum of Rs. 2,600 as principal and interest due upon a bond. The bond stipulated that, unless the amount of the debt (Rs. 1,000) was paid within two months and 15 days of the date thereof, interest at the rate of 2 annas per rupee per month should run from the date of the bond. The defendant admitted execution; but pleaded (1) that prior to the institution of the suit he had tendered the money which was refused by the plaintiff's husband and [201] agent; and (2) that the stipulation for the payment of interest was in the nature of a penal clause.

The Subordinate Judge was of opinion that the rate of interest agreed upon between the parties was not a penal sum, and held that the defendant's plea of tender and refusal had been satisfactorily proved. He accordingly gave the plaintiff a decree for Rs. 1,000, the principal amount, and interest as stipulated in the bond up to the date of tender, *i.e.*, Rs. 437-8.

On appeal, the District Judge, relying on the authority of *Bansidhur* v. *Bu Ali Khan* (3), held that the aforesaid clause in the bond stipulating for payment of interest was of a penal character, and in modification of the decree of the lower Court allowed interest at the rate of Rs. 20 per cent. per annum.

The plaintiff appealed to the High Court.

Baboo *Akhil Chandra Sen*, for the appellant.

Munshi *Serajul Islam*, for the respondent.

JUDGMENT.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J.—The question for decision in this case is, whether the following stipulation in the bond upon which this suit was brought was a stipulation for the payment of interest or a stipulation which falls under s. 74 of the Contract Act, fixing a particular sum as the amount to be paid in case of a breach.

The stipulation is, "I cannot pay Rs. 1,000 now, so I will pay it within two months and fifteen days. If I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month."

It seems to us that this stipulation does not fall under s. 74 of the Contract Act. No sum is named here as the amount to be paid by the defendant in case of a breach. It simply stipulates that if the money is not paid within two months and fifteen days, the borrower agrees to pay the amount borrowed with interest at the rate of 2 annas per rupee per month. It therefore falls within s. 2 of Act XXVIII of 1855.

The distinction between an agreement to pay interest at a [202] certain rate and an agreement to pay a certain sum of money as the amount to be paid in case of breach is stated in a decision of this Court in the case of *Mackintosh* v. *Crow* (1). Mr. Justice Wilson in delivering the judgment of the Court, after examining the various cases bearing upon

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(1) 9 C. 689. (2) 10 C. 305. (3) 3 A. 260.

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this point and explaining the nature of the provisions of s. 2 of Act XXVIII of 1855, and s 74 of the Contract Act, says : "In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term. But where the contract is merely that if the money is not paid at the due date, it shall thenceforth carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due month by month, *i.e.*, as the case may be, for a new consideration. And in my opinion the case falls under the first rule of law above-mentioned, not under the second. This view of the law was acted upon by this Court in *Mackintosh* v. *Hunt* (1)."

It is true that in this case the rate of interest stipulated for is to be payable from the date of the loan ; but this circumstance does not, in our opinion, take the case out of the purview of s. 2 of Act XXVIII of 1855 ; because there is only one rate of interest stipulated to be paid here. The bond does not provide for the payment of two rates of interest, one lower and the other higher, the latter being payable under certain circumstances. In this case it cannot be therefore held that a lower rate is the stipulated rate of interest agreed to be paid by the debtor under s. 2, Act XXVIII of 1855, and that a higher rate is named in order to determine the amount of compensation to be paid under s. 74 of the Contract Act in case of a breach. The agreement in this case is that *no* interest would be payable if the money covered by the bond be paid within the time mentioned in it, but if it be not paid within that time, interest at the [203] rate of 2 annas per rupee *per mensem* would be payable. This agreement falls, in our opinion, under s. 2 of Act XXVIII of 1855.

We may point out here that the authority of the cases in which a higher rate of interest has been considered to be in the nature of a penalty has been much shaken by the decision of the Judicial Committee of the Privy Council in *Balkishen* v. *Run Bahadur Singh* (2). In that case a solenamah provided for the payment of 6 per cent. interest upon the money payable under it, but under certain circumstances the rate was to be doubled. Their Lordships observed : They do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solenamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others.

We are therefore of opinion that the lower appellate Court is wrong in disallowing the stipulated rate of interest. We set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs.

K. M. C. *Appeal decreed.*

(1) 2 C. 201. (2) 10 C. 305.

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APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

RAM KISHORE GANGOPADHYA (*One of the Defendants*) v. BANDIKARATAN TEWARI CHOWDHRY (*Plaintiff*).*
[15th April, 1886.]

Limitation Act, 1877, *Art.* 144—*Suit for possession.*

On the 7th December 1863, *A* in execution of his decree purchased and obtained symbolical possession of a certain 4-annas share, the property of his judgment-debtor. The 4-annas share was at the time under a mortgage to *B*, who happened to be in possession of the share as lessee. The term of the lease expired in 1870 or 1871. *A*, *C* and *D*, who were members of a Hindu joint family, afterwards came to a partition of their common estate in which was included the 4-annas share, and one of them, *D*, sold his share in the 4-annas to *B*, who, on the 22nd December 1871, purchased it in the name of *E*, *B* then [204] brought a suit to enforce his mortgage against *F*, the heir of his motgagor, and on the 8th December 1873, obtained a decree which on special appeal was confirmed by the High Court on the 21st December 1875. On the 6th December 1875 *A*, *C* and *E* had brought a suit for the possession of the 4-annas share against one Makund Kishore, who had wrongfully taken possession of the property in 1870 or 1871, soon after the expiration of the lease to *B* The suit was finally decided in their favour on the 29th July 1879. In the mean time, that is somewhere in 1876, *B* had contrived to take possession of the whole share In 1883 symbolical possession was obtained under the decree of the 29th July. *B* then executed his mortgage decree, and attached the 4-annas share, excluding the portion which stood in the name of his benamidar. *Z*, the heir of *A*, having failed to make good his claim to a share of the property in the execution proceedings, now brought a suit for possession against *B* on the 19th July 1884.

Held, that the suit, having been brought within twelve years from the date of the fraudulent possession by *B*, was in time, and fell under Art. 144 of the Limitation Act.

THE facts of this case, so far as they are material on the issue of limitation, are these :—

One Bhubanmoyee was the owner of a 4-annas share of the property in dispute. Shibdoyal Tewari, the grandfather of the plaintiff, obtained a decree against her, and, on the 7th December 1863, in execution of that decree, purchased the said share and obtained symbolical possession of it on the 28th December 1870.

It appears that on the 4th March 1863, the defendant No. 1 had advanced a sum of Rs. 600 to Bhubanmoyee and Tripura Sundari on a bond in which the said 4-annas share was hypothecated to him. It also appears that some arrangement was come to between the parties to this transaction, under which the 4-annas share was left in the possession of the mortgagee, as lessee, from the year 1270 to the year 1277 ; and it has been found in this case that at the time when possession was being made over to Shibdoyal under his purchase, the property was in the possession of the mortgagee, the defendant No. 1.

Shibdoyal was a member of a joint Hindu family, the other members of which were Jadu Nath and Biswa Nath. There was a partition amongst the members, and under that partition, a 1-anna 5-gundas share was allotted to Shibdoyal, a 1-anna share [205] to Jadu Nath, and a 1-anna

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*Appeal from Order No. 374 of 1885, against the order of Baboo Rajendra Coomar Bose, Subordinate Judge of Mymensingh, dated the 18th of July 1885, reversing the order of Baboo Shumbhu Chandra Nag, Munsif of Issurgunge, dated the 26th of March, 1885.

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15 gundas share to Biswa Nath. It appears that a decree was passed against Biswa Nath, in execution of which, the defendant No. 1, on the 22nd December 1871, purchased Biswa Nath's interest in the property in the benami of one Kali Kishore.

After the death of Bhubanmoyee, the defendant No. 1 brought a suit against one Debendra Kishore Acharji, as representing Bhubanmoyee's interest in the property, to enforce his mortgage. In that suit one Makunda Kishore Acharji intervened, alleging that he had purchased the property as the property of Tripura Sundari. It may be stated here that, upon the findings of the lower appellate Court, it is clear that Tripura Sundari had no interest in this property, and that the person who was entitled to it was Bhubanmoyee.

On the 28th November 1883, the suit of the defendant No. 1 was decreed in his favour, and that decree was confirmed by this Court in special appeal on 21st December, 1875. But intermediately, that is, on the 6th December 1875, a suit was brought by Shibdoyal, Jadu Nath, and Kali Kishore, the benamidar of the defendant No 1, against Makunda Kishore to obtain possession of the whole 4-annas share, alleging that Makunda Kishore had ousted them in Bysack 1278, that is to say, on the expiry of the lease to defendant No. 1, which expired at the end of 1277.

It has been found by the lower appellate Court that whilst this latter case was pending in appeal below, the defendant took possession of the whole 4-annas share, but eventually the High Court, on the 28th July 1879, confirmed the decree of the lower Court which was in favour of the plaintiffs in that suit, and in execution of that decree, symbolical possession was taken in 1290, corresponding to 1883.

It appears that the defendant No. 1 then executed the mortgage decree which he had obtained against Debendra Kishore Acharji, and attached a 2-annas 15-gundas share of the property, excluding, of course, the 1-anna 15-gundas share of Biswa Nath which he had purchased in the benami of Kali Kishore. The present plaintiff, who is the grandson of Shibdayal, to whom a 1-anna 5-gundas share was allotted on the partition of the family [206] property, preferred a claim to the said share; that claim was rejected, and the property was ordered to be sold. The present suit was brought for posession on the 19th of July 1884.

The Court of first instance held that the claim was barred by limitation. The lower appellate Court was of a contrary opinion, and it remanded the case to the first Court to take an account of the profits enjoyed by the appellant during his possession.

Against this decision, the defendant No. 1 preferred a second appeal, while the plaintiff objected to that part of the judgment which directed an account to be taken.

Baboo *Jogesh Chunder Roy*, for the appellant.

Baboo *Dwarika Nath Chakravati*, for the respondent.

JUDGMENT.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J. (who, after stating the facts as above, continued).—The question of limitation must depend upon the question as to which article of the Limitation Act is applicable to the present case. Having regard to the facts found by the lower appellate Court, it is clear that arts. 137 and 138 are not applicable, because at the time of Shibdoyal's auction purchase, the judgment-debtor was in possession, and art. 138 is not

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applicable, because upon the finding of the lower appellate Court, the purchaser, Shibdoyal, obtained possession through the lessee who was in possession at that time. Arts. 139, 140, 141, and 143 have evidently nothing to do with the present case. Therefore either Art. 142 or 144 must be applicable.

If art. 142 were applicable, the plaintiff's suit would of course be barred, because the date of dispossession or discontinuance of possession must under any circumstances have been in the year 1278 or 1871, and the suit having been brought in 1884, it would have been barred. But it appears to us that this article is not applicable to the peculiar acts of this case. There was no doubt a dispossession which gave the plaintiff a cause of action. That dispossession was in the year 1871, when, on the expiration of the lease at the end of 1277, wrongful possession was taken by Makunda Kishore, and upon that dispossession **[207]** a suit was brought by the plaintiffs' predecessor in title, Shibdoyal, and also by his co-sharer Jadu Nath, and defendant No. 1, who is setting up the plea of limitation because in that suit his benamidar, Kali Kishore, was one of the plaintiffs. Therefore the suit contemplated by art. 142, having regard to the facts of this case, was brought and was decreed. But while that suit was pending in the first appellate Court, the defendant No. 1 who was one of the plaintiffs in that suit, alone took wrongful possession of the property. A suit against him therefore would not under these circumstances have been a suit under art. 142, because the dispossession which gave rise to the cause of action led to the suit which was instituted on 6th December 1875, and that was a suit which, upon the facts found in this case, was brought under art. 142.

The present suit therefore not coming under art. 142, it must come under art. 144, which is in these general terms:—"Possession of immoveable property or any interest therein not hereby specially provided for." The lower appellate Court was therefore right in overruling the plea of limitation, because the adverse possession of defendant No. 1 commenced when he fraudulently took possession of the property in dispute in the year 1283, while he and his co-plaintiffs were prosecuting the suit which they had brought upon the dispossession by Makunda Kishore in the first appellate Court. The appeal of the defendant No. 1 therefore fails.

As regards the objection taken by the plaintiff, we think that it is valid. Under the mortgage set up by the defendant No. 1, he has no right to the possession of the property. His right is simply to enforce that mortgage by the sale of the mortgaged property in execution of decree. He is therefore not entitled to retain possession of the property. If he has any remedy in respect of his mortgage, this decree will not in any way prejudice that right. If he has a right he may enforce it still by a separate suit, but under the mortgage he is not entitled to retain possession of the property.

That being so, the lower appellate Court was not right in remanding the case in order that an account might be taken. **[208]** The proper decree, upon the findings of the lower appellate Court would have been a decree for possession.

We accordingly modify the decree of the lower appellate Court, and direct that a decree be made in favour of the plaintiff for possession of the property in dispute.

The plaintiff will recover wasilat under s. 211 of the Code of Civil Procedure from the date of the institution of the suit until delivery of

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possession or until the expiration of three years from this date, whichever event first occurs, with interest thereupon at six per cent. from date of ascertainment. The plaintiff will have his costs in all the Courts from the defendant.

K. M. C. *Decree modified.*

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APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

RAM NARAIN KOER AND OTHERS (*Defendants*) *v.* MAHABIR PERSHAD SINGH AND ANOTHER (*Plaintiffs*) AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (*Defendants*).*
[9th June, 1886.]

Public Demands Recovery Act (*Beng. Act VII of* 1880), ss. 10, 23—*Attachment under certificate procedure—"Estate," Meaning of—Act XI of* 1859, ss. 5, 6—*Notification of sale, Specification of.*

The certificate and notice referred to in s. 10, Beng. Act VII of 1880, are executive acts, and an attachment, which is the result of those acts, is not a judicial, but an executive proceeding.

The meaning of s. 23 of that Act, which lays down that a Collector "in the discharge of his functions shall be deemed to be a person acting judicially within the meaning of Act XVIII of 1850," is, that for the purpose of protecting him from personal liability his action is to be regarded as judicial.

Under s. 6 of Act XI of 1859, it is not necessary that a notification should specify the owners of an estate or the owners of shares in the estate. *Secretary of State &c.* v. *Rashbehary Mookerjee* (1), followed.

All that is necessary under that section is that the notification should specify the estate or shares in the estate to be sold, and in selling a share in an estate it is unnecessary to specify the shares or mouzahs of which that share is composed.

[209] The word "estate," as there used, ordinarily means "mehal;" but the term also applies to a portion of a mehal with regard to which a separate account has been opened, but not to an undivided portion of a mehal as to which separate accounts are not kept.

[F., 1 C.L.J. 91=32 C. 509=9 C.W.N. 348; 6 C.L.J. 163 (167); R. & Expl., 69 P.L.R. 1913=15 P.W.R. 1913=50 P.R. 1913=17 Ind. Cas. 735; R. 20 C. 325; 8 C.W.N. 337 (343); 8 C.W.N. 757 (761)=32 C. 111; 32 C. 502=1 C.L.J. 14=9 C.W.N. 343 (F.B.); 32 C. 542=9 C.W.N. 487; 34 C. 381 (390)=5 C.L.J. 425.]

THIS was a suit brought to set aside a sale of Mehal Roypatti, held for arrears of Government revenue, on the 6th January 1883, at which the mehal was purchased by the defendants Nos. 1 to 5.

The facts were that Mehal Roypatti consisted of two *kalams* under a *butwara* partition, the one bearing the Towzi No. 3142 consisting of eight *kalams*; in all of which the plaintiffs held a share, one of the other shareholders in these *kalams*, who held a share, equal to the share of the plaintiffs, having opened a separate accout with the Collector for payment of his share of the revenue; the remainder of the *pattis* being joint.

The other *kalam* of Mehal Roypatti, bearing the Towzi No. 3143, consisted of seventeen minor *kalams*, and in this both the plaintiffs and their co-sharers had opened separate accounts for payment of revenue.

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* Appeals from Original Decrees Nos. 358—360 of 1885, against the decrees of Baboo Matadin, Rai Bahadoor, Subordinate Judge of Chupra, dated the 25th of April 1885.

(1) 9 C. 591.

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On the 28th September 1882, which was the last day for payment of Government Revenue, at the beginning of the day, the Government revenue in respect of Towzi No. 3142 was in arrear. On that day the plaintiffs paid in a sum in respect of Towzi No. 3142, which in amount, however, fell short of the arrear due.

On the same day there was also an arrear in respect of the plaintiffs' separate account in Towzi No. 3143, which at the beginning of the day amounted to Rs. 240. During that day the plaintiffs paid in Rs. 220; and at a later hour the same day paid in a further sum of Rs. 20. It appeared, however, that the plaintiffs' co-sharers had in respect of Towzi No. 3143 paid in more than their proper shares of revenue, so that, although there was a deficiency as regards the plaintiffs' separate account in Towzi No. 3143 without reckoning the Rs. 20 paid, still there would have been a credit balance in respect of the whole mehal.

As regards this part of the case the plaintiffs asserted that, on the 28th September 1882, there was no arrear due on account of the estate Towzi No. 3143, and that the Rs. 20 had been deposited on account of the arrears due for Towzi No. 3142. [210] They further alleged that the sale was held in an irregular manner; that the notifications under ss. 6 and 7 of Act XI of 1859 were not duly made, the shares in the estate not having been specified; that the correct name of the proprietor and the necessary particulars were not mentioned in the sale notification, the name of a person long since dead alone being mentioned; and that in consequence of these irregularities the sale was made at an inadequate price. Also that the Mehal sold was at the time of the sale under attachment for arrears of road cess, and that such an attachment was similar to and had the effect of an attachment by a Civil Court, and that a notice under s. 5 of Act XI of 1859 was necessary; that even if it were not so, the sale could not be held under s. 17 of Act XI of 1859. That the plaintiffs were minors at the date of the sale; that their estate was in the hands of the Court of Wards till July 1881; that the Collector gave up charge without making the estate over to their guardians; that it was not till February 1884 that their mother took out a certificate of guardianship and took over the management of the estate; that therefore the period to which the arrears related, and at which the sale was held, was one during which there was nobody on behalf of the minors managing the estate; that the Collector not having made over the estate to any body, the estate should be considered to have been under the charge of the Court of Wards.

The defendants Nos. 1 to 5 and the Secretary of State contended that the Rs. 20 was deposited on account of estate Towzi No. 3143, and denied all the other allegations made by the plaintiffs.

The Subordinate Judge found that the documents put in proved that the Rs. 20 was deposited on account of the estate Towzi No. 3143, and that there was an arrear due on account of Towzi No. 3142: that the notifications were duly served; but that the particulars required by s. 6 of Act XI of 1859 had not been complied with, inasmuch as no specification was given in the notification of the share belonging to the defaulter, or of the different *kalams* in the mehal, nor was the name of the recorded proprietor given; nor any statement made of the shares concerning which separate accounts had been opened as directed by s. 13 of Act XI of 1859.

[211] He further found that the mehal sold was at the time under attachment for arrears of road cess, and held that such an attachment was

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similar to and had the effect of an attachment by a Civil Court, and was an act done by the Collector in a judicial capacity; that therefore a notice under s. 5 of Act XI was indispensable; and no notice having been given, the sale was illegal. That the estate of the plaintiffs after having been given up by the Court of Wards under s. 8 of Beng. Act IV of 1870, had immediately been taken charge of by their mother, who had collected the rents and had paid Government revenue.

He further held that the sale had been made at a very inadequate price, and that inasmuch as the sale had been made illegally, the inadequacy of the price was prejudicial to the plaintiffs.

He therefore set aside the sale.

The auction purchasers, defendants Nos. 1 to 5, appealed to the High Court.

Mr. *Evans*, Baboo *Unnoda Pershad Banerjee*, Baboo *Mohesh Chunder Chowdhry* and Mr. *C. Gregory*, for the appellants.

Baboo *Hem Chunder Banerjee*, Moulvi *Mahomed Yusoof* and Baboo *Saligram Singh*, for the respondents.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

JUDGMENT.

The present suit is brought by the plaintiffs, who are the owners of a share of the property known as Mehal Roypatti, to set aside a sale for arrears of Government revenue which took place on the 6th of January 1883. A number of points have been raised which must be considered separately.

The point which it will be convenient to consider first is this: It is said that there was no authority to sell at all, because there was no arrear in the Government revenue. Of course, if that were so, the sale would be absolutely and totally void. The way it is sought to make out this point is this: There were two mehals, one numbered 3142, and the other 3143. The present plaintiffs were shareholders in each of those mehals. In mehal 3142 there were a number of other shareholders, one of whom had obtained from the Collector the [212] opening of a separate account of revenue in respect of his own share. In mehal 3143 there were also a number of shareholders, and no less than fifteen separate accounts of revenue had been opened in respect of the shares of the different shareholders. On the day fixed for the payment of arrears of Government revenue, before sunset, the 20th September 1882, at the beginning of the day, the Government revenue in respect of mehal 3142 was in arrear. A sum of money, but a sum short of the requisite amount, was paid by the present plaintiffs on that day, undoubtedly in respect of this mehal. There was also an arrear on that same day in respect of the present plaintiffs' separate accounts of revenue for mehal 3143; and that arrear at the beginning of that day amounted to Rs. 240. On that day they paid in Rs. 220 in one sum in respect of mehal 3143. On the same day they paid in another sum of Rs. 20. In all the documents relating to the transaction that sum of Rs. 20 appears as paid in respect of mehal 3143; but it also appears that the other shareholders had paid in more than their proper proportion of revenue. So without reckoning the Rs. 20 which were paid in on that day by the plaintiffs, although there would have been a deficiency on the present plaintiffs' separate account, there would not have been a deficiency, but a credit balance, in respect

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of the whole mehal. The plaintiffs say that they did not really pay those Rs. 20 in respect of mehal 3143, but that they paid that sum in respect of mehal 3142. That point the lower Court has found against them.

The Collectorate documents are clear on this point; and again it is quite clear that *that* sum of Rs. 20 was the precise sum, which, at the moment it was paid in, was necessary to clear off the arrear on the plaintiffs' separate account in respect of mehal 3143. These two circumstances afford very strong proof that it was in repect of mehal 3143, and not in respect of mehal 3142, that the plaintiffs paid the Rs. 20. We think therefore that the lower Court was quite right in rejecting the plaintiffs' evidence, that the Rs. 20 were really paid in respect of mehal 3142. It follows from that, that there was an arrear at sunset of that day in respect of mehal 3142. The first point therefore fails.

[213] The next point relates to a contention based on s. 5 of the Revenue Sale Act (XI of 1859). Section 5 says that no estate, and no share or interest in an estate, shall be sold for the recovery of arrears otherwise than after a notification shall have been affixed in certain places for a period not less than fifteen clear days preceding the date fixed for payment, in certain cases: *first*, where the arrears are other than those of the current year, or of the year immediately preceding; *second*, where the arrears are due in respect of an estate other than the estate to be sold; *third*, where the arrears are those of an estate under attachment, by order of any judicial authority, or managed by the Collector in accordance with such order.

It is said that, in this case the sale proceedings were void because the property, on the day fixed for payment and fifteen days before, was under attachment by order of a judicial authority.

It is not necessary for us to consider what the legal consequence would be if the case had fallen within s. 5, all the proceedings prescribed not having been taken. We think that the case does not fall within that section. It is said that the property was under attachment by order of a judicial authority because a certificate proceeding for the recovery of arrears of road cess had been taken, and a certificate had been made, and a notice as prescribed by s. 10, Beng. Act VII of 1880, had been issued, and, as contended for by the plaintiffs, served.

We think that this contention fails for two reasons: *first*, the notice which is referred to does not amount to an attachment by order of a judicial authority. Bengal Act VII of 1880, which, by its terms, is incorporated with the two earlier Acts upon the like subject, provides for certificates in various cases. In s. 5 for a certificate of the balance left due after a revenue sale; in s. 7 for a certificate of debts due and payable to the Collector in a variety of cases; and in s. 9 for a certificate in cases of Government debts payable to persons other than the Collector, or in cases of debts due to managers on behalf of the Court of Wards. In each of these cases the certificate is given the effect of a decree for the purpose of execution. We then come to s. 10. That section says that, when a certificate in any of **[214]** the cases I have referred to "shall have been filed, the Collector shall issue to the judgment-debtor a copy of such certificate and a notice in Form 4 in the second schedule annexed to this Act;" and "from and after the service of such notice, such certificate shall bind all immoveable property of such judgment-debtor situate within the jurisdiction of such Collector in the same manner and with like effect as if such immoveable property had been attached under the provisions of s. 274 of the Civil

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Procedure Code." In other words, when once a certificate is filed, then notice is to issue. The notice is a notice informing the person concerned that a certificate has been filed; that if he denies his liability he must show cause why the certificate should not be executed; that if he does not show cause it will be executed; and it prohibits him from alienating his property. When that notice is served the certificate is to bind immoveable property to the same extent as if it were an attachment issued under s. 274 of the Code of Civil Procedure.

The certificate procedure in its very nature is clearly not a judicial procedure. There is no examining of the parties. There is no giving to any of them an opportunity to be heard. It is clearly an executive act, and that is what it is intended to be. The certificate and notice are clearly not judicial but executive acts. *Prima facie*, therefore, the attachment, which is the result of those acts, is not a judicial but an executive proceeding. Then when we look at s. 23 we find that the Collector, in the discharge of his functions under Beng. Act VII of 1880, is to be "deemed to be a person acting judicially within the meaning of Act XVIII of 1850," that is, for the purpose of protecting him from personal liability his action is to be regarded as judicial. For these reasons we think that the attachment is not a judicial attachment.

In the next place, if it were a judicial attachment, it would be necessary for the present plaintiffs, who rely upon it, to show that at the time in question there was an actual valid attachment of this nature in force. This is not the case of a person who has in ignorance acquired a title upon which he might rely. It is the case of a defaulting party setting up his own default of payment of road cess and the proceedings taken [215] against his property in consequence. It is clear, therefore, that he is bound to show that everything was done regularly. What s. 10 directs is that a notice should be served, the contents of which I have described. The mode of serving the notice is prescribed by s. 5 of Beng. Act VII of 1868: "Every notice in and by this Act, or by the said Act XI of 1859, directed to be served, shall be served by delivering to the person to whom it may be directed, a copy thereof attested by the Collector, or by delivering such copy at the usual place of abode of such person, to some adult male member of his family, or, in case it cannot be so served, by posting such copy upon some conspicuous part of the usual or last known place of abode of such person." There was no attempt whatever to serve the notice issued under s. 10 in any of the ways contemplated by s. 5. It was treated as if it were an attachment by which the Collector was to take possession of the property. There was no personal service, and no attempt to serve sale notice at the dwelling place. There was simply a proclamation by the *peadah* of the terms of the notice, and a sticking up of the notice in a conspicuous place. Inasmuch therefore as the notice was not properly served there was no attachment.

The next objection is of a more serious character. It is said that the provisions of s. 6 of Act XI of 1859 have not been complied with, and further that on the authority of the recent Full Bench case of *Lala Mobaruk Lal* v. *The Secretary of State* (1) any defect in the notice under s. 6 is fatal to the whole of the sale proceedings.

It is not necessary for us to consider whether that Full Bench case does or does not go the full length of this contention, because it appears to us that there was no defect in the sale proclamation in this case.

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(1) 11 C. 200.

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Two alleged defects are relied upon: *First*, it is said that the sale proclamation was faulty, because it mentioned as the registered owner a person long since dead and nobody else; and, *secondly*, that it did not sufficiently describe the share of the property to be sold. What it did do was this: It described the serial number. It stated correctly the towzi number. It stated correctly the name of the mehal, and the [216] pergunnah in which the mehal was situated. Then in the column, "name of proprietor mentioned in the sherista," it gave the name of Ghinu Singh. It may be taken that Ghinu Singh had been the registered proprietor, and that he had long since been dead. This was the ground of the objection founded on the name of the person in the sale proclamation, and it was sought to strengthen the objection by showing that, although the names of the present plaintiffs had not been entered in the register, yet an order had been passed for entering them in the register under the Land Registration Act of 1876. But the words of the section are plain. What is required is that the notice shall specify the estate or the shares in the estate to be sold. It is nowhere said that it is necessary to specify the owners of the estate, or the owners of the shares in the estate. And it has been held by this Court that *that* is the true view of the effect of the section. The point came before this Court in the case of the *Secretary of State* v. *Rashbehari Mukerjee* (1), and it was there held that the omission of the names of some of the recorded proprietors was not a fatal objection under s. 6, the reason being that what the law required was the specification of the estate to be sold, not the specification of the owners of the estate. That case applies to this. Then with regard to the second objection under s. 6, that is, that the estate or share in the estate sold was not sufficiently specified, it is necessary to look at the facts. The mehal in question bears the towzi number, as I have said, 3142. Its name is Mehal Roypatti. Its sudder jumma is Rs. 2,028 odd. One of the shareholders in the estate had before the period in question obtained from the Collector the opening of a separate account of revenue in his name, and the separate jumma assessed upon him in that separate account was Rs. 788 odd, leaving a balance of Rs. 1,240 odd, as the jumma of the non-*ijmali* portion. What the sale notification did was this. It stated correctly the towzi number and the name of the mehal. It cannot therefore be said that it did not specify the estate, because "estate" ordinarily means "mehal." The term "estate" does apply to a portion of a mehal with regard to which a separate account [217] is opened, but it does not apply to an undivided portion of a mehal as to which separate accounts are not kept.

Then it is said that the share in the estate is not specified. What is specified is this: The whole of the sudder jumma is specified. The jumma of the portion in respect of which a separate account was opened is specified, and the jumma of the *ijmali* portion is specified. *Prima facie*, therefore the sale notification does specify the share in the estate, because, where a separate account is opened under s. 10 of Act XI of 1859, it is only the jumma that has been separated. Therefore the estate, is specified, and as to the thing which has been divided the division is specified. But it is said that in this particular case the matter is different: that the division of the jumma does not show the shares in the estate, the shareholders not holding similar shares in all the mouzahs making up the estate. But does that affect the shares of the estate, that is, the shares of the mehal? We think it does not. "Estate" has been defined in Beng.

(1) 9 C. 591.

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Act VII of 1868. The words of s. 6 point throughout to estates and shares of estates, not to particular properties which make up estates. Then we must remember that the Collector, when he acts under ss. 10 and 11, may or may not know the shares in the mouzahs making up an estate. What is to be stated to him is the shares of the estate, and if the parties do not dispute the shares in that estate as they did not in this case, he assesses the revenue accordingly and opens separate accounts. But in such a case, the Collector has no reason for inquiring what the shares of the parties may be in the mouzahs, if the shares in the mouzahs be different from the shares in the estate. The authorities are to the same effect. In the case of *Amirunnessa Khatoon* v. *The Secretary of State* (1), heard before Garth, C.J., and Macpherson, J., it was held that it was unnecessary to specify in the notification of sale the names of the mouzahs included in the property sought to be sold. If in selling an estate it is unnecessary to specify the mouzahs of which that estate is made up, why should it be necessary, when selling a share in an estate, to specify the shares or mouzahs of which that share is made up?

[218] The objection based on s. 6 therefore fails.

The next objection taken is under s. 5. It is said that the property being under attachment in the way that I have already described was not liable to be sold at all, because, *first*, it was under the management of the Court of Wards. On the evidence it appears to us perfectly clear, as it did to the Court below, that it was not under the management of the Court of Wards.

It is then said that it was not liable to be sold because it was held under attachment by the Revenue authorities by order of a judicial authority. But it is very clear that what that section points to is not an attachment in the sense in which the term is used in the Code of Civil Procedure, but an attachment such as is provided for in the Criminal Procedure Code, which takes the property out of the possession of the ordinary owner and places it into the possession of the Collector. The distinction is pointed out by the Privy Council in the case of *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (2).

For these reasons we are unable to agree with the lower Court in the view which it took with regard to the effect in this case of s. 5 and of s. 6. We agree with the lower Court in all those points in which it decided against the contention of the plaintiffs.

The result is that in our judgment all the objections to the sale fail, that is to say, all the objections which a Court of law can give any effect to.

If, as suggested by the respondents' vakeel before us, this is a case of special hardship to the plaintiffs either from their being infants, or, for any other reason, the Courts of Law have not the power to interfere. If there be any power for such a contention, it is a matter for the consideration of the local Government.

The decision of the lower Court must be set aside, and the suit dismissed with costs in both Courts.

This judgment will govern the other two cases, namely the appeals from Original Decrees Nos. 359 and 360 of 1885.

T. A. P. *Appeal allowed.*

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(1) 10 C. 63. (2) 12 B. L. R. 297.

13 C. 219.

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[219] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

NOWBAT ROY AND OTHERS (*Defendants*) *v.* LALA KEDAR NATH (*Plaintiff*).* [9th July, 1886.]

Act XL of 1858, *s.* 3—*Certificate of Guardianship—Certificate ordered, but not issued, Effect of—Limitation.*

A certificate of guardianship, obtained under s. 3 of Act XL of 1858 takes effect from the time it is issued, and not from the date of the order directing its issue. *Sahai Nand* v. *Mungniram Marwari* (1) followed.

[R., 13 B. 285 (290).]

THIS was a suit brought on the 12th May 1884 by a person who alleged he was adopted on the 13th April 1863, under a deed of authority, dated August 1845, to set aside certain alienations made in 1859 by his adoptive mother. At the date of this alleged adoption the plaintiff was of the age of one year; the adoptive mother died in 1285 F. S. (1878), and thereupon one Lala Topsiram applied to the Court for a certificate of guardianship under Act XL of 1858, and obtained an order appointing him guardian of the minor. This certificate was, however, never issued.

The main question in this suit was whether the suit was barred by limitation, *viz.*, whether the order for the issue of the certificate of guardianship to Lala Topsiram had the effect of deferring the plaintiff's majority to such time as he might attain his twenty-first year; or whether by reason of the abandonment of that order without taking out a certificate thereunder, the plaintiff had attained his majority at eighteen?

The Court of first instance held that as the certificate had never issued, the plaintiff attained his majority at the age of 18 years, and that therefore the suit was barred. The lower appellate Court held that the order of the Court granting the certificate was sufficient of itself to bring the minor within the provisions of s. 3 of Act IX of 1875, and therefore that the suit [220] was not barred, as the plaintiff would attain his majority at twenty-one ; the suit was therefore remanded for re-hearing.

The defendants appealed to the High Court.

Baboo *Umakali Mookerjee*, for the appellants, contended that the suit was barred ; that the effect of the mere order granting the certificate of guardianship under Act XL of 1858 was not of itself sufficient to bring the minor under the provisions of s. 3 of the Majority Act—*Stephen* v. *Stephen* (2).

Moulvi *Mahomed Yusoof*, for the respondent, contended that the suit was not barred; and cited, as to the effect of the order without issue of the certificate, *Chunee Mul Johurry* v. *Brojo Nath Roy Chowdhry* (3).

The judgment of the Court (WILSON and PORTER, JJ.) was as follows :—

JUDGMENT.

The only point before us in this appeal is as to the date on which the plaintiff is to be taken to have attained his majority, whether on the

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* Appeal from Appellate Order, No. 121 of 1886, against the order of H. W. Gordon, Esq. Judge of Chuprah, dated the 29th of December 1885, reversing the order of Baboo Matadin, Subordinate Judge of that district, dated the 30th of December 1884.

(1) 12 C. 542. (2) 9 C. 901. (3) 8 C. 967.

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completion of his eighteenth or on the completion of his twenty-first year. If a guardian was duly appointed according to law then under the Majority Act he would not attain his majority until the completion of his twenty-first year. If such appointment of a guardian was not duly made, he would attain his majority on the completion of the eighteenth year.

The fact is, as found, that an application was made for a certificate of guardianship, and an order was passed for the issue of a certificate, but that order was apparently abandoned, and no certificate was ever obtained.

It appears to us that under the Minors' Act it is the certificate which creates the relation of guardian and ward, and that the actual obtaining of the certificate is what is meant by the appointment of a guardian referred to in the Majority Act.

In the case of *Stephen* v. *Stephen* (1) it was held by Sir Richard Garth and Mr. Justice Cunningham, confirming a judgment of the Original Side of this Court, that a certificate of guardianship takes effect not from the date of the order granting it, but from the time the certificate is actually issued. On the other hand, in the case of *Chunee Mul Johurry* v. *Brojo Nath Roy* [221] *Chowdhry* (2) a different view was taken by Field and Macpherson, JJ., who held that the making of the order for, and not the taking out of, the certificate, is that by which a guardian is appointed. On a later occasion the matter came again before another Bench of this Court in the case of *Sahai Nand* v. *Mungniram Marwari* (3), and Tottenham and Norris, JJ., who decided that case, followed the view taken by Garth, C.J., and Cunningham, J., already noticed.

It appears to us therefore that there is a distinct preponderance of authority in this Court in favour of the view that a certificate of guardianship takes effect from the time it is issued—a view which, in our opinion, is in accordance with the true construction of the statutes themselves.

The result is that the order of remand by the District Judge must be set aside, and that the decree of the first Court must stand.

The appellant will have his costs in this and the lower appellate Court.

T. A. P. *Appeal allowed.*

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13 C. 221.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

AGA MAHOMED HAMADANI (*Plaintiff*) *v.* COHEN AND OTHERS (*Defendants*).* [22nd July, 1886.]

Burma Courts Act (*XVII of* 1875) ss. 49, 97—*Civil Procedure Code* (*Act XIV of* 1882), ss. 3, 4, 540—*Limitation Act* (*XV of* 1877), *sch. II, art.* 156.

An appeal from the Court of the Recorder of Rangoon, to the High Court is an appeal under the Civil Procedure Code, and must be made within the time prescribed by art. 156, sch. II of the Limitation Act.

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*Appeal from Original Decree, No. 269 of 1885, against the decree of Charles John Wilkinson, Esq., Recorder of Rangoon, dated the 1st of December 1882.

(1) 9 C. 901. (2) 8 C. 967. (3) 12 C. 542.

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THE plaintiff sued the Directors of the Kamindine Burra Bazar Co., Ld., to recover from them five shares, or the value thereof, in the said Company, which shares had become forfeited through failure to pay calls made thereon. The suit was valued [222] at Rs. 3,070. The defence was that the Directors had not been duly elected, and had no power to make the calls. On the 1st December 1882 the Recorder of Rangoon, before whom the case was heard, dismissed the suit with costs.

The plaintiff appealed to the High Court, presenting his memorandum of appeal on the 18th February 1885. The Deputy Registrar refused to admit the appeal without the sanction of the Court. On the 19th February, Garth, C.J., and Wilson, J., admitted the appeal subject to argument at the hearing as to whether the appeal was barred as being presented out of time.

On the appeal coming on for hearing—

Mr. *Pugh* (Mr. *Watkins* with him) appeared for the appellant.

Mr. *Evans* (Mr. *Simons* with him) appeared for the respondents.

Mr. *Evans* took a preliminary objection that the appeal was out of time.

Mr. *Pugh* contended that the appeal was not one under the Civil Procedure Code, but under the Burma Courts Act, and that therefore, inasmuch as no period of limitation was provided by that Act for appeals to the High Court, art. 156 of sch. II of the Limitation Act could not apply.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows :—

JUDGMENT.

We think that this matter is really free from doubt. The question is whether the present appeal, which is an appeal from a decision of the Recorder of Rangoon, was filed within time or out of time; and that depends upon whether it is, or is not, governed by art. 156 in the second schedule of the Limitation Act. That article says that an appeal under the Code of Civil Procedure to a High Court, except in certain cases mentioned, must be brought within ninety days from the date of the decree or order appealed against.

What we have to decide is whether an appeal from the Recorder's Court of Rangoon to this Court is an appeal under the Code of Civil Procedure.

The Acts relating to the matter are these:—*First*, the Burma Courts Act (XVII of 1875). That Act provides for the [223] organization and the jurisdiction of the various Courts therein mentioned. Chapter IV deals with the Court of the Recorder of Rangoon, and s. 49 in that Chapter says: "There shall be no appeal from the decree or order of the Recorder passed in any original suit or proceeding where the amount or value of the subject-matter does not exceed three thousand rupees; but where the amount or value of the suit or proceeding in the Recorder's Court exceeds three thousand rupees, and is less than ten thousand rupees, an appeal shall lie to the High Court." And s. 97 enacts that, "save as otherwise provided by this Act, the Code of Civil Procedure shall be, and shall on and from the 15th day of April 1872, be deemed to have been in force throughout British Burma." The Code of Civil Procedure in force at that time was Act VIII of 1859. Then we turn to the present Procedure Code which is in the main identical with the Code of 1877. It applies

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in general terms to the whole of British India, and therefore includes British Burma. Then s. 3 says, that when in any Act reference is made to Act VIII of 1859 (that is, the Procedure Code of 1859), or Act XXIII of 1861 (that is, the amending Act), or the Code of Civil Procedure, or to Act X of 1877, such reference shall, so far as practicable, be read as applying to this Code, or the corresponding part of it. The consequence of that section is that in the Burma Courts Act we must now read s. 97 as incorporating the present Civil Procedure Code.

Then s. 4 says: "Save as provided in the second paragraph of s. 3 (the paragraph which I have just read), nothing herein contained shall be deemed to affect the following enactments," amongst which is the Burma Courts Act of 1875. The meaning of that kind of saving clause has been very often considered. There is no doubt that the meaning is that, if anything in the Code is found to conflict with anything in the Burma Courts Act, the Code shall not prevail to override the inconsistent provisions in the Burma Courts Act, so far as they are inconsistent.

Then comes s. 540, which says: "Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees or from any part of the [224] decrees of the Courts exercising original jurisdiction to the Courts authorised to hear appeals from the decisions of those Courts." That is a general provision not conflicting with any enactment in the Burma Courts Act or any other Act by which an appeal was excluded, because that exclusion is expressly saved, and not prescribing for Burma or any other part of British India to what Court any appeal shall lie, but merely laying down the broad rule that were an appeal is not expressly excluded an appeal shall lie to whatever Court under the enactment in force may be the proper Court. That is the state of the enactments on this matter.

Now, what is is meant by an appeal under the Civil Procedure Code? A particular appeal was given by the Burma Courts Act, and the Burma Courts Act is still the only Act which prescribes to what Court this appeal shall lie. If it had not been given by the Burma Courts Act then s. 540 of the Civil Procedure Code would have been sufficient to give it, provided that some Court was by some enactment provided as the proper Court to hear the appeal. The procedure in appeals in every respect is governed by the Code of Civil Procedure. The Limitation Act, sch II, art. 156, when it speaks of the Civil Procedure Code, is, on the face of it, speaking of a Code which relates to procedure, and does not ordinarily deal with substantive rights: and the natural meaning of an appeal under the Civil Procedure Code appears to us to be an appeal governed by the Code of Civil Procedure so far as procedure is concerned.

It appears to us therefore that this appeal is clearly out of time, and must be rejected on that ground. The respondent is entitled to his costs.

Since this case was heard our attention has been called to the case of *Mahomed Hossein* v. *Inodeen* (1). That case, however, does not seem to us to have any close bearing upon the present. It was there held that art. 156, sch. II of the Limitation Act does not apply to proceedings under s. 27 or s. 34 of the Burma Courts Act. Section 27 gives power to the Judicial Commissioner (who is, we presume, in such a case, by reason of s. 2 of the General Clauses Act, a High Court within the meaning of [225] the Limitation Act) under certain

(1) 10 C. 946.

circumstances, if in his discretion he thinks fit to do so, to admit a second appeal. Section 34 empowers him, in certain cases, to send for the record of a case and deal with it in his discretion. To apply art. 156 to such cases would be to use it, not to restrict any rights given to the parties, but to curtail a discretion given to the Court. And this was the ground of decision. Moreover, the procedure under those sections is quite foreign to the Civil Procedure Code.

T. A. P. *Appeal dismissed.*

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13 C. 225.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

SEW BUX BOGLA v. SHIB CHUNDER SEN AND ANOTHER.
[30th July, 1886.]

Civil Procedure Code (Act XIV of 1882), *ss.* 295, 622—*Rateable distribution—Material irregularity affecting the merits of the case.*

The words of s. 295 of the Code of Civil Procedure, "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors.

The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code.

The words "a material irregularity" in s. 622 of the Code of Civil Procedure, include an irregularity of procedure materially affecting the merits of the case.

An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section. *Magni Ram* v. *Jiwa Lal* (1) observed on.

[**Appr.**, 21 C. 809 (817) ; 26 C. 772 (776) ; 28 M. 380 (384) = 15 M.L.J. 202 ; **Cons.**, 2 L.B.R. 333 (335) ; **Disc.**, 2 C.W.N. 474 (477) ; **R.**, 28 B. 264 ; 6 P. R. 1903 ; 14 C. 768 (778) ; 1 C.W.N. 617 (625) ; 130 P.L.R. 1905 = 69 P.R. 1905 ; 9 C.L.J. 210 (213) = 4 Ind. Cas. 52 ; **Cited**, 3 L.B.R. 275 ; **D.**, 16 B. 91 (98).]

THIS was a rule calling upon one Bhugwan Doss to show cause why an order of the Officiating Chief Judge of the Small Cause Court should not be set aside under s. 622 of the Code of Civil Procedure.

The facts of the case were as follows :—

On the 23rd June 1885, one Sew Bux Bogla obtained a decree for Rs. 1,397-11, in the Calcutta Court of Small Causes, against Shib Chunder Sen and Hurry Narain Sen, which directed payment to be made by monthly instalments of Rs. 50.

[226] In execution of this decree certain property of the judgment-debtors was attached on the 7th January 1886.

On the 31st August, 1885, one Bhugwan Doss obtained a decree against the same defendants for the sum of Rs. 1,241-14-3 payable in monthly instalments of Rs. 100.

On the 8th January 1886, Bhughwan Doss applied for attachment of the defendants' property ; on that date a warrant was issued, but the property was never actually attached.

Sometime between the 8th and 15th January, 1886, the defendants filed their petition of insolvency, and the usual vesting order was made.

The Official Assignee then paid into the Court of Small Causes the

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(1) 7 A. 336.

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amount of the decree obtained by Sew Bux, and the property was released from attachment.

Bhugwan Doss then applied to the Court under s. 295 of the Code of Civil Procedure for a share in the money so paid into Court, and his claim was allowed by the Judges of the Small Cause Court.

On this the rule above mentioned was granted by the High Court to Sew Bux Bogla.

Mr. *Bonnerjee*, in showing cause, contended that there was nothing to show that the Judges of the Small Cause Court had acted without jurisdiction or had exercised a jurisdiction not vested in them, and that under s. 622 these were the only grounds on which the Court would interfere; that illegality did not mean a mistake in law, and cited *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), and *Magni Ram* v. *Jiwa Lal* (2).

Mr. *O'Kinealy*, in support of the rule, contended that the money could not be said to have been realized "by sale or otherwise in execution"; the payment was a voluntary one made by the Official Assignee and on the construction of s. 295 cited *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi* (3). With reference to the powers of interference by the Court under s. 622, he contended that there had been a material irregularity affecting the merits, inasmuch as the Judges had proceeded under a section which did not apply, and [227] that this would enable the Court to interfere, citing *Tiruchittambala Chetti* v. *Seshayyangar* (4), *Badami Kuar* v. *Dinu Rai* (5) and *Maulvi Mahammad* v. *Syed Hussain* (6).

ORDER.

TREVELYAN, J.—This application raises a question of importance. It is an application to the Court under the revision section (s. 622) of the Civil Procedure Code to set aside an order made by the Small Cause Court. I have taken some time to consider this case, not because I have entertained any doubt, but because I thought it desirable to hesitate before interfering with the considered judgment of two able and experienced Judges of the Small Cause Court. I have no doubt whatever that the Judges of the Small Cause Court were wrong.

The only question is whether, considering a recent ruling of the Privy Council, and the interpretation which has been given to that ruling by a Full Bench of the High Court of the North Western Provinces, I have power to interfere. The facts are as follows. On the 23rd of June, 1885, Sew Bux Bogla obtained a decree in the Calcutta Small Cause Court against Shib Chunder Sen and Hurry Narain Sen for Rs. 1,397-11 to be paid by instalments of Rs. 50 a month.

On the 7th of January, 1886 certain property of these defendants was attached in execution of this decree. In considering this case it occurred to me that there might be a question as to whether this attachment was valid, as the decree provides for payment by instalments, and was silent as to execution going for the whole amount in case of the failure to pay any instalments. I do not think, however, that I need consider this question, as the validity of rule 34 of the rules of the Small Cause Court has not been impugned by Mr. Bonnerjee. On the 31st of August 1885 Bhugwan Doss Bogla obtained a decree against Shib Chunder Sen and Hurry

(1) 11 C. 6=11 I.A. 237. (2) 7 A. 336. (3) 6 B. 588.
(4) 4 M. 383. (5) 8 A. 111. (6) 3 A. 203.

Narain Sen for the sum of Rs. 1,241-14-3, to be paid by instalments of Rs. 100 a month. 1886 JULY 30.

On the 8th of January 1886, Bhugwan Doss applied for attachment of the defendants' property, and on the same date a warrant of attachment was issued, but the property was not attached. On some day between the 8th and the 15th of [228] January 1886 the defendants filed their petition in the Insolvent Court and the usual vesting order was made. ORIGINAL CIVIL. 13 C. 225.

The result of this was that the Official Assignee obtained a title to the property attached, subject only to Sew Bux Bogla's attachment. To get rid of this attachment the Official Assignee, on the 15th of January 1886, paid into Court the amount of Sew Bux Bogla's decree, and the property was accordingly released.

Bhugwan Doss applied for a share of this money under s. 295 of the Civil Procedure Code, and his claim has been allowed by the Small Cause Court.

Section 295 is as follows: " Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons." In this case I think that no assets have been realized by " sale or otherwise in execution of a decree."

These works, I think, provide only for the case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors.

The section does not compel a judgment-creditor whose debt is satisfied by the judgment-debtor or, as in this case, by a person standing in the shoes of the judgment-debtor, to share with other persons the money received by him in satisfaction of his judgment. The construction put upon the section would prevent a judgment-creditor from coming to an arrangement with his debtor. If the property attached in this case were more than sufficient to pay off both decrees, the attaching creditor, although he has a preferential title to the Official Assignee, would be deprived of his rights by the money being paid into Court.

This result was, I am sure, never contemplated by this section.

It would in reality take away from a creditor the benefit which an attachment gives him against the Official Assignee.

This section was considered by a Bench of the Bombay High Court in the case of *Purshotamdass Tribhovandass* v. [229] *Mahanant Surajbharthi Haribarthi* (1). In that case a judgment-creditor executed his decree by arrest. The debtor, on being arrested, paid the amount of the decree, and was discharged. Another judgment-creditor, who had applied for execution of his decree, claimed to be entitled to a share of the money paid by the judgment-debtor.

It was held that this money was not realized by sale or otherwise in execution of a decree, and that " realized " in s. 295 means realized from the property of the judgment-debtor. I do not think that in this case the money was realized out of the property of the judgment-debtor. Suppose that a friend of the judgment-debtor had paid off the decree for him, it is clear that it could not in that case be said that the money was realized out of the property of the judgment-debtor. It surely makes no

(1) 6 B. 588.

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difference that the money was paid by the Official Assignee. The Bombay High Court points out that the view they take is confirmed by s. 341, cl. (*b*), which provides for the discharge of the judgment-debtor from arrest, "at the request of the person on whose application he has been imprisoned," so, as they say, this seems to assume that the arresting creditor may avail himself of the arrest to enter into any arrangement he thinks proper with the debtor behind the back and independently of other creditors who may have applied for execution. In this case also the attachment would be removed, and the Official Assignee would acquire the property directly the decree is paid off, or an arrangement be come to between him and the attaching creditor.

I think that "by sale or otherwise" means by sale or by other process of execution provided for in the Civil Procedure Code. If the Small Cause Court Judges were right in their construction of the section, the following might occur: A debtor might pay off an attaching creditor who would have to divide the money with other creditors who had applied for execution, and then these other creditors might by attachment or otherwise realize the whole of their money, whereas the first attaching creditor only receives a portion, and could not receive more out of the property of the judgment-debtor, as the judgment-debtor had paid off his debt. The judgment of the Small Cause Court being in my [230] opinion wrong, the question is whether I can interfere with its order under s. 622 of the Civil Procedure Code.

I can only do so if I think that the Small Cause Court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

This section has been recently considered by the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1). All that case really decides is that s. 622 does not give a right of appeal on questions of law, and that in case where the Subordinate Court has jurisdiction, the superior Court can only interfere where that Court has acted illegally and with material irregularity in the exercise of such jurisdiction.

A Full Bench of the Allahabad High Court in the case of *Magni Ram* v. *Jiwa Lal* (2), held that the Privy Council decided, in the case I have referred to, that only questions relating to the jurisdiction of the Court can be entertained under s. 622. I think that the Privy Council did not only include in s. 622 questions relating to the jurisdiction of the Court, but also questions relating to the *exercise* of the jurisdiction of the Court. The Allahabad Court leaves out of consideration the words "or to have acted in the exercise of its jurisdiction illegally or with material irregularity," words to which the Privy Council distinctly gives effect. Can I in this case say that the Small Cause Court, to use the words of the Privy Council and of the section, exercise their jurisdiction "illegally or with material irregularity"? It is not easy always to draw a clear line between an illegal exercise of jurisdiction and a mistake of law. If A sued B for some property, and the Court gave a decree to C who was not a party to the suit, this would come clearly under this section. The adoption of a procedure different from that provided by law and such as to cause material injury to the suitor could, I think, be dealt with by s. 622. The application of a

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(1) 11 I.A. 237 = 11 C. 6. (2) 7 A. 336.

section of the Code to a case to which it does not apply stands, I think, upon the same footing. 1886 JULY 30.

ORIGINAL CIVIL.

13 C. 225.

[231] This is what has been done in the present case. It seems to me that, as held by Mr. Justice Straight and Mr. Justice Tyrrel, in *Badami Kuar* v. *Dinu Rai* (1), a material irregularity includes an irregularity of procedure materially affecting the merits of the case. The illustration which Mr. Justice Straight gives, namely, the seizure of the costs of a judgment-debtor, in some respects has a resemblance to the present case. I think that the decision of the Small Cause Court must be set aside with costs.

Attorney for Sew Bux Bogla: Baboo *N. C. Bose.*

Attorney for Bhugwan Doss: Mr. *Hart.*

T. A. P. *Rule absolute.*

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13 C. 231.

APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Porter.

FAZEL BISWAS AND OTHERS (*Plaintiffs*) v. JAMADAR SHEIK AND OTHERS (*Defendants*).* [24th June, 1886.]

Review—Civil Procedure Code, 1882, *s.* 624—*Application for review heard by successor to Judge who passed the decree.*

Where an application for review is presented to the Judge who made the decree, and he thereupon issues notice to the other side, the application is "made" to him within the meaning of s. 624 of the Civil Procedure Code, and may be heard and disposed of by his successor in office. *Karoo Sing* v. *Deo Narain Sing* (2) followed.

[Appr., 13 M. 178 (188) (F.B.); **R.,** 16 B. 603 (605); 10 C.P.L.R. 62 (63); 3 O.C. 363 (364).]

THIS case was originally heard by the Munsif of Jessore, who gave a decree in favour of the plaintiffs, and an appeal by the defendants from that decree to the Subordinate Judge was dismissed. The Subordinate Judge afterwards admitted an application for review of his judgment, and directed the application to be registered, and the fees for service of notice to be deposited within three days. The Subordinate Judge left before the review was heard, and it was taken up and heard by his successor, who reversed the decree, and in lieu thereof made a decree dismissing the suit. From this decision the plaintiffs appealed.

[232] Baboo *Mohit Chundra Bose* and Baboo *Amarendra Nath Chatterji*, for the appellants.

Baboo *Byddi Nath Dutt*, for the respondents.

The judgment of the Court (BEVERLEY and PORTER, JJ.) was as follows:—

JUDGMENT.

The only point raised in this appeal is that "the Subordinate Judge has acted without jurisdiction and in contravention of the law in admitting the judgment of his predecessor into review, and in re-hearing the

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* Appeal from Appellate Decree, No. 183 of 1886, against the decree of Baboo Promotho Nath Banerji, Subordinate Judge of Jessore, dated the 29th of September 1885, reversing the decree of Baboo Jodu Nath Ghose, Munsif of Jessore, dated the 15th of December 1884.

(1) 8 A. 111. (2) 10 C. 80.

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appeal." This clearly means that the Subordinate Judge has acted in contravention of s. 624 of the Code.

Now it appears that the application for review of judgment was made, or in other words preferred, to the same Subordinate Judge who made the decree. That Subordinate Judge directed that the application should be entered on the register, and that the requisite fees for service of notice should be deposited within three days. The present case therefore seems to be precisely on all fours with that of *Karoo Sing* v. *Deo Narain Sing* (1) in which it was held that if the application for review is presented to the Judge who made the decree, and if he thereupon issues notice to the other side, the application has been "made" to him within the meaning of the section, and may be heard and disposed of by his successor in office.

We are not prepared to dissent from this view of the law, and we accordingly dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

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13 C. 232.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

GOLAM RAHMAN (*Plaintiff*) *v.* FATIMA BIBI (*Defendant*).*
[26th July, 1886.]

Burma Courts Act (*XVII of* 1875), s. 49—*Restitution of Conjugal Rights—Appeal from the decree of Recorder of Rangoon—Civil Procedure Code* (*Act XIV of* 1882), s. 540.

The proviso in s. 49 of the Burma Courts Act amounts to an express declaration that it is a condition precedent to the right of appeal from the Recorder's Court that the suit shall be one which has an amount or [233] value capable of being estimated in money, and that that amount or value must fall within certain specified limits.

A suit for the restitution of conjugal rights is incapable of being valued, and no appeal therefore in such a suit will lie under the Burma Courts Act from a decision of the Recorder of Rangoon.

[F., 18 C. 378 (381); R., 31 C. 849 = 8 C.W.N. 705; 28 A. 545 (F.B.) = 3 A.L.J. 266 = A.W.N. (1906) 99; D., 34 C. 352 = 11 C.W.N. 458 = 5 C. L. J. 400.]

THIS was a suit for restitution of conjugal rights. The defence was that the plaintiff had beaten and cruelly ill-treated his wife, and that her dower had not been paid.

The Recorder of Rangoon, before whom the suit was heard, dismissed the suit with costs on the 1st April 1885.

The plaintiff appealed to the High Court, valuing his appeal for the purpose of jurisdiction at Rs. 5,000, and paying a Court fee under No. 15, sch. 2 of the Court Fees Act. He also put in an affidavit, which was uncontradicted, that he valued the appeal at that particular sum, inasmuch as his marriage expenses had amounted to Rs. 5,000.

Mr. *Amir Ali*, Mr. *Roberts* and Mr. *Gregory*, for the appellant.

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* Appeal from Original Decree, No. 374 of 1885, against the order and decree of W. F. Agnew, Esq., Recorder of Rangoon, dated respectively the 6th of February and 1st of April 1885.

(1) 10 C. 80.

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Mr. *O'Kinealy* for the respondent took a preliminary objection that no appeal would lie to the High Court under the Burma Courts Act, as no valuation for the purpose of jurisdiction on a suit for restitution of conjugal rights could be placed at all; and therefore the value of the suit for the purposes of jurisdiction could not be said to have exceeded Rs. 3,000, which amount would alone entitle a suitor to an appeal to the High Court under s. 49 of Act XVII of 1875.

Mr. *Amir Ali.*—The objection as to valuation is too late. It ought to have been raised before the hearing by motion to reject or remove the appeal—*Aldridge* v. *Cato* (1). [WILSON, J.—It is not an objection to valuation, but one of jurisdiction.] An objection to jurisdiction founded on valuation comes within the principle laid down by James, L.J. See also *Shire* v. *Shire* (2).

As to the main objection, it is submitted an appeal does lie. No valuation can be put on suits in which the question of status is involved. In the case of *Shire* v. *Shire* already cited, Lord Brougham lays down the principle in distinct terms; see also *Camilleri* v. *Fleri* (3) and *D'Orliac* v. *D'Orliac* (4), **[234]** and *Re Skinner* (5). In this latter case a suit as to the custody of a minor was held appealable to the Privy Council.

Suits of this character are not contemplated by s. 49 of the Burma Courts Act (Act XVII of 1875), and therefore the jurisdiction vested in the High Court under s. 540 of the Civil Procedure Code (Act XIV of 1882) cannot be ousted by s. 49. This section only refers to cases where the subject-matter of the suit is capable of being assessed at a money value. If the objection of the other side is well founded, the result will be that, whilst there is a right of appeal in every case over Rs. 3,000 in value, no appeal will be given in cases far more important, involving legitimacy, marriage relation, &c., merely because the subject-matter of the suits cannot be assessed at a money value. It was also contended that the affidavit of the plaintiff ought to be taken as conclusive on the question of valuation.

Mr. *O'Kinealy* in reply.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

JUDGMENT.

It appears to us that the objection which has been taken to this appeal must prevail.

If this Court has jurisdiction to entertain this appeal, it must be either by reason of the Burma Courts Act, or by reason of the provisions of the Civil Procedure Code, or both.

This is an appeal from a decision of the Recorder of Rangoon. And the only section in the Burma Courts Act which could be pointed to as giving an appeal to this Court is s. 49. That section says, *first*, that "there shall be no appeal from the decree or order of the Recorder passed in any original suit or proceeding where the amount or value of the subject-matter does not exceed three thousand rupees." That excludes appeals altogether in cases under the sum mentioned. The section then goes on to say, that "where the amount or value of the suit or proceeding in the Recorder's Court exceeds three thousand rupees and is less than ten thousand rupees, an appeal shall lie to the High Court." These are the only words in the section and in the Act

(1) L.R. 4 P.C. 313. (2) 5 Moo. P.C. 81. (3) 5 Moo. P.C. 161.
(4) 4 Moo. P.C. 374. (5) L.R. 3 C.P. 451.

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giving this Court jurisdiction to hear any appeal from the [235] Recorder's Court. And then follow excluding words : "Provided that the amount or value of the matter in dispute on appeal must exceed the former sum and be less than the latter."

It appears to us that the effect of this clause is to say that an appeal shall lie within certain limits, and that it shall not lie unless the matter falls within those limits. It therefore amounts to an express declaration that it is a condition precedent to the right of appeal that the suit shall be one which has an amount or value capable of being estimated in money, and that *that* amount or value shall fall within certain specified limits.

The section in the Civil Procedure Code which has been relied upon is s. 540. Now, that section does not deal with the jurisdiction of Courts. It deals with the rights of appeal given to parties. And in enactments of this kind the distinction must always be remembered between sections which confer jurisdiction on Courts and sections which confer rights on parties. In order to sustain an appeal to this Court it is necessary to show two things—that the party desirous of appealing has the right to appeal, and the Court to which he would prefer the appeal has the right to entertain it.

Section 540 says: "Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts." In order to enable us under that section to hear this appeal, it must be shown that this Court is authorized to hear appeals from the Recorder's Court of Rangoon. But this Court is authorized only under s. 49 of the Burma Courts Act, that is to say, in the particular cases already referred to. And it appears to us that the words, "the Court authorized to hear appeals," in s. 540 of the Code, must mean either the Court authorized to hear appeals from the Courts in question generally which this Court is not authorized to do in respect of the Recorder's Court, or else the Court authorized to hear such appeals as the appeal in question, which has not been shown of our Court as to this appeal. Even if that difficulty were got over, there would remain another. It must appear that it is not expressly [236] provided by any law that such an appeal as this does not lie to this Court. But, as I have already pointed out, s. 49 provides that an appeal shall not lie from the Recorder's Court to this Court unless it is capable of a money valuation, and that money valuation falls within certain limits.

The distinction between suits capable of money valuation and those not capable of such valuation is one perfectly familiar in this country. It has been embodied in Act after Act, especially in the Stamp Acts and the Court Fees' Act ; and a suit of this particular nature and a great many others have been treated in them as suits incapable of valuation.

It appears to us, therefore, that neither the Burma Courts Act nor the Civil Procedure Code gives any jurisdiction to this Court.

It will be right perhaps to mention the affidavit put in by the appellant, in which he professes to place a pecuniary value on the society of his wife against whom he claims a restitution of conjugal rights. But that affidavit cannot alter the real nature and character of the suit, which is one not capable of being valued.

For these reasons we think that this appeal cannot be entertained and must be rejected with costs.

T. A. P. *Appeal dismissed.*

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1886
APRIL 6.

PRIVY COUNCIL.

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[237] PRIVY COUNCIL.

PRESENT:

Lord Blackburn, Lord Halsbury, Lord Hobhouse, and Sir R. Couch.
[*On appeal from the High Court at Calcutta, in* 9 *C.* 939.]

GAN KIM SWEE AND OTHERS (*Defendants*) *v.* RALLI BROTHERS (*Plaintiffs.*)* [31st March, 1st, 2nd, and 6th April, 1886.]

Contract, Breach of—Alleged breach of warranty by vendor on a sale and delivery of goods—Burden of proof after acceptance following upon an examination by purchaser.

Under five contracts for the sale of good Burma cutch, to be delivered to a Calcutta firm in Calcutta, by the vendors, who knew that it was bought for the export market, delivery and acceptance followed upon a searching examination of the cutch by the purchasers.

The latter having sent advices of this purchase to a New York firm with which they were in partnership, parcels of cutch were sold to different buyers in America, to whom, under such "forward" contracts, the cutch was shipped in separate shipments by the Calcutta firm.

On the arrival of the cutch, objection was taken to its quality by the American buyers, who refused to take delivery. The Calcutta firm, thereupon, sued the vendors under the five contracts above mentioned.

The burden of proof being upon the plaintiffs, who had accepted the cutch after full examination in Calcutta, to prove the breach of contract by the vendors by cogent evidence sufficient to rebut the presumption of due performance that arose from such acceptance, *held* that this presumption was not rebutted in the absence of evidence as to the treatment of the cutch on its re-shipment by the plaintiffs on the voyage from India to America, and at the port of arrival.

APPEAL from a decree (13th September 1883) of a Divisional Bench of the High Court.

The decree from which this appeal was preferred awarded Rs. 1,13,066, with interest at 6 per cent., and costs, to the respondents, Messrs. Ralli Brothers, of Calcutta, as damages sustained by them in consequence of a breach of warranty of the quality of 9,043 bags of cutch, sold and delivered to them by the appellants, who were Chinese merchants, trading in Calcutta under the style of Eng. Hong & Co. The latter, having a branch firm in Rangoon, traded in cutch, the produce of Burma forests, which, after being sorted, packed in bags, and **[238]** marked with a trade mark in Rangoon by the firm, was shipped to Calcutta.

By five contracts, dated respectively 24th September, 1st, 3rd and 30th December 1879, and 3rd February 1880, Eng. Hong & Co., contracted to deliver to Ralli Brothers, bags of cutch marked ◇E.G.◇ to amounts varying from 500 bags to 4,000 bags, "guaranteed to be of the standard quality of the mark" (1), at prices varying from Rs. 9-8 per bazaar maund in the first contract to Rs. 12-8 in the last; delivery to be given and taken from the sellers' godowns in Calcutta, within periods, fixed in the contracts, varying from 23rd September 1879 to 6th February 1880.

Ralli Brothers, in Calcutta, having advised their New York firm, the latter, as agents, made contracts for sale of the cutch to other firms in

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(1) Initials of a Rangoon firm, Eck Guan.

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America, of which the Calcutta firm received advice. Delivery of the cutch after examination having been taken in Calcutta, under the above contracts, by the Calcutta firm, they re-shipped and despatched it to America in several shipments, according to the number of "forward" contracts, there being in this case eight.

On arrival every shipment was rejected, with a slight exception. Of 1,500 bags, which had been accepted in Calcutta under the Contract of 24th September 1879, only 950 bags were accepted by the American firms. The remaining 550 bags of that batch, together with all the cutch delivered as above stated, and despatched in other shipments to America, were rejected by the American buyers.

The suit out of which this appeal arose was thereupon brought by the Calcutta firm of Ralli Brothers.

The plaint alleged that the marks mentioned in the five contracts for delivery in Calcutta were well known as indicating a prime quality; but the cutch delivered was bad in quality, mixed with other substances, and in the case of some bags fraudulently packed.

The defendants, amongst other things, denied that there was a standard of prime quality in cutch, or that any fixed standard [239] of quality was meant by the marks; the quality of cutch varying from year to year, and even from month to month of the cutch season. They also denied that the cutch, delivered by them, and accepted after examination by the plaintiffs, was of other quality than that contracted for, or that any had been fraudulently packed.

The construction of the five contracts, and the effect of the examination and acceptance in Calcutta, as well as questions as to the quality of the cutch at the time of the delivery in Calcutta, and as to the alleged false packing, were put in issue.

Part of the evidence consisted of the examination of witnesses taken under commissions issued to Rangoon, New York, and London.

The suit, having been partly heard in the original jurisdiction by one Judge, was then, by consent of parties, and under an order of the Chief Justice, heard and determined by a Bench of two Judges (Norris and Wilkinson, JJ.). The Court held that the marks referred to in the five contracts were used for the purpose of indicating that the cutch was of the average quality packed by the Rangoon firm denoted by the marks, and meant that the cutch was to be good and of a uniform quality. They found, however, that the cutch delivered was not so.

Finding that the defendants knew at the time that the cutch had been bought by the plaintiffs for export, they held that the proper measure of damages was the difference between the price which would have been paid in New York for the cutch had it been good, and the price that it, being bad, actually realized. The claim in respect of false packing was rejected.

Mr. *A. Cohen, Q.C.*, Mr. *A. Charles, Q.C.*, and Mr. *J. H. A. Branson* appeared for the appellants.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, for the respondents.

For the appellants the argument principally urged was that the High Court, in deciding that the cutch delivered was not of such good quality as had been contracted for, had acted upon evidence insufficient in effect to rebut the inference, or presumption, that necessarily arose from the acceptance of the cutch [240] in Calcutta after a searching examination. All the evidence pointed to such an examination having taken place. The result was that all the evidence taken under the New York and London commissions was only so far relevant as it might be taken to bear on the question

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of the long previous condition of the cutch *i.e.*, at the time of delivery in Calcutta; and that evidence affected the real question between the parties remotely only and not directly. Considering the length of time, and the effects of exposure, from which the cutch might well have suffered either in the re-shipment after delivery in Calcutta, or on the voyage, or in New York on arrival, it followed that evidence of its condition, when ultimately rejected by the buyers in America, was no criterion of what it might have been at the time of its delivery in Calcutta. The judgment of the High Court had been given without sufficient regard to where the burden of proof lay, and was incorrect.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne* argued for the respondents that they, who were not precluded by the acceptance in Calcutta from proving inferiority in the quality of cutch actually existing at the time of delivery, had established by the general body of the evidence that the cutch could not have been in a good state when delivered. Thus a breach of contract had been made out. The respondents had sustained damage to an amount at least equal to that awarded by the decree, the appellants having been aware that the market in Calcutta for cutch was an export market, and that the contracts in question were entered into by the respondents with a view to re-shipping the cutch to a foreign port.

Counsel for the appellants were not called upon to reply.

JUDGMENT.

Their Lordships' judgment was delivered by

LORD HALSBURY.—This is an appeal from the High Court at Fort William in Bengal, where judgment was given for the respondents, the plaintiffs below, with damages for the breach of warranties, contained in five several contracts for the sale of cutch to the respondents.

The course of the evidence in this case renders it unnecessary to draw any distinction between the first and the four later contracts. It is not denied that in all five contracts the obligation **[241]** was to deliver good cutch, and the real dispute in this case is whether good cutch was delivered. Had the evidence raised any distinction between cutch of a peculiar manufacture or quality, as indicated by a recognised mark, it might have been necessary to consider more minutely the effect of the warranties contained in the four later contracts; but the contest between the parties has been conducted on much broader grounds. The 11,000 bags, the subject of the five contracts, were delivered in Calcutta between the 5th of April 1879 and the 26th April 1880.

In the course of the deliveries extending over this period an examination to determine whether it should be accepted as according to contract or not took place. Some was rejected, other cutch substituted, and extra allowance made for weight. This was done in the presence of one or other of the brokers and of the person selected by the purchasers, who made the examination and conducted the examination in the manner in which, at that time, cutch was generally examined. The correspondence between the respondents and their New York agency discloses the fact that upon some telegrams and letters which are not before us, the respondents explained to their agency why they had accepted some which, in their judgment, might not exactly have come up to the contract quality. They say: "We had to reject several lots, receiving only what would pass as prime. We had to complain also in some instances about heavy tare, and we only received such lots with full allowance of weight." Then in a letter dated June 22, 1880, they say: "As you are aware, we were all along receiving our cutch on advancing markets, and

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although, we were very careful in receiving, in many instances we were compelled to accept deliveries which we would have rejected if our market was quiet, and we were not pressed by freight engagements." Then they say: "We may here add, that owing to the strong demonstrations and the rejections made by our competitors and ourselves, the quality and the packing of the supplies since February has improved, and we hope that on arrival you will find an improvement in our shipments." Then again: "We are sorry at not having been aware of the objectionable form of your contracts for cutch, which do not admit of any allowances in case of inferiority of quality, as otherwise we would have certainly [242] been much more particular in restricting our business to the very best marks. Being ignorant of this, and seeing our competitors (who had far better experience than ourselves in this article) buy the E. G. mark, we thought that by being careful in the delivery, and receiving full allowances for any inferiority in the quality or extra tare, we could protect ourselves and take our share in this business. On several occasions we have rejected lots for inferiority of quality or false packing (when we were not pressed for shipment), and the same lots have been accepted and shipped by our competitors, and this was an argument of our seller for our being very particular in our deliveries." Then they say again, in a letter dated the 30th July: "After the great disappointments we have had (which, however, have been partly caused by the fact that we were never aware of the clause in your contracts allowing the buyer to reject out-and-out any inferior quality) we shall of course be more careful in our deliveries and ship only really good quality."

It is to be observed that that correspondence, which obviously arises from some telegram not before us, had taken place between the parties before the end of April 1880, and indeed the selected specimen on which so much turns, and which will have hereafter to be dealt with, was taken before the end of April 1880, and throughout the course of delivery in New York, occupying from the 13th April until the 21st October, no complaint whatever is made of either quality or packing until the letter of the 4th November. Mr. Cowie very fairly admitted that, although that letter of the 4th November refers to some communication by these persons, it refers to some verbal communication on or about that time, and the letter itself, when looked at, does not refer to inferiority of quality at all, but refers, apparently, to the question of false packing.

It probably is not necessary, upon this state of facts, and seeing what the course of delivery has been, to put any construction on the Indian Contract Act, since treating it as a matter simply of fact and inference, it is impossible not to see that the evidence of the searching examination at Calcutta, and the period which is allowed to elapse from the time, and during the course of delivery, [243] extending over the period referred to, renders it at all events incumbent, by very cogent evidence on the part of the respondents, to rebut the inference which justly would be drawn from the acceptance in Calcutta, after such searching examination, that the goods delivered were according to contract.

Their Lordships are of opinion that the Judges of the High Court were right in rejecting the claim in respect of false packing. If the evidence of the condition of the cutch as received in New York was accurate, it is absolutely impossible to suppose that it could have escaped the

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examination at Calcutta. To take the one specimen which has been more than once referred to of a fraudulently packed bag—there is no other phrase that will adequately describe it—in which there were two or three inches of cutch outside and the interior filled with dirt and rubbish, and which has been referred to once or twice as a piece of evidence that it is impossible to reconcile with a really honest examination at Calcutta, it is worthy of remark that, although a considerable quantity—and as Mr. Doyne has pointed out in his argument, a very considerable number —of bags were rejected at Calcutta, it was not suggested in any part of the evidence that anything of that sort was discovered during the examination. It would almost have followed, as a matter of course, that if any such fraudulent trick as that has been discovered, the examination would have been much more stringent even than it was. But the respondents took delivery after examination, and if they had sought to show that the article as delivered in New York was the same in quality and condition as to packing as when it was received and accepted by them, they should have given some evidence (for the burden was clearly on them) of its treatment in Calcutta after delivery to them, its loading on board, the conditions of the voyage, and, further have shown that no changes of heat, moisture, or pressure by superincumbent weight, could have affected the article during the voyage until its delivery in New York. It is obvious that the respondents have offered no evidence on any one of these questions, and it appears to their Lordships they have entirely failed to satisfy the burden which was upon them. But while their Lordships entirely agree with the Judges of the High Court in rejecting the claim as to false packing, they [244] are unable to follow the learned Judges in their conclusion as to the inferior quality of the cutch. The judgment apparently depends upon the proposition that the cutch in its original manufacture contained an inordinate quantity of sandy or earthy matter; and that the condition of the cutch was incapable of being discovered in Calcutta upon the examination on account of the semi-liquid state of the cutch. Their Lordships are unable to discover any evidence to justify that finding. If indeed the evidence had established that the liquid state of the cutch at Calcutta had prevented examination, and upon its arrival at New York it disclosed that, as orginally manufactured, it was defective, a different question might have arisen; but in truth there is hardly any evidence in support of this branch of the proposition. Their Lordships fail to discover any evidence that the examination at Calcutta was prevented or even affected by the liquid condition of the cutch; and there is absolutely no evidence of the cutch being so manufactured that it contained an undue quantity of earthy or sandy matter. The learned Judges appear to have acted upon their own view of what was described by the sample marked "T 3," and they have regarded this sample, the size of which does not distinctly appear, but which appears to have been taken at the latter end of April 1880, as having sufficiently informed their minds of what was the quality of the 11,000 bags of cutch. Their Lordships are wholly unable to acquiesce in the inference drawn, and therefore will humbly advise Her Majesty that the judgment of the High Court should be reversed, and the suit be decreed to be dismissed with costs, and the respondents will pay the costs of this appeal.

Appeal allowed, with costs.

Solicitors for the appellants: Messrs. *Watkins & Lattey.*
Solicitors for the respondents: Messrs. *Sanderson & Holland.*
C. B.

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JUNE 24.

APPELLATE
CIVIL.

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[245] APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Macpherson.

RAM NARAIN SINGH AND OTHERS (*Defendants*) *v.* RAM RUNJUN CHUCKERBUTTY (*Plaintiff*).* [24th June, 1886.]

Sonthal Pergunnahs Settlement—Regulation III of 1872, *ss.* 24, 25—*Suit to set aside order of Settlement Officer—Non-publication of record of rights.*

Where, in December 1884 a suit was brought to set aside an order of the Settlement Officer under Regulation III of 1872, made in December 1875, after disposing of the plaintiff's objections to the defendants' title, and it was found that no record of rights had been published in accordance with s. 24 of the Regulation: *Held*, the suit was not barred under s. 25 as not having been brought within three years from the date of the order. The final order referred to in that section must be one subsequent to or not preceding the publication of the record of rights.

THIS suit was brought for the reversal of an order of the Settlement Officer, dated 16th December 1875, by which the rights of the first defendant as *mokuraridar*, and of the other defendants as *dur-mokuraridars* of certain mauzahs, were recognized, and for possession of the said mauzahs. The plaintiff alleged that he was in possession of the said mauzahs as zemindar, and that they had been sub-let by him in *ijara* which expired in 1284 (1877); that the settlement proceedings commenced in these mouzahs in 1875, whilst they were so sub-let; that before the Settlement Officer, the defendants falsely represented that they held these mauzahs on *mokurari* and *dur-mokurari* titles, and that the Settlement Officer, notwithstanding an objection filed by the plaintiff, recorded his order to the above effect under Regulation III of 1872. No record of rights, however, as provided by the Regulation, was ever published. The plaintiff denied that the defendants had any such title as had been recognized by the Settlement Officer, and alleged that in 1289 (1883) he demanded possession of the mauzahs from the defendants [246] from the beginning of 1290 (1884), which they refused to give him, and he dated his cause of action from the latter date. The suit was instituted on 20th December 1884. The only defence material to this report was that the suit was barred by limitation under s. 25 of Regulation III of 1872, inasmuch as it had not been brought within three years from the date of the order of the Settlement Officer.

The suit was dismissed on this ground by the first Court; but on appeal that decision was reversed by the Deputy Commissioner, who remanded the case for trial on the merits.

From this decision the defendants appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Jogesh Chunder Day*, for the appellants.

Baboo *Karuna Sindhu Mukherjee*, for the respondent.

For the appellants it was contended that it was not necessary that the publication of a record of rights should be made before a final order could be made by the Settlement Officer. A final order might be made at any stage; and, as in this case, the order had been made disposing of the

* Appeals from Appellate Orders, Nos. 110 and 117 of 1886, against the orders of L. R. Forbes, Esq., Deputy Commissioner of Sonthal Pergunnahs, dated the 2nd of January 1886, reversing the order of J. A. Craven, Esq., Sub-Divisional Officer of Jamtara, dated the 13th of August 1885.

plaintiff's objection, and the order had not been appealed from, it was a final order under s. 25 of the Regulation, though made before the publication of the record of rights, and the suit should have been brought within three years from that order.

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For the respondent it was contended that the final order referred to in s. 25 applied only to final orders disposing of objections taken to an entry in the record of rights after its due publication under s. 34. Here the objection filed by the plaintiffs was one made under ss. 12 and 14, and not under s. 24, and the order made on it was not a final order; there was consequently no order from which the three years' limitation could commence.

The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows:—

JUDGMENT.

It is contended that the lower appellate Court has put a wrong construction upon that portion of s. 25 of Regulation III of 1872 which enacts that the Civil Courts in the Sonthal [247] Pergunnahs can entertain a suit brought to "contest the finding or record of the Settlement Officer within three years from the date of the said publication or of the final order of the Revenue Court." The publication referred to is that of the record of rights, which under s. 24 requires to be notified, and published by posting a copy thereof in some conspicuous place in the village, otherwise in such manner as may be convenient. The second clause of that section gives a right to any person interested to bring forward in the Original or Appellate Settlement Courts any objection he may desire to make to any part of such record.

In the present case it is admitted that the Settlement Officer in the course of a settlement held that the defendants were *mokuraridars* of certain villages. But it is admitted also that no record of rights was ever published under s. 24. And the question which now arises is, whether the suit brought to contest that finding is within time under s. 25. We think the construction which the lower Court has put upon that section is the right one. We are practically asked to read for the words Revenue Court in s. 25 the words "Settlement Officer." We see no grounds on which any such construction can be maintained. The words in the section seem to indicate that a suit is within time if brought within three years from the date of the publication, or if there is any subsequent order of the Revenue Court, from such date. Sections 24 and 25 read together show that it is open to any one to question the correctness of the conclusion arrived at by the Settlement Officer, subsequent to the publication of the record of rights. And when we find in the limitation clause that a suit may be brought either from the date of the said publication or from the final order of the Revenue Court, it seems to us that the order of the Revenue Court must be one which follows and does not precede the publication of the record of rights.

We think, therefore, that the view of the lower appellate Court is right, and that the appeal must be dismissed with costs.

This decision governs the appeal No. 117 of 1886.

J. V. W. *Appeal dismissed.*

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13 C. 248.

13 C. 248.

[248] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

KALI KRISHNA TAGORE (*Plaintiff*) *v.* GOLAM ALLY (*Defendant*).*
[7th July, 1886.]

Landlord and tenant—Suit for ejectment—Repudiation of title—Setting up different tenure from that alleged by landlord.

The plaintiff in 1870 brought a suit for rent, in which the defendant set up and filed a permanent *howladari* lease, but admitted that he held at the rent alleged by the plaintiff, and that suit was decreed, the Court thinking it unnecessary to decide the question of the validity of the tenure set up by the defendant. In a suit brought after a notice to quit which was found to be invalid, to eject the defendant, and for a declaration that he had no such permanent *howladari* tenure as he alleged, the defendant again set up the *howladari* lease under which he admitted he had paid a fixed rent to the plaintiff : *Held*, that though the defendant repudiated the particular holding which the plaintiff attributed to him, h did not question the plaintiff's right to receive the rent, and therefore did not in any sense repudiate his landlord's title. What he did amount merely to questioning the right of the landlord to enhance the rent, which was not such a disclaimer as would result in law in a forfeiture of his tenure. The plaintiff therefore was not entitled to eject the defendant without giving him a proper notice to quit.

Vivian v. *Moat* (1) distinguished, on the ground that the principle on which it is based is wholly inapplicable in Bengal. *Baba* v. *Vishvanath Joshi* (2) dissented from.

[Expl., 24 C. 440 (447); R., 14 C. 323 (342); 15 B. 407 (413); 17 B. 631 (635); 17 M. 218 (220) = 3 M.L.J. 287; D., 9 C.W.N. 460 (463) = 1 C.L.J. 116.]

THE facts and contentions in this case are sufficiently stated in the judgment of the Court (PETHERAM, C.J., and GHOSE, J.)

Mr. *Woodroffe* and Baboo *Doorga Mohun Doss*, for the appellant.

The *Advocate-General* (Mr. *Paul*), Mr. *Amir Ali*, Mr. *W.M. Doss* and Baboo *Rash Behary Ghose*, for the respondent.

JUDGMENT.

This appeal arises out of a suit brought by the plaintiff Baboo Kali Krishna Tagore, who is the zemindar of Pergunnah Edilpore, against Golam Ally, the defendant, to eject him from certain lands situated in that pergunnah : and for a declaration that the defendant's allegation made in a previous suit between the parties, that [249] he, the defendant, had a permanent *howla* interest in the lands, is untrue. The plaint sets forth that the lands in suit, which are within a property named Haturea, were leased out to the defendant's father, one Mahomed Ashak in 1234 (1827) as a *kursa* or ordinary ryoti tenure, to be held by him as a tenant-at-will ; that the said tenure was not granted for agricultural purposes ; that subsequently, in the years 1250 (1843) and 1264 (1857), respectively, two dowls or kabulyats were executed by the said Mahomed Ashak in favour of the plaintiff's father, Babu Gopal Lal Tagore, in respect of the said lands at enhanced rents, the rent reserved by the last dowl being Rs. 421-7-10 ; that subsequently, in a suit brought by the plaintiff in 1870 for rents of the

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* Appeal from Original Decree, No. 262 of 1884, against the decree of Baboo Jagaduriubh Mozoomdar, Rai Bahadur, Subordinate Judge or Furreedpore, dated the 30th of May 1884.

(1) L.R. 16 Ch. 730. (2) 8 B. 228.

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years 1274 to Sraban 1277 (1867 to July 1870), the defendant set up and filed a permanent *howladari* lease, but at the same time admitting that he had been holding the land at the rent alleged by the plaintiff; that the Court which decided the suit did not consider it necessary to go into the question of the validity of the *howla* set up by the defendant, but decreed the claim for rent, there being, in fact, no dispute as to the amount thereof; that subsequently, in 1284 (1877), the defendant changed the features and character of a portion of the lands by digging tanks without the plaintiff's knowledge, which acts were contrary to the express stipulations of the dowl of 1264, and the custom of that part of the country; that thereupon a notice to quit was served upon the defendant on the 11th Assar 1289 (1882), requiring him to relinquish possession of the lands within fifteen days. The suit was brought upon the basis of the said notice to eject the defendant from the land hitherto held by him, and also to have it declared that the defendant was not entitled to the *howla* which he claimed.

The answer to this suit was that the notice was bad in law; that it was neither sufficient nor reasonable; that the dowls set up by the plaintiff were untrue; that the excavations complained of in the plaint were made some time before the year 1284 from time to time, and that the plaintiff acquiesced in these acts; that in the year 1184 (1777) a remote predecessor of the plaintiff, namely, one Jaswant Rai, who was then entitled to the whole of the mauzah Haturea, granted to the defendant's grandfather, **[250]** Sheikh Domai, a permanent *howladari* pottah for 9 drones 14 kanis and odd of lands at a fixed rental of Rs. 421-7-10; that this rent had ever since been paid to the plaintiff's father and subsequently to the plaintiff; and that the fact of this *howla* was set up more than 12 years ago with the knowledge of the plaintiff and his father, the late Baboo Gapal Lal Tagore; and that, therefore, the plaintiff was now barred by limitation from questioning the *howla*. The written statement further contended that the meaning of the word "*kursa*" as given in the plaint was incorrect; and that the tenants of Pergunnah Edilpore, who had *kursa* rights, could acquire rights of occupancy by occupation for more than 12 years; that even upon the dowls filed by the plaintiff and the statements contained in the plaint it could not be said that the defendant was a tenant-at-will; and that, further, having continued to possess and enjoy the lands at a progressive rent for the reclamation of jungle, and without interruption from generation to generation, from before the Permanent Settlement, a right of occupancy had accrued to the defendant within, or subordinate to, the superior *howladari* interest.

The Court below has held that the person whose signature the notice to quit bears, had no authority whatsoever to give such a notice; that the defendant's tenure is at least a tenancy from year to year; and, therefore, a notice given in the middle of the year, requiring him to quit within fifteen days, was not a reasonable and sufficient notice, and that therefore the plaintiff is not entitled to eject the defendant in this suit.

Upon the matter of the excavation complained of in the plaint, the Subordinate Judge has found that the tanks were dug many years ago without any let or hindrance on the part of the zemindar, and has accordingly held that no ground for ejectment on this score is made out.

The title of the plaintiff to eject having failed, the Court below had next to consider whether or no the plaintiff was entitled to declaratory relief in respect of the *howla* set up by the defendant. Upon this

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question the Subordinate Judge has found that the lease set up by the defendant, that is to say, the *howladari* pottah of 1184, is a forged document, but that the existence of the *howla*, though not proved to be held at a [251] fixed rent from before the Permanent Settlement, is made out by the various rent receipts produced by the defendant, which described the tenure as a *howla* tenure, and that the said receipts were granted apparently with the knowledge of the naib and other superior officers of the plaintiff; and it must, therefore, be inferred that the plaintiff and his father were aware of the fact that a *howladari* title had been set up many years ago, that is to say, more than 12 years ago; and, therefore, both upon the ground that the defendant has made out that he has a *howla* right in the property in question, and also upon the ground that the said *howla* had been set up more than 12 years before suit, with the knowledge of the zemindar, the plaintiff is not entitled to question, and is, in fact, barred by limitation from now questioning the said *howla*. As regards the two dowls of the years 1250 and 1264 produced by the plaintiff, as having been executed by the defendant's father, Mahomed Ashak, the lower Court has found that they are untrue, and have been manufactured on the occasion of the rent suit of the year 1870. Having come to these conclusions, the Subordinate Judge has dismissed the suit with costs.

The plaintiff has appealed to this Court; and we might here observe that no contention has been raised before us as to the notice served upon the defendant being valid in law, nor that the plaintiff is entitled to eject by reason of the excavations made by the defendant.

The points that have been raised by the learned Counsel for the appellant are: (1) that the setting up by the defendant of a permanent *howladari* right in the property in question amounted to a denial of the ordinary rights of the zemindar; and, therefore, the defendant must be taken to have forfeited his tenure; and the plaintiff is, therefore, entitled to eject the defendant without any previous notice to quit; (2) that the foundation upon which the *howladari* title was based having failed, namely, the lease of the year 1184 having been found by the lower Court to be a manufactured document, the Subordinate Judge ought, consistently with his finding, to have found that the defendant was entitled to no *howladari* interest in the lands; (3) that the rent receipts relied upon by the lower [252] Court have not been proved according to law, and are not genuine; (4) that there is no proof whatsoever that as a matter of fact the *howladari* lease of 1184 was set up at any time with the knowledge of the plaintiff or his father previous to the suit of 1870, and therefore the plaintiff is not barred by the law of limitation from now questioning the said *howladari* title; (5) that the dowls produced by the plaintiff ought to have been found by the lower Court to be genuine; and, lastly, that even if the plaintiff be not entitled to eject the defendant, he is, at any rate, entitled to have a declaration to the effect that the *howladari* title set up by him is untrue.

The learned Advocate-General for the respondent, in the course of his arguments in support of the decree of the Court below, contended, among other matters, that the plaint disclosed no cause of action, and that the Court below ought to have found that the *howladari* lease of 1184 was a genuine instrument.

Upon the arguments raised before us, it would appear that there are *two* questions of law, and three questions of fact, involved in this appeal.

The questions of law are : (1) does the plaint disclose a cause of action; and (2) whether, in the absence of a notice to quit, is the plaintiff entitled to eject ?

The questions of fact are : (1) whether the defendant is entitled to the *howla* which he claims ; (2) whether the *howla* was set up more than 12 years ago with the knowledge of the plaintiff or his father ; and (3) whether the defendant's father executed the dowls produced by the plaintiff?

Upon the question whether the plaint discloses any cause of action or not, as raised by the learned Advocate-General, we are clearly of opinion that it does. If the allegations in the plaint are correct the plaintiff has a perfectly good cause of action to maintain the suit. Whether or no the plaintiff has upon the evidence made out a cause of action is a different matter altogether, and a question which will be considered hereafter. We might, however, here observe that even if all other grounds fail, the setting up by the tenant defendant of a permanant tenure—a tenure which cannot be enhanced—is sufficient to give the [253] zemindar a cause of action to come into Court to have that title set aside ; and if the plaintiff has made out a case in respect of this matter, he would be entitled to relief.

The next question to be considered is, whether the setting up of a *howladari* title in the suit of the year 1870 by the defendant amounted to a disclaimer of the plaintiff's title as landlord ; whether in fact there has been a forfeiture of the tenure by the defendant such that the plaintiff is entitled to evict without putting an end to the tenure by a proper notice to quit. Now it will be observed that, although the defendant in the suit of 1870, and also in the present suit, repudiated the particular holding which the landlord attributes to him, yet he never questioned the landlord's right to receive the rent which it is agreed between the parties was being paid for many years together ; he did not in any sense repudiate the landlord's title. What he did was simply to question the right of the landlord to enhance the rent, and that, in our opinion, was not such a disclaimer as would result in law in a forfeiture of the tenure itself. Mr. Woodroffe in support of his contention quoted the case of *Vivian* v. *Moat* (1) and the case of *Baba* v. *Vishvanath Joshi* (2). In the first mentioned case, the tenant denied the right of the landlord to raise his rent, and set up a title to hold the lands at a customary or quit rent. It was held that this was a disclaimer of the landlord's title, such as would obviate the necessity of a notice to quit. But it will be observed that the decision rests upon the ground that the title to hold land at a customary rent is inconsistent with the ordinary relationship of landlord and tenant, as it exists in England. Fry, J., observes : "Now what is a customary rent ? I understood that a customary rent means this : a rent which entitles the occupier to hold so long as he pays. There is therefore the suggestion that the late landlord and the present plaintiffs were not ordinary landlords of this estate, but were either lords of the manor or owners of some other right which gave them a title to a customary rent, which they could demand, and nothing more than that." And it will be further observed from the judgment that the existence of the tenancy was not admitted until the time when the case came on for argument. We [254] think, therefore, that the principle upon which that decision is based is wholly inapplicable in Bengal, where rights grow up under the law, such

(1) L.R. 16 Ch. 730. (2) 8 B. 228.

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as rights of occupancy, irrespective of contract, and where there are numerous tenures held by persons at fixed rents, and it has never been understood in this country that the assertion of such a right is a denial of the landlord's title *as such*. As regards the case cited by the learned Counsel from the Bombay reports, we need only say that it is apparently based upon the case of *Vivian* v. *Moat* and the other English cases quoted therein, and that, for the reasons already mentioned, we are not prepared to follow the rule of law laid down in it.

But apart from these considerations, it appears to us to be perfectly clear, that if there was a forfeiture of the tenancy by what the defendant said in the suit of 1870, there has been since then a distinct waiver on the part of the landlord of his right to evict upon that ground ; for it has been found in the judgment of the Court below, and, in fact, it was conceded in the course of the argument for the plaintiff, that since the suit of 1870 the plaintiff has continued to receive the same rent which the defendant had been paying previous to the suit of 1870, until within a short time before the institution of the present suit ; and it was not until 1882 that the plaintiff gave the defendant a notice to quit, apparently treating him as a tenant up to that time. And it is further noteworthy that even in the said notice the plaintiff does not rely upon the alleged forfeiture as a ground upon which the defendant should be ejected.

We may here observe that upon the plaintiff's own case as disclosed in his plaint, and the dowels propounded by him, the defendant is at least a tenant from year to year, and that being so, it seems to us to be clear that this tenancy must be terminated by a proper notice to quit before a suit for ejectment can be maintained ; and it follows, therefore, that the plaintiff is not entitled to a decree for ejectment in this suit.

(The Court then dealt with the questions of fact ; this portion of the judgment is omitted as being unnecessary for this report). The result, therefore, is that the claim for ejectment must be [255] dismissed, but that a declaration must be given in favour of the plaintiff to the effect that the defendant has no *howladari* interest in the lands covered by the suit ; and in this respect the decree of the Court below must be altered.

As regards the costs of the suit, we think that each party having set up a case which is either false or unproven, they should bear their own costs in both the Courts.

J. V. W. *Decree varied.*

13 C. 255.

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APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

NAUN SINGH (*Plaintiff*) *v.* RASH BEHARI SINGH AND OTHERS (*Defendants*).* [30th April, 1886.]

Valuation of Suit—Suit for pre-emption—Jurisdiction—Bengal Civil Courts Act (*VI of* 1871), *s.* 20.

In a pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under s. 20, Act VI of 1871.

[R., 6 O. C. 255 (257).]

THIS suit was brought for the enforcement of the plaintiff's right of pre-emption. The property in dispute was sold to the defendants for Rs. 700. The plaintiff sought to recover possession of it by the cancellation of the aforesaid sale on payment of Rs. 700 to the defendants (purchasers). The suit was brought in the Munsif's Court. The defendants amongst other pleas objected to the jurisdiction of the Court, on the ground that the property sought to be recovered was of the value of more than Rs. 1,000.

The Munsif overruling this objection dismissed the suit upon the merits. The plaintiff preferred an appeal against the Munsif's decree. The Subordinate Judge, on the objection of the defendants, re-opened the question of jurisdiction, and finding that the property in dispute was of the value of more than Rs. 1,000 dismissed the suit upon the ground that the Munsif had no jurisdiction to entertain it.

[256] The plaintiff appealed to the High Court.

Baboo *Jogindra Chunder Ghose* for the appellant.

Mr. *M. L. Sandel* for the respondents.

The judgment of the Court (MITTER and NORRIS, JJ.) after setting out the facts as above, proceeded as follows :

JUDGMENT.

In this second appeal it has been urged that the defendants, respondents, are not entitled to re-open the question of jurisdiction in the Appellate Court, they having not preferred any appeal against the Munsif's decision upon this point. We are of opinion that this contention is not valid. The defendants, respondents, were entitled to answer the plaintiff's appeal upon the ground that the Munsif had no jurisdiction to entertain the suit. We think therefore that there is no force in this contention.

The second ground that has been urged before us is that the finding of the Subordinate Judge that the value of the property in dispute is more than Rs. 1,000, does not necessarily lead to the conclusion that the Munsif had no jurisdiction to entertain this suit. It has been contended that the value of the property in dispute in this case is not necessarily the value of the subject-matter in dispute. The plaintiff offered to pay Rs. 700, the consideration money stated in the conveyance to the defendant. That amount at any rate should be deducted from the value of

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* Appeal from Appellate Decree, No. 1257 of 1885, against the decree of Babu Abinash Chunder Mitter, Subordinate Judge of Patna, dated the 27th of March 1885, affirming the decree of Rai Baboo Sheo Sarun Lal Bahadur, Munsif of Patna, dated the 28th of April 1884.

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the property in dispute in order to ascertain the value of the subject-matter in dispute.

We are of opinion that the subject-matter in dispute in this case is the right of pre-emption which the plaintiff asserts that he has in respect of the property in suit. The question for decision, in order to ascertain whether the Munsif had jurisdiction or not, is as laid down in s. 20 of the Bengal Civil Courts Act (VI of 1871)—what is the value of this right? It is not very easy to lay down any general principle for ascertaining the value of a right of pre-emption in any given case. But it is clear to us that it is not the value of the property itself. For example, if a plaintiff seeks to recover possession of a property covered by his *pottah*, and the rent charged upon the property is of considerable amount, the value of the property itself would not be the value of the right which the plaintiff would seek to recover. Therefore [257] it seems to us that in determining the question whether the value of the subject-matter in dispute in this case is above Rs. 1,000, the lower appellate Court has proceeded upon an erroneous principle. As already remarked, it is not possible to lay down any hard-and-fast rule for measuring the value of a right of pre-emption in any particular case. But the lower appellate Court in this case, for reasons already given, was not right in measuring it by the value of the property itself without taking into consideration the fact that the plaintiff has offered to pay to the defendant Rs. 700 and would be bound to make the payment before he could succeed.

It has not been shown therefore that the Munsif was in error in holding that he had jurisdiction to entertain the suit. That being so, the Subordinate Judge's judgment cannot stand. We therefore reverse that judgment and send back this case to that Court to decide the appeal on the merits. Costs will abide the result.

K. M. C. *Case remanded.*

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13 C. 257.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

SRIHARY MUNDUL (*Judgment-debtor*) *v.* MURARI CHOWDHRY AND ANOTHER (*Decree-holders*).* [2nd July, 1886.]

Limitation—Execution of Decree—Jurisdiction of Court where decree was passed—Transfer of decree for execution—Code of Civil Procedure, ss. 223, 239, 248.

On the 4th of March 1884, a decree-holder applied to the Court of the Subordinate Judge of Moorshedabad (where the decree was passed) for transfer of the decree to the District Court of Beerbhoom for execution. The transfer was made, and, on application by the decree-holder, the judgment-debtor's properties in Beerbhoom were attached. Thereupon the judgment-debtor objected to the attachment, and obtained an order under s. 239 of the Code of Civil Procedure staying the execution proceedings. The judgment-debtor then applied to the Court of the Subordinate Judge of Moorshedabad objecting to the execution of the decree, on the ground that it was barred by limitation. The objection was overruled by the Subordinate Judge, and his [258] decision was upheld on appeal to the District Judge. On second appeal to the High Court,

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* Appeal from Order, No. 150 of 1886, against the order of T. D. Beighton, Esq., Judge of Moorshedabad, dated the 19th of January 1886, affirming the order of Baboo Nobin Chunder Ganguli, Subordinate Judge of Moorshedabad, dated the 22nd of September 1885.

Held, that the Moorshedabed Court was competent to hear and determine the plea of limitation.

Held, also, that the fact of the judgment-debtors not raising the plea of limitation in the Beerbhoom Court did not, under the circumstances, preclude him from relying on it in his subsequent application to the Court at Moorshedabad.

[R., 17 A. 431 (435); 22 C. 89 (44); 28 M. 466 (471) = 15 M. L. J. 116 (F. B.).]

THIS was an application for execution of decree. The judgment appealed from was, so far as material, as follows:—

" The dates in connection with this appeal which relates to the execution of a decree are as follows:—

Decree obtained in the Court of the Subordinate Judge of Moorshedabad ...	5th May	1877
First application for execution		1878
Struck off	June	1878
Second application	22nd December	1880
Notice to judgment-debtor	14th January	1881
Served	28th January	1881
Struck off for default	19th April	1881
Third application containing a prayer for transfer to the Court of the Subordinate Judge of Beerbhoom where the judgment-debtor's property is situated	4th March	1884

" Subsequently an order for sale of certain property took place at Beerbhoom, but no sale has actually occurred.

" Finally the judgment-debtor applied to the Subordinate Judge of Moorshedabad alleging that the third application was barred, and praying for an order to stay execution at Beerbhoom. The execution proceedings have been stayed, but the Subordinate Judge has decided the present application in favour of the decree-holder, considering that the application is not barred.

" Against this decision both parties have appealed, the judgment-debtor urging that the proceedings are barred, and the decree-holder by way of cross-appeal argues that the Subordinate Judge of Moorshedabad had no jurisdiction to try the objection which ought to have been made at Beerbhoom.

" Before deciding the main point at issue I deal chiefly with the argument of respondent that the third application was not barred by limitation when presented. The order of 19th April was that **[259]** the decree-holder do pay into Court two annas postage stamps and 'the decree (*sic*) within five days.' This was apparently not done, and the case was struck off for default on the 19th April. The respondent argues that there being no provision in the Civil Procedure Code for 'striking off' an execution proceeding, the application was never dismissed, and the decree was alive on 4th March 1884. He cites a case of *Biswa Sonan Chunder Gossyamy* v. *Binanda Chunder Dibingar Adkíkar Gossyamy* (1) in support of this view. This case does not apply here; for whether the expression 'struck off' in the present proceeding was the correct one or not, the order passed certainly amounts to a dismissal. The order was not passed by the Court for its own convenience, or of its own motion, but after default had been made by the decree-holder in carrying out an order passed by the Court. No steps were taken by the decree-holder under

(1) 10 C. 416.

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s. 108 of the Civil Procedure Code to get this order set aside, and no step-in-aid of execution having been taken between January 1881 and March 1884, the decree was at this latter date barred by limitation.

"The main question is whether the decree has been revived by the proceedings in the Court of Beerbhoom, or rather whether the judgment-debtor, having neglected to plead limitation in the proper Court, is now precluded from raising the point at Moorshedabad. A number of authorities have been cited as regards the powers of a Court executing a decree sent to it for execution, and I have considered these very carefully. The principal authority is the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1). The following principle appears to have been established by this case even if the proceedings were (as they undoubtedly were) barred by limitation when the decree reached the Beerbhoom Court. The order of the Beerbhoom Court allowing execution to revive, is, if unreversed, valid, provided that the Beerbhoom Court had jurisdiction to try whether it was barred by time or not."

The learned Judge then went on to discuss the cases of *Mina Konwari* v. *Juggut Setani* (2); *Lutfullah* v. *Kirat Chand* (3); **[260]** *Nursing Doyal* v. *Hurryhar Saha* (4); and *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (1). He found that the Beerbhoom Court had acted with jurisdiction, and he held that the proceedings were not barred by limitation.

The judgment-debtor appealed to the High Court on the following grounds: (1) that the case of *Mungal Pershad Dichit* had no application to the present case, as the proceedings in the Beerbhoom Court were not brought to the knowledge of the judgment-debtor, and no notice of the application of the 4th of March had been served on him; (2) that the Judge was wrong in deciding against the judgment-debtor without finding whether he had or had not notice of the proceedings in the Beerbhoom Court; (3) that the judgment-debtor was not bound to take the plea of limitation in the Beerbhoom Court, and that he was entitled to take it in the present proceedings.

Baboo *Troyluckho Nath Mitter* and Baboo *Rutnessur Sen*, for the appellant.

Baboo *Nil Madhub Sen*, for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This appeal relates to the execution of a decree passed by the Subordinate Judge of Moorshedabad, which has been transferred under s. 223 of the Code of Civil Procedure, to the District Court of Beerbhoom. The application for transfer was made on the 4th March 1884, and before transferring the decree, the Subordinate Judge of Moorshedabad issued the notice required by s. 248 on the judgment-debtors. After report made of due service, the proceedings requisite for transfer of the decree were taken. On the application of the decree-holder, certain properties belonging to the judgment-debtors were attached in the district of Beerbhoom, on which one of the judgment-debtors objected to the attachment, and obtained an order under s. 239 staying execution of the decree so as to enable him to apply to the Moorshedabad Court to consider his

(1) 8 C. 51.
(2) 10 C. 196.
(3) 13 B. L. R. Ap. 30=21 W. R. 330.
(4) 5 C. 897.

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objections. The exact terms of this order are not before us, because the order in appeal is from the Moorshedabad Court, and the [261] proceedings of the Beerbhoom Court have not been sent up. However, for the purposes of this appeal, it is sufficient to say that the Beerbhoom Court passed an order under s. 239. The Subordinate Judge as the Court which passed the decree and the District Judge in appeal have concurrently rejected the objection made by the judgment-debtor, that execution was barred by limitation, and they have relied on the judgment of the Privy Council in the well-knowncase of *Mungal Pershad Dichit* v. *Girja Kant Lahiri* (1). It appears to us that both the Courts have misapprehended this judgment of the Privy Council in applying it to the present case. In that case the objection raised was that the sixth application for execution was barred by limitation, and that therefore the seventh application, that is, the application under which the proceedings were then being taken, was inoperative. Their Lordships held that no objection had been raised in the courts of the proceedings taken on the sixth application, but that the debtor had appeared, and in applying for the postponement of the sale had submitted to the attachment of his property. The Privy Council accordingly held that the Court could not re-open the previous proceedings. In the case before us, the objection is taken to the application now before the Court. The District Judge appears to have held that the objection of limitation cannot be allowed to be raised by the judgment-debtor, because he has submitted to certain proceedings in the Beerbhoom Court. But the only proceeding taken by that Court against him was one of attachment of his property, and the judgment-debtor forthwith objected to such attachment, and obtained an order from the Court staying further proceedings under s. 239. There was consequently no adjudication of this point against the judgment-debtor in the Beerbhoom Court.

The next question raised is whether the Moorshedabad Court had any jurisdiction to entertain such objection, the decree having been transferred to the Beerbhoom Court for execution. The terms of ss. 239 and 242 seem to us to recognize the jurisdiction of the Moorshedabad Court. The cases which have been cited to us merely show that the Court to which a decree has [262] been transferred for execution has jurisdiction to determine an objection of limitation, such as has been raised in the present case; but none of the cases go so far as to exclude the jurisdiction of the Court which passed the decree. In the present case the notice under s. 248 was passed by the Moorshedabad Court, and the judgment-debtor before us also contends that his objection that no service of this notice was made should be heard by that Court. One of the objects of serving such a notice is to enable the judgment-debtor to object to execution of the decree because it is barred by limitation, and therefore we also think that the Moorshedabad Court from which the notice issued would be the proper Court to determine this matter, although it might also have been raised and decided by the Court at Beerbhoom. We may refer to s. 224 (*c*) under which the Court sending a decree for execution by any other Court is required to send a copy of any order that may be passed for the execution of the decree. In this case we apprehend that the Moorshedabad Court would have sent a copy of the order made by it on receipt of the report of the service of the notice under s. 248. As it has been held that, but for *Mungal Pershad Dichit's* case, execution of the decree is barred by limitation, and that case, in our opinion, does not apply, the

(1) 8 C. 51.

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order of the lower Court must be set aside and its finding on the actual facts accepted. In substitution for the orders passed, it will accordingly be declared that execution is barred by limitation. The judgment-debtor will receive his costs of all the Courts.

P. O'K. *Appeal allowed.*

13 C. 262.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Agnew.

MISRI LAL AND OTHERS (*First Party, Defendants*) *v.* MOZHAR HOSSAIN (*Plaintiff*) AND OTHERS (*Second Party, Defendants*).* [30th April, 1886.]

Mortgage—Mortgage of crops that may be grown upon a certain plot of land, its nature and effect—Transfer of Property Act—Contract Act.

The mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction.

[263] The transaction is neither governed by the Transfer of Property Act nor by the Contract Act; but it is in the nature of an agreement to mortgage moveable property that may come into existence in future.

[R., 10 A. 133; 2 C.P.L.R. 193; 5 C.P.L.R. 6 (8); 16 M. 429 (434); 13 C.P.L.R. 43 (44); 31 C. 667 (675); 5 N.L.R. 21 (24)=1 Ind. Cas. 903; 11 O.C. 301; 6 Ind. Cas. 504=8 M.L.T. 91; 7 N.L.R. 72=10 Ind. Cas. 869.]

MAHOMED ASGAR hypothecated under a registered bond of the 22nd March 1883, for the sum of Rs. 397, being the price of the seed supplied, all the indigo crop that might grow on a certain plot of land during the year in favour of Mozhar Hossain. Subsequently under a bond of the 3rd August he mortgaged the same crop to Misri Lal & Co. Before the expiration of the term of their bond the latter instituted a suit against Mahomed Asgar for the payment of their money, and *pendente lite* obtained an order of Court prohibiting him from removing certain indigo cakes, and under colour of that order conveyed the goods from the debtor's factory to their own godown. Mozhar Hossain now brought a suit against Misri Lal & Co., as the principal defendants for the enforcement of his lien on the said indigo. The Munsif found that Misri Lal & Co, had appropriated the indigo which was the subject of the mortgage under the bond of the 22nd March, and being of opinion that the plaintiff by virtue of his hypothecation bond had a prior lien on the produce gave a decree against the principal defendants for the sum stipulated in the bond. On appeal the Subordinate Judge confirmed the decree. On second appeal to the High Court, it was contended *inter alia* that " on a proper construction of the plaintiff's mortgage deed, the lower Courts should have held that no mortgage at all, at least none regarding future indigo, was created in favour of the plaintiff by the deed set up by him, and that the said deed did not create any right in favour of the plaintiff (the deed not being operative as as mortgage deed at all) regarding what is alleged to have been taken by the defendants, so that the plaintiff might be entitled to follow the same in their hands."

* Appeal from Appellate Decree No. 1251 of 1885, against the decree of Moulvi Abdul Aziz, Khan Bahadoor, Subordinate Judge of Sarun, dated the 17th of March 1885, affirming the decree of Baboo Nepal Chunder Bose, Munsif of Sewan, dated the 19th of August 1884.

The Advocate-General (Mr. *Paul*), Munshi *Mahomed Yusuf* and Baboo *Dwarika Nath Mookerjee*, for the appellants.

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Munshi *Serajul Islam*, for the respondents.

The judgment of the Court (MITTER and AGNEW, JJ.) was as follows:—

JUDGMENT.

It has been contended before us that the mortgage upon which the plaintiff relies is not valid under the Transfer of Property [264] Act. We are of opinion that the Transfer of Property Act does not deal with a mortgage of this kind. Future indigo crops that may be grown upon a certain plot of land belonging to the mortgagor were mortgaged. A mortgage of this kind does not come within the purview of the Transfer of Property Act. Neither can it be called a pledge of specific moveable property. It is a mortgage of moveable property that may come into existence in future. Such a transaction as this is neither governed by the Transfer of Property Act nor by the Contract Act. The transaction in question is in the nature of an agreement to mortgage moveable property that may come into existence in future. We see no reason to hold that it is not valid. It has been recognized in Courts of Justice in this country; see *Lala Tilockdhari Lal* v. *Furlong* (1).

We dismiss the appeal with costs.

K. C. M. *Appeal dismissed.*

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13 C. 264.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

SAJIBULLAH SIRKAR (*Defendant*) v. HAZI KHOSH MOHAMED SIRKAR (*Plaintiff*).* [27th May, 1886.]

***Registration Act**, ss. 73, 76, and 77—Suit for registration of document.*

An application having been made under s. 73 of the Registration Act, the Registrar passed the following order: "All the parties have not appeared, the appeal is struck off. It, however, seems to me that the order of the Sub-Registrar was quite correct." *Held*, that the mere fact of the applicant not having adduced any evidence before the Registrar did not make his order one not refusing registration within the meaning of s. 76; nor was the applicant precluded on that ground alone from pursuing his remedy under s. 77 by a civil suit.

[F., 9 A.L.J. 4 = 13 Ind. Cas. 83 = 34 A. 165.]

THE suit, out of which this appeal arises, was brought under s. 77 of the Registration Act for obtaining a decree directing the registration of a document alleged to have been executed by the defendant in favour of the plaintiff. The registration of this [265] document was refused by the Sub-Registrar under s. 73. Within 30 days of the order of refusal by the Sub-Registrar an application was made to the Registrar to whom the said Sub-Registrar was subordinate, in order to establish the applicant's right to have the document registered. The applicant, however, did not appear before the Registrar on the date appointed for holding the enquiry into the

* Appeal from Appellate Decree No. 144 of 1886, against the decree of C. A. Kelly, Esq., Judge of Dinagepore, dated the 6th of October 1885, reversing the decree of Baboo Sudhangsu Bhusan Roy, Munsif of Dinagepore, dated the 1st of August 1885.

(1) 2 B. L. R. A. C. 230.

1886 MAY 27. — APPELLATE CIVIL. — 13 C. 264.

question whether the document was executed or not, and no evidence having been offered by either party, the application was refused. The plaintiff then, within the time mentioned in s. 77, instituted this suit. The Munsif was of opinion that the plaintiff was not entitled to institute it under the provisions of s. 77, inasmuch as he had not adduced any evidence before the Registrar to establish the facts required by law to be established. The District Judge being of a contrary opinion, and finding that the document was executed, awarded a decree against the defendant.

The defendant appealed to the High Court.

Babu *Josoda Nundun Pramanick*, for the appellant.

Babu *Gurudas Banerjee*, for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.), after stating the facts as above, proceeded as follows :—

JUDGMENT.

In this second appeal it is contended on behalf of the defendant appellant that the Munsif's view of s. 77 is correct. Section 77 says, omitting the parts which are not material to the question before us, that where a Registrar refuses to order a document to be registered under s. 76, any person claiming under such document may, within 30 days after the making of the order of refusal, institute in the Civil Court a suit for a decree directing the document to be registered. The question therefore is whether there was a refusal by the Registrar to order the document to be registered under s. 76. We are of opinion that the mere fact of the applicant not having adduced any evidence before the Registrar does not make his order one not refusing registration within the meaning of s. 76. The absence of evidence to establish the execution of the deed cannot be a test with reference to the question whether there is or not a refusal under s. 76 because there may be cases in which the applicant, [266] after taking all the steps available to him, may fail to compel the attendance of his witnesses, and it would be unreasonable to hold in a case of that description that the applicant was not entitled to the remedy by civil suit under s. 77. It seems to us that where it is found that the application was a *bona fide* application under s. 73, and where it does not appear that the applicant abandoned his application, he would not be precluded from pursuing his remedy under s. 77 by a civil suit merely on the ground that no evidence having been adduced by him before the Registrar, the Registrar refused registration.

We therefore agree with the District Judge in the view he has taken of the provisions of s. 77. The appeal will be dismissed with costs.

K. C. M. *Appeal dismissed.*

13 C. 266.

1886 MAY 31. — APPELLATE CIVIL. — 13 C. 266.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

HURO CHUNDER ROY (*Defendant*) *v.* SURNAMOYI (*Plaintiff*).* [31st May, 1886.]

Limitation Act, s. 5—Discretion of Court—Appeal out of time, admission of.

Section 5 of the Limitation Act gives a discretion to a Court to admit an appeal filed out of time.

A valued his suit at Rs. 18,000, which was reduced to less than Rs. 5,000 by the Court of first instance at Rajshahye. A decree, dated the 20th December 1883, was given against the defendant, who applied for copies on the 3rd of February, and the decree was ready on the 7th. The defendant was apparently under the impression that the appeal would lie to the High Court; but on the 16th of March a letter was despatched by his Calcutta agent informing him that he was mistaken and that the appeal lay to the District Judge. This letter reached Rajshahye on the 17th, and the appeal was filed on the 23rd of March.

Held, that under the circumstances the Court might admit the appeal in the exercise of its discretion under s. 5 of the Limitation Act.

[Diss., 12 A. 461 (481) = 10 A.W.N. 149 (F.B.); Appr. 13 M. 269 (270); Cited, 2 L. B.R. 283 (284); R., 8 C.P.L.R. 121 (122); 21 B. 552 (555); 19 A. 348 (350) = 17 A.W.N. 86 (F.B.); 3 C.W.N. 55; 5 C.L.J. 380 (382) = 34 C. 216.]

THIS suit, which was instituted in the Court of the Subordinate Judge of Rajshahye, was one for khas possession of certain mouzahs and valued at Rs. 18,000. The Court decreed the claim, but upon the objection of the defendant reduced the value to [267] Rs. 4,178-10-5 and allowed proportionate costs. The decree was dated the 20th of December 1883. The defendant (judgment-debtor) applied for copies on the 3rd of February and the decree was ready on the 7th; the defendant, on account of the valuation put by the plaintiff at Rs. 18,000, being then under the impression that the appeal would lie to the High Court. On the 17th of March a letter from his agent at Calcutta reached him at Rajshahi informing him that he was mistaken, and that the appeal would lie to the District Judge. The appeal was filed in the District Court on the 23rd of March. On the above state of facts the appellant prayed for the admission of his appeal which was clearly beyond time.

The District Judge passed the following judgment, and rejected the appeal with costs: "This appeal is admittedly out of time; but the appellant seeks to have it admitted on an affidavit purporting to account for the delay, and of which the sum and substance (all verbiage stripped off) is this simpliciter, that he thought the appeal would lie to the High Court and so delayed filing it in this Court. Giving him credit for so thinking, his mistaken thoughts cannot override the law of limitation."

The defendant appealed to the High Court.

Babu *Rashbehari Ghose* and Baboo *Girija Sunkur Mozoomdar*, for the appellant.

Babu *Srinath Dass*, Babu *Gurudas Banerjee* and Babu *Jogesh Chunder Roy*, for the respondent.

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* Appeal from Appellate Decree No. 238 of 1886, against the decree of F. J. G. Campbell, Esq., Judge of Rajshahye, dated the 5th of October 1885, affirming the decree of Baboo Promotho Nauth Mookerjee, Subordinate Judge of that district, dated the 20th of December 1885.

1886 MAY 31. — APPELLATE CIVIL. — 13 C. 266.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows:—

JUDGMENT.

It appears to us that the lower appellate Court in this case has rejected the appeal as filed out of time and refused to admit it under s. 5, on the ground that a *bona fide* mistake made by the appellant in respect of the limit of time within which according to law he is bound to file his appeal is under no *circumstances* a valid ground for admitting an appeal under s. 5.

We are of opinion that is not a correct view of the provisions of s. 5. It is for the Judge in each case to exercise his discretion, having regard to the particular facts established before him. [268] We upon that ground set aside his order rejecting the appeal and remand the case to him to decide that point again.

We may, however, point out that if the facts stated before us are correct, and if the matter had been left to us to decide, we should have been very much inclined to think that the appeal should be allowed to be filed under s. 5. We may here state the facts that have been stated before us. The decree of the lower Court is dated 20th December 1883; the suit was valued at Rs. 18,000, but on the objection of the defendant the Court decided that the value of the subject-matter of the suit was below Rs. 5,000. The appellant applied for copies on the 3rd of February, the decree was ready on the 7th of February, the appellant being then under the impression that the appeal would lie to the High Court. Then on the 16th of March a letter was received from his agent at Calcutta, informing the appellant that he was mistaken, and that an appeal would lie to the District Judge. This letter reached Rajshahye on the 17th, and the appeal was filed on the 23rd of March.

The costs of this hearing will abide the result.

K. C. M. *Case remanded.*

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13 C. 268.

CIVIL REFERENCE,

Before Mr. Justice Mitter and Mr. Justice Grant.

BHAIRAB CHUNDRA CHOWDHRI (*Plaintiff*) *v.* ALEK JAN (*Defendant*).* [28th April, 1886.]

Stamp Act, 1879, *s.* 13—*Suit on bond—Stamp, Sufficiency of.*

A bond stipulated that for the consideration of a loan of Rs. 80 the debtor should deliver to the creditor on a future day "800 arris of grain valued at Rs. 10 per 100 arris." The bond was engrossed on an 8-anna stamp paper. In a suit on the bond for the recovery of 800 arris, at 4 arris per rupee, or its price, Rs. 200:

Held, that the bond was adequately stamped.

THIS was a reference in a suit which was brought to recover 800 arris of grain, or their value at 4 arris per Re. 1. The Munsif disallowed the claim as to a moiety on the ground that [269] the bond had been engrossed on a stamp paper of 8 annas only, and the plaintiff could not,

* Civil Reference No. 5 A of 1886, made by Baboo Baroda Prasanna Shome, Subordinate Judge of Chittagong, dated the 10th of February 1886.

under a bond so stamped, recover more than 400 arris of grain, or their value, Rs. 100. The bond which was dated the 17th Bhadro, stipulated that in consideration of a loan of Rs. 80 the defendant should deliver to the plaintiff within the month of Magh 800 arris of grain valued at Rs. 10 per 100 arris. Both the plaintiff and the defendant appealed against the order, the former contending that the bond was sufficiently stamped, and the latter that it was a forgery.

The appellate Court was of opinion that the stamp on the bond, was insufficient to cover the claim of Rs. 200, and referred the following question to the High Court: Is the bond adequately stamped under the provisions of s. 13, Act I of 1879?

Babu *Akhil Chunder Sen*, for the appellant.

The decision of the Court (MITTER and GRANT, JJ.) was as follows:—

OPINION.

MITTER, J.—We are of opinion that the Subordinate Judge was not right in holding that the instrument upon which this suit was brought was not properly stamped. The amount secured by the instrument is the value of the paddy agreed to be made over to the creditor, as fixed by the instrument itself. If there be a rise in the price of the paddy at the time of the institution of the suit it would not make the instrument an instrument which is not sufficiently stamped under the Act. If the view of the Subordinate Judge were correct, it would be impossible for the parties to the document to fix the value or the amount to be secured for the purpose of determining what stamp duty should be paid.

The record will be sent back.

K. C. M.

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13 C. 270.

[270] CRIMINAL REVISION.

Before Mr. Justice Mitter and Mr. Justice Grant.

POONIT SINGH (*Petitioner*) v. MADHO BHOT AND ANOTHER (*Opposite Parties*).* [22nd July, 1886.]

Penal Code, s. 182—False information to a public servant, Charge of—Criminal Procedure Code, s. 195—Sanction to prosecution—Separate convictions for one statement, illegality of.

An information was given to a police officer in the course of which two persons were named in whose houses stolen property belonging to a certain individual would be discovered: on complaint the information was found to be false, and the accused was convicted and punished for two offences under s. 182 as affecting two different persons. *Held*, that although the information related to two different persons, the accused could be charged with having made only one false statement, and punished for one offence under s. 182.

Section 195 of the Criminal Procedure Code clearly shows that a complaint directly made by a public servant mentioned therein is quite as sufficient as his sanction.

Empress of India v. *Radha Kishan* (1) dissented from.

THIS was an application for revision under s. 435 of the Criminal Procedure Code. The petitioner, Poonit Singh, was a resident of Bhutowli in Arrah, of which village Anandi Doss was a part proprietor. A

* Criminal Revision No. 282 of 1886, against the order passed by J. R. Hand Esq., Deputy Magistrate of Arrah, dated the 23rd of June 1886.

(1) 5 A. 36.

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theft was reported to have taken place in the house of Anandi Doss, and a police inquiry was pending. On the 3rd of April, Poonit Singh appeared before the District Superintendent, and asked that the houses of certain zemindars and mahajans of Arrah be searched, as he had overheard "four bad characters of his village (Bhutowli) say in the cutchery verandah that they had committed the theft in Anandi Doss's house and the stolen property was in the houses of Chunder Koomar, Abdulla and another." In consequence of this information, which was duly recorded at the thanna the same day by the Sub-Inspector, the Police searched the houses of Chunder Koomar and Abdulla. No property was found, and the original case was reported as false.

[271] Upon complaint the Deputy Magistrate convicted Poonit Singh on two distinct charges under s. 182 of the Penal Code, one in the matter of Chunder Koomar and the other in that of Abdulla, and sentenced him to three months' imprisonment under each head.

It was contended on behalf of the petitioner before the High Court (1) that the Deputy Magistrate had no jurisdiction to try an offence under s. 182 upon the complaint of a private person without the previous sanction of the public servant concerned ; and (2) that the Deputy Magistrate was in error in awarding two distinct punishments for one and the same offence

Mr. *R. Mittra* and Baboo *Bhagobotty Churn Ghose*, for the petitioner.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows :—

JUDGMENT.

Two points of law have been argued before us : *first* that the Magistrate was not authorized by law to allow this prosecution to be instituted on the complaint of a private individual. In support of this contention the learned Counsel who appeared for the petitioner has cited a ruling of the Allahabad High Court—*Empress of India* v. *Radha Kishan* (1). With due deference to the learned Judge who decided that case we are unable to take the view which has been taken in it. The language of s. 195 clearly shows that it would be quite sufficient if either the sanction of the public servant mentioned therein were given or a complaint is directly made by him. That being so, we are unable to agree in the proposition of law laid down in the case cited before us. This point therefore fails, but upon the second point which has been taken before us, we think that the conviction and sentence in one of the two cases are bad. The accused person was charged with having given a false information to a public servant, and in that information no doubt he mentioned the names of two persons in whose houses he, the accused, was informed that stolen property belonging to Anandi Doss would be found, but the statement is one, and therefore he [272] could be charged only with having made one false statement. He was therefore erroneously tried for two distinct offences under s. 182. We therefore set aside the conviction and sentence in the second case, *viz.*, the case which was initiated on the complaint of Sheikh Abdulla. The conviction and sentence passed by the Magistrate in the case which was instituted on the complaint of Madho Bhot, gomastah of Baboo Chunder Coomar, will stand.

K. C. M. *Conviction quashed in part.*

(1) 5 A. 36.

13 C. 272.

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CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF YACOOB.
YACOOB *v.* ADAMSON.* [4th August, 1886.]

Presidency Magistrate—Summary trial--Conviction in non-appealable case--High Court as a Court of Revision—Code of Criminal Procedure, ss. 370, 537.

In every case which is not appealable to the High Court a Presidency Magistrate should state his reasons for convicting the prisoner so that the High Court may judge as to whether there were sufficient materials before the Magistrate to support the conviction.

In a case where the accused was convicted of theft and sentenced to six months' rigorous imprisonment, the notes of the evidence taken by the Magistrate did not afford sufficient materials upon which the prisoner could be legally convicted, and the Magistrate had omitted to record his reasons for the conviction under s. 370, cl. (i) of the Code of Criminal Procedure.

Held, by the High Court as a Court of Revision that the conviction and sentence must be set aside, notwithstanding the provisions of s. 537 of the Code of Criminal Procedure.

[R., 21 A. 189 (191); 31 C. 983 (986) = 8 C.W.N. 839.]

IN this case the accused Sheikh Yacoob applied to the High Court by petition, under the provisions of s. 439 of the Code of Criminal Procedure, praying that a finding and sentence passed by the Presidency Magistrate in a case wherein the petitioner was charged with the theft of certain Government Currency Notes should be set aside on the ground that there was no evidence on the record to support the conviction. The Chief Magistrate's judgment was as follows :—

[273] "In this case Captain Adamson missed a note for Rs. 100 and some Rs. 10 notes from his cabin to which apparently accused No. 1, Yacoob, had access and in fact was in charge of. Nothing was heard of the property for about a fortnight, when a Rs. 100 note seems to have been changed by the second accused, Rahim Bux, who told the witness Adels that he got the note from accused No. 1. The number of the note for Rs. 100 has not been satisfactorily traced, and that being so, I am of opinion that the second accused must be acquitted. As to Yacoob I have no doubt whatever that it was he who committed the theft, and the order is that he do undergo six months' rigorous imprisonment."

Mr. *H. E. Mendies*, for the petitioner.

Mr. *W. C. Bonnerjee*, for the Crown.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

Captain Adamson, commander of the *Queen of Scots*, lost some currency notes from the pocket of his trousers which were in his cabin. He says that he fetched the petitioner before us who was the steward of the ship, and some others, and sent for the Police. The matter, however, proceeded no further at that time, as no sufficient evidence was obtained. The petitioner then left his service, but a fortnight afterwards,

* Criminal Revision Case, No. 305 of 1886, against the order passed by Mr. F. J. Marsden, Chief Presidency Magistrate, Calcutta, dated the 8th July 1886.

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in consequence of the changing of some notes, suspicion fell upon him, and he was placed with another man before the Presidency Magistrate on trial for the same theft. In the result the Presidency Magistrate held that the stolen notes had not been satisfactorily traced, and he consequently acquitted the other person. But with regard to the petitioner, the steward, the Presidency Magistrate stated that he had "no doubt whatever that it was he who had committed the theft, and the order is that he do undergo six months' rigorous imprisonment." There is nothing in the notes of the evidence taken by the Magistrate on this trial on which, so far as we can see, the petitioner could have been legally convicted; or which carries the case against him one step further than when it was first investigated by the Police. The order passed is not appealable, but the matter has come before us as a Court of Revision on an application made [274] by the petitioner who is under sentence. The Code of Criminal Procedure does not provide for the manner in which evidence should be recorded by a Presidency Magistrate in a case in which the sentence or order is not appealable, but it enacts (s. 370) that instead of recording a judgment in the manner provided for other Courts, a Presidency Magistrate shall record certain particulars, amongst which cl. (*i*) declares that he shall record a brief statement of the reasons for the conviction. In the case before us, we have no evidence at all on which the petitioner could have been convicted, and the Magistrate, in convicting him, has omitted to record any statement of the reasons for the conviction. Reference may be made to s. 537, which declares that no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on revision on account of any error, omission or irregularity in the judgment unless such error, omission or irregularity has occasioned a failure of justice. In the present case it is impossible to say what the result of this error, omission or irregularity on the part of the Presidency Magistrate may or may not have been. As the case now stands before us, there is absolutely no evidence against the petitioner, and there is no statement of any valid reasons on which the conviction could be supported. If a conviction such as this were to be maintained the powers of this Court as a Court of Revision could never be exercised. We cannot suppose that this was intended by the Legislature. The case of *Empress* v. *Panjab Singh* (1) was a case analogous to that now before us, the matter under revision there being an order passed on a summary trial in which the Magistrate had failed to comply with cl. (*h*), s. 263, which required him to "record a brief statement of the reasons of the conviction."

In that case it was held that the Magistrate should state those reasons in such a manner that this Court on revision may judge whether there were sufficient materials before him to support the conviction. Following that case we are of opinion that the conviction and sentence must be set aside.

P. O'K. *Conviction set aside.*

(1) 6 C. 579.

13 C. 275.

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[275] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

IN THE MATTER OF DURGA CHARAN DAS *v.* SASHI BHUSAN GUHO AND OTHERS.* [8th August, 1886.]

Criminal Procedure Code, s. 133—*Public way—Nuisance—Removal of obstruction—Jury—Majority of Jury.*

When a minority of a Jury appointed under the provisions of s. 133 of the Criminal Procedure Code do not act, the Magistrate cannot proceed under that section upon a report submitted by the majority.

THIS was a reference by the Sessions Judge of Backergunge, the terms of which were as follows:—

"I have the honour to submit herewith the record of the proceedings of the Magistrate of the district under Chapter X, Criminal Procedure Code, on the petition of Durga Charan Das against Sashi Bhusan Guho and others, and to recommend that for the reasons subjoined the final order of the Magistrate be set aside and he be directed to proceed afresh *ab initio* according to law.

"It appears that on the 30th October, 1885, Durga Charan Dass of Runshi, a neighbour of the applicant for revision, presented a petition to the Magistrate, to the effect that the applicant for revision and nine others had closed a public path by means of a thorny hedge and plantain trees planted across the same.

"On the petition is endorsed the examination of the petitioner by the Magistrate: 'The defendants have bunded my road in Soshipore, south of my 'bari'; they have cut it and planted on it suparis and plantains, and a new fence, and pulled down a '*char*' that was there. It is a frequented path leading to the Government road.' The petitioner was required to adduce evidence in seven days. On the 9th November two witnesses were examined, and the same day the Magistrate ordered 'Notice to defendants under s. 133 to clear the road or show cause on the 18th.' On the 18th November the applicant for revision, Sashi Bhusan Guho, entered appearance and showed cause by a counter-petition. The notice under s. 133 of the Criminal [276] Procedure Code seems to have been directed to the applicant for revision alone, and required him to remove the hedge or fence and other obstructions, and to restore the path or road to its former condition before the 18th November, or show cause against Durga Charan Das's petition on that day, but neither it nor the petition refers expressly to the "char" or bamboo bridge over the trench or ditch which severed the path in two. The counter-petition of the applicant for revision denied that he had obstructed any public path or road, affirmed the falsity of the petitioner Durga Charan Das's allegations, and moved the Magistrate to appoint a jury to pronounce whether the order directed to him was reasonable and proper. The defence of the applicant for revision appears to have been throughout that what the petitioner termed a permanent public path or road was in reality a temporary private path or foot-way over the applicant's own land. The Magistrate thereupon appointed a jury, consisting of the Sub-Registrar of Backergunge foreman, Rajmohon Chakrabarti and

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* Criminal Reference, No. 150 of 1886, made by J. F. Bradbury, Esq., Sessions Judge of Backergunge, dated the 23rd of July 1886.

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Ramcoomar Pal nominated by the Magistrate and Bishumbhur and Mohima Chunder Ghatak nominated by the applicant for revision, and instructed them to submit their award by the 28th November.

"The time for the submission of the award was extended by successive order of the 28th November, the 10th December, the 21st December, the 4th January, the 18th January, the 22nd February, the 27th February, the 8th March, the 15th March, the 10th and 29th April, but to no purpose. No award could be secured, and on the 11th May the Magistrate called on the parties to move for a fresh jury. Eventually, on the 20th May, the Magistrate appointed a fresh jury consisting of the Sub-Inspector of the Backergunge police station foreman, Mani Chunder Ganguli and Raj Kumar De, nominated by the Magistrate and Jagat Chunder Dass and Kali Nath Dutto nominated by the applicant for revision. The 2nd June was appointed for the submission of their award and an extension to the 11th June was accorded on the 2nd.

"On the 11th or the following day was received a document bearing the signatures of the Sub-Inspector of the Backergunge police station Prasunna Mukherjee, Mani Chunder Ganguli and [277] Raj Kumar De. It states that the jurymen nominated by the applicant for revision had taken no part in the award; that Jagat Dass had not assisted at any deliberation of the jury, and that Kali Nath Dutto had at first attended, but subsequently absented himself. The nominees of the applicant for revision have therefore submitted no award at all.

"The other three jurymen reported that there was a path used by the public along the line indicated by the petitioner over the property of the applicant for revision, that the bridge over the trench separating what had been Shumbhu Mushrif's homestead, but was at the date of the report a plantation of the petitioner's, and the homestead of the applicant for revision, was a great convenience, and that its existence prejudiced nobody. The Magistrate on the 12th June accepted the report as the award of the majority of the jury, and held that the 'char' was a public way, the bank of the ditch across which it was thrown being used in common by inhabitants of the village who crossed by the 'char.' '*The rest of the alleged path is a mere private matter of complainant's.* I therefore order,' he added, 'that defendant shall within ten days replace the char' and I make no further order. This order is under s. 139. Issue notice under s. 140.' Accordingly the applicant for revision was notified of the order and instructed to reconstruct the bridge over the trench in ten days. The notice bore date the 16th June, and against it the applicant for revision now moves. The notice expresses that the order of the 14th November had directed the reconstruction of the bridge. In fact that order does not allude to the bridge, but merely instructs the applicant for revision to remove all obstructions to the use of the path or road and restore it to its pristine condition. Again, the final notice requires merely the replacement of the bridge and not the re-opening of the obstructed path leading to the bridge.

"Of what use is the bridge if blocked completely at one end? The applicant for revision blocked the path leading to the bridge, and the bridge being thereby rendered useless dismantled it. Now he has been enjoined to replace the bridge, but 'the rest of the *alleged* path is a mere private matter of complainant's.' The Magistrate talks of the 'alleged path,' but I take it that there [278] was a path which the applicant for revision has closed. Else there would have been no bridge. I do not, however, understand the remainder of the passage last quoted. "The

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rest of the alleged path," says the Magistrate, "is a mere private matter of complainant's." What is "the rest of the alleged path?" The whole of the path or road save the few cubits spanned by the bridge? And what is the meaning of the phrase "a mere private matter of complainant's?" Does it denote the Magistrate's conviction that as regards the rest of the path claimed the petitioner Durga Charan Das may have an easement or right of way, but there is no public right of way? It seems susceptible of no other meaning, and yet the signification I have attached to it stultifies the final order which is limited to the reconstruction of the bridge. As I have already remarked, what is the use of a bridge blocked completely at one end? Yet the Magistrate has not enjoined the removal of the block or obstruction, to wit, the fence or hedge. The applicant for revision has been required merely to reconstruct the bridge on its original site and make it "purbabot" or as it was before.

"Before proceedings under s. 133 of the Criminal Procedure Code can be legally instituted it is the Magistrate's duty to find upon evidence that the path or road in question is or may be lawfully used by the public. It must be a way to which the public are entitled as of right, not a way over a piece of waste land the use of which has been suffered by the owner or tenant of the land. A permissive way may be obstructed at pleasure by the owner or tenant of the land over which it runs. In this instance the Magistrate did not find that the way was public before appointing the jury. The publicity of the way was not a question for the jury, and moreover the Magistrate is clearly of opinion that a part at least of the subject of the dispute does not concern the public. Ergo the appointment of a jury was irregular. *In the matter of the petition of Chunder Nath Sen* (1) and (cf.) *Basaruddin Buiah* v. *Bahara Ali* (2) and *Askar Mea* v. *Sabdar Mea* (3) and *Lal Miah* v. *Nazir Khalashi* (4).

[279] "Again, it cannot be said that the verdict of three jurymen out of five, two of whom did not express any opinion, and one of whom abstained altogether from the enquiry, is the verdict or award of the majority of the jury. One of the jury having declined to act, the only course legitimately open to the Magistrate was to appoint a fresh jury—*Uma Churn Mundle* v. *Joshein Sheikh* (5) or proceed under s. 141 of the Criminal Procedure Code.

"Finally, there is the order absolute, which does not consist with the original notice under s. 133 of the Criminal Procedure Code and which as it stands, cannot be other than infructuous. A literal compliance therewith will leave the path or road obstructed as before, and nothing but literal compliance therewith can be enforced under s. 188 of the Indian Penal Code. I think the whole proceedings should be set aside, and the Magistrate directed to proceed afresh according to law."

No one appeared on the reference.

The judgment of the High Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

The majority of the jury contemplated by s. 139 of the Code of Criminal Procedure is, in our opinion, a majority of the jurors appointed, arrived at after due deliberation amongst themselves. In the present case the majority consists of the only jurors who took the trouble to attend the

(1) 5 C. 875=6 C. L. R. 379. (2) 11 C. 8. (3) 12 C. 137.
(4) 12 C. 696. (5) 11 C. 84.

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meetings held. The report so submitted cannot therefore be regarded as a finding of the majority of the jurors under s. 139 on which the Magistrate can act. But at the same time the Magistrate is competent to act under s. 141 and pass such orders as he may think fit. And as matters now stand, we think that we may take the order before us as one so passed on the further materials supplied by the parties.

We find no valid objection to the order regarding the "char" or bamboo bridge over the ditch. The petitioner has been found to have removed it, and its removal is an obstruction to the passage hitherto enjoyed. We accordingly decline to interfere.

P.O'K.

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13 C. 280.

[280] APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

KALA CHARA TEA CO., LD. (*Plaintiffs*) *v.* SUKUL SINGH AND OTHERS (*Defendants*).* [30th July, 1886.]

Boundary dispute—Possession, Evidence of—Bengal Act V of 1875, *ss.* 40, 41, 59, 60, 62 *—Suit based on Title.*

A formal decision on the question of boundary in a boundary dispute under s. 62 of Bengal Act V of 1875, although conclusive as to possession, is no bar to a suit based upon title.

[R., 8 C. W. N. 876 (878).]

THIS was a suit brought to recover *khas* possession of six kedars of land held by the plaintiffs under certain settlement pottahs; the plaintiffs stated that they had been dispossessed in 1289 B. S. (1882), and had thereupon brought a suit under s. 9 of the Specific Relief Act for possession, that that suit was dismissed on the 4th September 1882, and that they brought the present suit for the purpose above mentioned on the 8th September 1884.

The defendants contended that the boundaries of the land given by the plaintiff Company were incorrect; that at the recent settlement these lands had been leased out to them under a pottah, and the boundaries laid, and the land had been held by them for more than 12 years.

The Assistant Commissioner, who was also Sudder Munsif, found that the boundaries given in the plaint were correct; that on reference to the map made by the Civil Court Ameen, and to the measurements made by him, the land belonged to the plaintiffs' pottah, but that according to the recent survey it appeared that the land had been included in the defendants' pottah; but after taking into consideration the evidence given by the plaintiff Company, he held that the land belonged to the plaintiff Company; he therefore gave them a decree.

The defendants appealed to the Deputy Commissioner of Cachar, who held that the suit was barred under s. 62 of Bengal [281] Act V of 1875, inasmuch as no appeal under s. 59 or 60 of that Act had been

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* Appeal from Appellate Decree No. 2181 of 1885, against the decree of J. Kennedy, Esq., Deputy Commissioner of Cachar, dated the 11th of July 1885, reversing the decree of Baboo Nritya Gopal Chatterjee, Munsif of Cachar, dated the 27th of January, 1885.

made against the order fixing the boundary of the mahals ; he therefore allowed the appeal.

The plaintiff Company appealed to the High Court.

Mr. *O'Kinealy* (with him Mr. *Macnair*), for the appellants contended that the suit should not have been treated as a suit to set aside an order deciding a boundary dispute under Bengal Act V of 1875, and that s. 62 of that Act did not apply ; that there had been no boundary dispute to which the plaintiffs had been parties ; and that no issue having been raised as to the alleged boundary dispute, and no ground of appeal as to the application of the said Act having been preferred against the judgment of the Munsif, the Sub-Judge was not justified in assuming that an order adverse to the plaintiffs had been come to under the Act.

Babu *Aukhil Chunder Sen*, for the respondents.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows :—

JUDGMENT.

This is a suit brought to recover certain lands which, the plaintiffs say, were included in the pottah or pottahs under which they held their property from the Government, and from which, they say, they have been dispossessed by the defendants.

A number of issues were raised, and the Munsif disposed of those issues in such a manner as to entitle the plaintiffs to the decree they asked for.

On appeal the Deputy Commissioner of Cachar has reversed that decision on one ground. He says, with reference to a survey which had been made apparently about the year 1831 or just previously, "the laying of the boundary mahals during the recent settlement was not appealed apparently either under s. 59 or s. 60 of Bengal Act V of 1875, and therefore under s. 62 of the same Act the present suit is barred. It has been argued that the dispute has been going on for a long time, and that legal proceedings were entered into regarding the matter previous to the laying of the boundary, but that does not appear to me to make any difference. The present suit admittedly was brought after the relaying of the boundary by the Settlement Officers, [282] and it is to the date only of the present suit that I can look." He has therefore held that the proceedings of the Settlement Officers under Bengal Act V of 1875 was by s. 62 of that Act conclusive.

Now s. 62 refers to an order deciding a boundary dispute Boundary disputes are dealt with in the fifth part of the Act. Section 40 says : "If it shall come to the notice of the Collector, in the course of a survey under this Act, that a dispute exists as to any boundary which should be surveyed, the Collector, after holding such inquiry as he may deem necessary, may determine such boundary as hereinafter provided." That clearly contemplates that there shall be a dispute between certain parties, that there shall be a proceeding between those parties in which they shall have an opportunity of stating and establishing their several claims, and in which the Collector is to decide the boundary as between the parties. The nature of the decision and the matter to be decided are stated in the next section. Section 41 says, that "the Collector shall determine the boundary according to actual possession, and cause it to be secured by boundary marks, and the order of the Collector under this section shall, until it be reversed or modified by competent authority, have the force of an order of any Civil Court, declaring the parties to be in possession of the land in accordance with the boundary as determined

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by the Collector." Therefore what the Collector is to determine, in a proper proceeding, is the fact of possession, and he is to lay down the boundary line according to actual possession. He is not to inquire, and has no jurisdiction to inquire, as to any question of right or title. Sections 59 and 60 give appeals to certain superior revenue authorities, and then comes s. 62, which says: "No suit shall be brought to set aside an order of a Superintendent of Survey, Collector, Assistant Superintendent, or Deputy Collector deciding a boundary dispute, unless an appeal shall have been first preferred under s. 59 or s. 60, or unless the person suing was at the time when such order was passed, a minor, or insane, or an idiot." In the present case there is not shown to have been any boundary dispute between the present parties to this suit. There is not shown to have been any proceeding before a [283] Revenue Officer to which these persons were parties, or in which they were represented. Therefore there was nothing in existence which could enable the Revenue Officer to decide a question of boundary between them under s. 40. Further, if there had been such proceeding before the Revenue Officer, and if he had decided anything, he would have decided the fact of possession, and his order would operate only as to the fact of possession. And as the only thing as to which a suit is forbidden by s. 62 is the setting aside of an order deciding a boundary dispute, it follows that if there had been the most regular proceeding and the most formal decision on the question of boundary in a boundary dispute, though that would have been conclusive as to possession, under s. 62 it would have been no bar to a suit based upon title.

For these reasons we think that the decision of the lower appellate Court cannot be supported, and must be set aside.

The Deputy Commissioner has not dealt with the other issues arising in this suit in a way which appears to us sufficient to enable us to dispose of the case. It is necessary therefore that the case should go back to him in order that he may decide those issues.

The appellant will have his costs of this appeal.

T. A. P. *Appeal allowed and case remanded.*

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13 C. 283.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

CHUNDER COOMAR ROY AND OTHERS (*Decree-holders*) *v.* GONESH CHUNDER DASS AND OTHERS (*Judgment-debtors*).*

[8th June, 1886.]

Possession, Suit for—Mesne profits—Decree silent as to mesne profits—Power of Court executing Decree—Hindu Law—Daughters' sons—Representatives—Reversioners, Liability of, for acts of widow.

Plaintiff sued for possession of certain lands and for mesne profits. He obtained a decree for possession, but the decree was silent as to mesne profits. *Held*, that the Court executing the decree was not competent to entertain a claim for mesne profits made by the decree-holder.

A Hindu governed by the Bengal School of Hindu Law brought a suit for possession of a certain taluk, but died before decree, leaving him surviving a

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* Appeal from Order No. 344 of 1885, against the order of Babu Rakhal Chunder Bose, Roy Bahadoor, Subordinate Judge of Furreedpore, dated the 15th of June, and amended on the 24th of September 1885.

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[284] widow and two daughters. The widow was substituted in the suit instead of her husband, and she obtained a decree for possession. By a summary order made in execution of the decree the widow was put in possession of the taluk as well as of certain lands, which lands were claimed by a person not a party to the suit, as lands not belonging to the taluk. The claimant afterwards brought a suit for these lands against the widow. The widow died during the suit, and was succeeded by her daughters who also died after a decree for possession of the lands had been obtained by the claimant against them, when their sons were substituted in their stead as defendants. It appeared that the widow, the daughters and the daughters' sons had all been in possession of the disputed lands as a portion of the family estate.

Held, that the reversioners, the daughters' sons, were liable as the legal representatives of the daughters, and as such were liable for all costs incurred in the suit brought by the claimant for possession of the disputed lands.

In this case the judgment appealed from was as follows :—

"In this execution case the judgment-debtors and the receiver of the Estate of Raj Chunder Dass have preferred the following objections: (1) The decree cannot be executed against the Estate of Raj Chunder Dass nor against his reversionary heirs ; (2) that the mesne profits and damages for cutting down trees as well as Rs. 10,000 the value of the produce of Kamar lands cannot be claimed in execution of the present decree ; (3) that the decree-holders cannot get any interest on the costs awarded by the Privy Council decree ; (4) that execution cannot be taken against the receiver without the permission of the High Court ; (5) that the assignment by which the present decree-holders have acquired their title is not *bona fide* and genuine.

"It is necessary to give a short history of the litigation which has continued for a very long time between the parties and their predecessors in interest.

"A certain jote and one taluk originally belonged to the Moonsees, who, in 1825, executed a kutkobala or deed of conditional sale for a consideration of Rs. 20,000 to Raj Chunder Dass, the husband of Rash Money Dassi of the aforesaid taluk. Re-payment not having been made, Raj Chunder Dass took foreclosure proceedings under Regulation XVII of 1806 to make the sale absolute, and in 1835 instituted a regular suit for possession of the said taluk against the Moonsees.

"Raj Chunder Dass having died pending the suit, his sonless widow, Rash Money Dassi was substituted in his place as plaintiff who, in 1840, obtained a decree for possession of the taluk against the said Moonsees, which decree was confirmed on appeal in 1843 by the Sudder Court.

"While the suit was pending another suit for arrears of rent of the aforesaid jote was instituted, and a decree was obtained by one Ram Rutton Roy against the said Moonsees, and in execution of the said rent decree, the jote itself [285] was sold to one Jagat Chunder Roy in 1836, who, through the Court of the Deputy Collector, which held the sale, obtained possession of the jote in 1839.

"After Rash Money obtained her decree for possession of the taluk in 1840, she applied for execution, and thereupon disputes regarding the boundaries of the taluk and jote lands arose between her and Jagat Chunder Roy, which disputes were subsequently terminated by a summary order of the Sudder Court in 1845, by which Rash Money Dassi was confirmed in the possession of the land as part of her taluk.

"In the present execution proceedings before me, possession of those lands and wasilat have been asked for.

"Jagat Chunder Roy sold the jote to one Ramdhun Sircar, whose three sons afterwards sold it to one Tarakant Banerjee, who in 1856,

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instituted a regular suit against Rash Money Dassi and others to recover possession of those lands as part and parcel of his purchased jote, and also for mesne profits for 10 years and 7 months, commencing from Magh 1252 (January 1846) to Shrabun 1263 (July 1856), amounting to Rs. 24,308-13 annas.

"From the plaint in that regular suit it appears to me that subsequent wasilat up to the date of recovery of possession was not claimed. At least I find no distinct prayer for the same.

"The defence set up in that regular suit by Rash Money Dassi, who represented the estate of her husband, Raj Chunder Dass was that the lands claimed by the plaintiff Tarakant were included in and were part of her husband's taluk, and property which he had got under and by virtue of the aforesaid *kutkobala* from the Moonsees, to whom I have said already both the taluk and the jote originally belonged.

"In 1857 the Principal Sudder Amin of this district dismissed the suit and the decree was confirmed on appeal by the Sudder Court in 1860, but the Privy Council reversed both decrees and remanded the case for trial on the merits. The Principal Sudder Amin again dismissed the suit on the merits in the year 1867, but the High Court, on the 7th of August 1868, reversed the decree, and gave a modified decree in plaintiff's favour, which was subsequently confirmed by the Privy Council on the 22nd March 1879. Plaintiff Tarakant Banerjee had, in the meantime, died, and his sons and heirs were substituted as plaintiffs in his place. Rash Money Dassi had also died, and her daughters were substituted as defendants in her place.

"When the Privy Council decree was sent to the High Court for execution, the sons and the heirs of Tarakant Banerjee had assigned the property and their interests in the decree to the present decree-holders, and by an order of the High Court the present decree-holders were substituted in the place of the original decree-holders.

"All the daughters of Rash Money Dassi had in the meantime died, and the decree-holders have now asked to execute the decree against the reversionary heirs of Raj Chunder Dass and against his estate, which is now in the hands of the [286] receiver, making him also a party to the proceedings. Hence the objections which I have written at the beginning have been taken by them.

"I will first take those which relate to mesne profits and interest on the costs awarded by the Privy Council decree. Although I find from the plaint that there was a prayer for wasilat, yet as the High Court judgment and decree, dated 7th August 1868, which for the first time gave some substantial relief to the plaintiff, are silent about mesne profits, I cannot in execution give such profits to the decree-holders. The Privy Council decree is also silent about interest on costs incurred in England; when the decree is silent about interest, it cannot be recovered in execution. The Court executing the decree has no power to assess mesne profits unless ordered in the decree, and the period fixed in it—*Mosoodun Lall* v. *Bheekaree Sing* (1); *Seth Gokul Doss Gopal Dass* v. *Murli* (2); *Wise* v. *Brojendro Coomar Roy* (3); *Sadasiva Pillai* v. *Ramalinga Pillai* (4); *Fakharudin Mahomed Ashan* v. *The Official Trustee of Bengal* (5).

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(1) B.L.R. Sup. Vol. 602 = 6 W.R. Mis. 109. (2) 3 C. 602. (3) 11 W.R. 200.
(4) 15 B.L.R. 383 = 24 W.R. 193 = 2 I.A. 219. (5) 8 C. 178.

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"It has been argued that the dispossession caused by Rash Money Dassi was a wrongful act in her own individual capacity, and therefore the estate of her husband, much less the reversioners, are not liable under the decree. But I find that there is nothing to show that Rash Money was not acting in good faith and in the belief that the lands which formed the subject of the suit really belonged to the estate of her husband (*vide* her written statement which she filed in the suit). No collusion or fraud has been proved against Rash Money and her daughters. I find that the suit was properly conducted by them in the belief that the lands in question formed part of Raj Chunder Dass's estate and for the benefit of the reversionary heirs. I also find that Rash Money simply carried on the suit instituted by her husband, and at the execution proceedings plaintiff's predecessors in interest were dispossessed under that belief which gave rise to all this litigation. I do not find that the suit was personal against the widow Rash Money.

"It has not been shown that the decree has been obtained against the widow or her daughters fraudulently or collusively. It is admitted that the lands in suit were in possession of Rash Money and her daughters, and on the death of the latter the reversioners are still in possession of those lands through the Receiver of the Court as part of the estate of Raj Chunder Dass. Under such circumstances, I hold that the reversioners and the estate of Raj Chunder Dass are liable in these execution proceedings, and the property and costs of the decrees will be recovered from them.

[287] "But as the estate and the lands in suit are now in the hands of the Receiver there will be an order of the Court to him to give up possession of those lands and also to pay costs of the suit and of execution to the decree-holders out of the estate of Raj Chunder Dass. He is not personally liable, but the Court is bound to take notice of his existence, and on a reference to his letter of appointment, which he got under s. 503 of the Civil Procedure Code, I find that he has been authorized by the High Court to institute and defend suits, &c., relating to the estate of Raj Chunder Dass. For this Court or for the decree-holders to take any permission from the High Court is not necessary. The Receiver, if he likes, can take permission from the High Court to pay up the decretal amount and to give up possession.

"The pleader for the Receiver said that the Receiver has no objection to the decree-holders taking possession of the decretal lands. I therefore direct that possession be given to the decree-holders under the directions of the High Court decree, dated 7th August 1868, according to the accompanying Ameen's map and Report by the Civil Court Ameen, and costs of the decrees and of execution are to be realized from the estate of Raj Chunder Dass, and the Receiver be directed to pay them up to the decree-holders.

"If the defendants have done any damage to the decretal lands after the suit was brought or after the final decree was obtained by cutting down trees, &c., the decree-holders cannot recover them in the execution proceedings. I therefore disallow that portion of their claim which relates to damages as well as to the value of the produce of kamar lands.

"As regards the fifth objection, I find that the original decree-holders were the benamidars of the present decree-holders, and that the lands in question really belong to the latter. The original decree-holders have admitted these facts, and the substitution was made in the High Court. It has not been shown that the assignment was not *bona fide* or genuine.

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"It has been argued that the present decree-holders are only entitled to Rs. 5,000 under the decree, which they have paid to the original decree-holders for the assignment. But I find that by the said assignment the decree was not sold. The above sum was paid to them for allowing their names to be used in this litigation and for the trouble and annoyance which they had suffered. The property virtually belongs to the present decree-holders and the deed of assignment only proves the fact of benami. It is not a deed by which the decree was sold. I therefore disallow the objection of the judgment-debtor on this point, and hold that the present decree-holders are entitled to take possession of the property and to get the costs mentioned in the decrees as well as execution costs."

From this decision the decree-holders appealed to the High Court, on the ground that the Judge should have allowed mesne profits and damages in the execution proceedings as well as interest on costs decreed, while the judgment-debtors filed cross-objections raising the same points as they relied on in the Court below.

[288] Baboo *Srinath Das* and Baboo *Unnoda Pershad Banerjee*, for the appellants.

Mr. *Woodroffe*, Mr. *Evans*, and Baboo *Jogendro Chunder Ghose* for the respondents.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was as follows:—

JUDGMENT.

This is an appeal arising out of the execution of a decree obtained by the appellants against Jugodumba and Pudmomoni, the daughters of Raj Chunder Das and his widow Rash Money. It appears that, after foreclosure, Raj Chunder Dass instituted a suit for possession of certain mortgaged property. During the pendency of the suit he died, and his widow Rash Money was substituted as plaintiff and obtained a decree. In execution, she entered into possession of lands belonging to a third party, who thereupon brought a suit against her to recover those lands. She died while that suit was under trial, and a decree was obtained in this Court against her daughters Jugodumba and Pudmomoni, who, at her death, were the next heirs of Raj Chunder. A third daughter Sree Coomary, it may here be mentioned, predeceased Rash Money, and therefore did not succeed with her sisters. Jugodumba alone appealed to the Privy Council. Her appeal was dismissed. The appeal now before us relates to the execution of that decree as regards mesne profits and costs. The question has also been raised whether the execution can be taken out against the Receiver who has, in the meantime, been appointed to the estate of Raj Chunder by an order of this Court in its Original Jurisdiction.

The Subordinate Judge has refused to allow the decree-holders mesne profits on the ground that they were not expressly given by the decretal order. It is not clear whether mesne profits were asked for in the plaint. The appeal before us has been argued on the assumption that they were but as, after full consideration of the law on the subject as contained in the reported decisions, we are of opinion that such mesne profits cannot be allowed, we have not thought it necessary to consider whether [289] or not they were so claimed. The learned pleader for the decree-holders, appellants, relies on the authority of the case of *Rajah Leelanund Singh* v. *Moharajah Luchmessur Singh* (1) followed by the case of *Gurudas*

(1) 13 M. I. A. 490=14 W. R. P. C. 23.

Roy v. *Stephen* (1), in contending that, although mesne profits were not expressly given by the decree, still, inasmuch as they had been asked for in the plaint and were directly connected with the possession given to his clients, the lower Court was wrong in refusing to allow such mesne profits. These cases, however, are no direct authority for this contention. The case of *Rajah Leelanund Singh* merely decided that, whereas in a former order of remand, their Lordships were unable to pass any final order in the case, but simply left it to the High Court to proceed in the suit as upon the result of the enquiry that they had ordered might seem just, it was competent to the High Court to allow mesne profits, and that they should, under the circumstances of the case, have been allowed. "Had the first part of the order in Council stood alone," their Lordships remark, "it would have been one of the consequential directions proper to be given to ascertain the amount of mesne profits at the time that possession of the villages was given; and inasmuch as one part of the order, namely, that with regard to possession, has been executed by the High Court, everything connected with that possession should be executed at the same time." The order passed by the High Court that they could not give mesne profits or anything beyond what the Privy Council in its decree had given was therefore set aside. The case of *Gurudas Roy* v. *Stephen* was one in which a party who, having obtained a decree, which was set aside in appeal, had, notwithstanding, executed it, was directed to make restitution to the opposite party by putting him exactly in the same position in which he would have been if the decree had not been put in execution. It was held that it was unnecessary for the appellate Court to pass any orders expressly on this point. So far, therefore, the cases relied upon by the appellant's pleader are not directly in his favour. On the other hand, the course of decisions is directly against **[290]** him. It was held by a Full Bench of this Court in the case of *Musoodun Loll* v. *Bhikaree Singh* (2), that in executing a decree, the Court that executes it has no power to alter or add to it, and that the only question in regard to mesne profits or interest which is left to be determined by the Court executing the decree is the question of amount. In *Sadasiva Pillai* v. *Ramalinga Pillai* (3), their Lordships of the Privy Council held that it was the settled law in India that where a decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mense profits. In *Fakharuddin Mahomed Ashan* v. *The Official Trustee of Bengal* (4) their Lordships state (see p. 190) that they "do not feel at all pressed by the authority of several cases to which their attention has been called, the doctrine of which has been affirmed by this Board, namely, that where a decree is silent on the subjeet of interest or of wasilat, interest or wasilat cannot be added in the course of execution. We are consequently of opinion that as the decree now under execution did not expressly give the appellants mesne profits, they are not entitled to realize them in execution of that decree, and that although they may have made mesne profits a portion of their claim together with recovery of the lands from which they had been unlawfully rejected, the Court executing the decree cannot properly assume that a decree for possession of those lands carries with it the right to obtain the mesne profits claimed in the plaint.

The appellant's pleader next contends that he is entitled to interest

(1) 13 B.L.R. Ap. 44=21 W.R. 195. (2) B.L.R. Sup. Vol. 602=6 W.R. Mis. 109.
(3) 2 I.A. 219=15 B.L.R. 383=24 W.R. 193.
(4) 8 C. 178.

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on costs in the lower Court, as such were expressly given by the terms of the decree of this Court. But we do not understand the order of the Subordinate Judge to refuse such interest except on the costs given by the Judicial Committee which are not ordered to bear interest. The appeal must therefore be dismissed.

It next becomes necessary to consider the objections raised by the learned Counsel for the respondents to the other portions of [291] the order of the Subordinate Judge. Mr. Woodroffe contends that, inasmuch as the respondents are the sons of Jugodumba and Pudmomoni and the sons' son of Sree Coomary (Jodoonath, the son of Sree Coomary, having died after succeeding to his inheritance and being now represented by his son), these persons cannot be regarded as legal representatives of the original judgment-debtors, Jugodumba and Pudmomoni, because they have succeeded not as heirs of those two ladies, but as heirs of their last male ancestor, Raj Chunder. It is further contended that they are liable only to the extent of any property that they might have inherited from those two ladies. But these two ladies, Jugodumba and Pudmomoni, themselves succeeded by right of inheritance to their father, Raj Chunder, and, for all purposes, represented that estate. We further observe that the respondents are still in possession of the lands which were wrongfully taken by Rash Money as included in the decree obtained by Raj Chunder for possession of the mortgaged property after foreclosure. They are not, therefore, in a position to disconnect themselves from the acts of Rash Money under which these lands were taken, and held as a portion of the family estate even at the present day. Under such circumstances, we think that the Subordinate Judge has rightly held that the respondents are the legal representatives of the judgment-debtors, and, as such, are liable to all costs incurred in the suit brought by the plaintiffs.

With reference to the objection that execution cannot proceed against the estate in the hands of the Receiver appointed by an order passed in the Original Side of this Court, we observe that the Receiver in the lower Court expressed his willingness to give up the estate. We think, therefore, that this objection cannot be sustained.

P.O'K. *Appeal dismissed.*

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13 C. 292.

[292] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Porter.

WAJIBUN AND OTHERS (*Defendants*) *v.* KADIR BUKSH (*Plaintiff*).*
[18th June, 1886.]

Limitation Act (XV of 1877), s. 19—Acknowledgment of debt—Secondary Evidence of Acknowledgment—Authority to bind Minor by acknowledgment.

An original account book containing an acknowledgment of a debt had been filed in Court, and subsequently lost whilst in Court; *held*, that the secondary evidence of such acknowledgment might be given, notwithstanding the words of s. 19 of the Limitation Act.

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* Appeal from Appellate Decree No. 1577 of 1885, against the decree of Baboo Mothura Nath Gupto, Roy Bahadur, Subordinate Judge of Patna, dated the 24th of April 1885, affirming the decree of Moulvi Abdul Bari, Khan Bahadur, B.L., Munsif of that district, dated the 27th of June 1884.

A person merely by reason of being the mother and guardian of a minor has no authority to make an acknowledgment of a debt on behalf of the minor, so as to give a creditor a fresh start for the period of limitation.

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[Diss., 17 M. 221; 18 M. 456 (457); F., 20 B. 155 (158); Appr., 20 B. 61 (74); 26 A. 598 = 1 A.L.J. 302 (303) = A.W.N. (1904) 137; R., 26 C. 51 (52); 27 M. 243 (245) = 14 M.L.J. 84 (F.B.); 23 P.W.R. 1907 = 43 P.L.R. 1907 (F.B.); 12 C.W.N. 256 (260) = 3 M.L.T. 156 = 35 C. 320.]

THE plaintiff brought this suit on the 4th May 1883 against the heirs of one Syed Abu Syed to recover a sum of Rs. 929-5 on account of goods sold to Syed Abu Syed during his lifetime between the years 1872 and 1879.

He alleged that shortly after the death of Syed Abu Syed, *viz.*, on 1st August 1880, it was agreed amongst the said heirs that 11 annas of the debt was to be paid by the defendant Fusibun (the elder widow) and her children defendants Nos. 1 to 8, and 5 annas by the defendant Wajibun, the younger widow, and her children, defendants Nos. 9 to 14, and that on that day accounts were settled and signed by the *ammukhtars* of the widows; and that the book which bore these signatures had been filed in a suit in the Small Cause Court and was not forthcoming.

The elder widow did not appear, and her children through their guardian admitted the plaintiff's claim; the younger widow appeared, and contended that, as the account closed in April 1879, the suit was barred; she admitted the settlement, but denied the *ammukhtar's* power to sign the account for her and her children.

The Munsif allowed the plaintiff to give secondary evidence of the acknowledgment in the account book, and found that the acknowledgment had been made on the widows' behalf with [293] their authority; he therefore gave the plaintiff a decree against all the defendants, making the estate of the deceased in the respective defendant's hands liable for the debt.

The defendant Wajibun and her children through her appealed to the Subordinate Judge.

The Subordinate Judge found that the accounts had been settled on the 1st August 1880; that they had been duly signed by the widows' *ammukhtars*; and that the Munsif had rightly allowed secondary evidence of the acknowledgment, the book having been proved to have been lost; he therefore upheld the Munsif's decree.

The same defendants appealed to the High Court.

Mr. *Abdool Hossein* and Munshi *Serajul Islam* for the appellants contended that the suit was barred; that under s. 19 of the Limitation Act oral evidence of the contents of the so-called acknowledgment should not have been admitted; that the Judge was wrong in giving a decree against the minors, as they could not be bound by the acts of the *ammukhtars*.

Munshi *Mahomed Yusuf* for the respondents contended that the acknowledgment implied a fresh promise, and that limitation would run from that period; that the plaintiff was entitled to recover the whole of the debt from the widow Wajibun who had made herself liable for the whole of the debt by acknowledging it; that under the Muhammadan law the plaintiff might recover the whole of the debt from Wajibun as representative of the deceased.

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The judgment of the Court (GHOSE and PORTER, JJ.) was as follows:—

JUDGMENT.

This was a suit to recover from the heirs, other than the mother of one Syed Mahomed Abu Syed, the price of clothes and other articles sold to him by the plaintiff from 1279 F. S. to Bysakh 1286 F. S. The said heirs are: *first*, Mussamut Fusibun, the first widow of Mahomed Abu Syed, the defendant No. 1, and the defendants Nos. 2 to 8, the children of Abdul Syed by Fusibun; and, *second*, Mussamut Bibi Wajibun, his second widow, the defendant No. 9, and the defendants Nos. 10 to 14, his minor children by Wajibun—the said minors being represented by their mother and natural guardian, Wajibun.

[294] This suit was brought on the 14th of May 1883, that is to say, three years after the transactions of sale; but it was alleged and proved in the opinion of both the lower Courts, that on the 1st of August 1880, the accounts were settled between the plaintiff on the one hand and Mussamut Fusibun and Mussamat Wajibun on the other, and that Rs. 2,555-2 having been found to be due to the plaintiff from the estate of Abu Syed, the sum Rs. 2,129-5-8 was determined as payable by the two sets of defendants, in the proportion of Rs. 1,612-10-10, and Rs. 566-10-10, respectively. This settlement was acknowledged in writing by the two ladies on the accounts, their respective agents authorized in that behalf signing for them.

The plaintiff thereupon contended that the suit having been brought within three years from the said acknowledgment, it was within time.

We ought here to mention that the suit was for the recovery of Rs.929-5, after giving credit to the defendants for the sums paid by them, and the decree that was awarded by the Courts below was for Rs 462-10-6, as recoverable from the estate of Abu Syed, in the hands of defendants Nos. 1 to 8, and the sum of Rs. 466-10-6, from that portion of the said estate which was in the hands of defendants Nos. 9 to 14.

The present appeal is by Mussamut Wajibun and her children against that portion of the decree that was awarded against them, and the main contentions that were raised on their behalf before us were: (1) that the acknowledgment signed by the defendants being not forthcoming, no oral evidence should have been received under s. 19 of the Limitation Act, to prove the contents of the said acknowledgment; (2) that the acknowledgment did not bind the minors, and, therefore, so far as they were concerned, no decree ought to have been given against them.

As regards the first contention it appears to us that, although s. 19 of the Limitation Act provides that "when the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but no oral evidence of the contents shall be received," still this was not meant to exclude *secondary* evidence of the contents of the acknowledgment, under s. 65 of the Evidence Act, when a proper case for [295] the reception of such evidence is made out, and in this respect we agree in the views so fully expressed in a recent decision by a Divisional Bench of this Court in the case of *Sambhu Nath Nath* (1). In the present case it has been found that the original account book containing the acknowledgment was filed by the plaintiff

(1) 12 C. 267.

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in a previous suit between the parties, but has since been lost, and, therefore, it seems to us that it was open to the plaintiff to give secondary evidence of the contents of the said acknowledgment.

As regards the second contention, we are of opinion that the acknowledgment by an agent, authorized in that behalf by Mussamut Wajibun, would not necessarily bind the minors. The mother, in the absence of any special authority being proved to exist in her, cannot be regarded as an agent on the part of the minors duly authorized in that behalf within the meaning of s. 19 of the Limitation Law, and it appears to us that a person, merely by reason of her being the mother and natural guardian, has no authority to make an acknowledgment on behalf of minors so as to give a creditor a fresh start for the period of limitation.

We therefore think that the claim, so far as the minors are concerned, is barred by limitation, it having been brought beyond three years from the original transactions.

It is, however, contended by the learned vakil for the respondent that the acknowledgment implies a fresh promise, and that, therefore, irrespective of s. 19 of the Limitation Act, the debt is not barred against the minors. But it is quite clear that there was no consideration, so far as the minors were concerned, for this fresh promise on the part of the mother, and therefore the said promise by her could not be regarded as an act in the interest of the minors, such as would be binding upon them. Another point was raised by the vakeel for the respondent to the effect that, supposing that the claim could not be maintained against the minors, Mussamut Bibi Wajibun, by reason of her acknowledgment, made herself liable to make good the whole amount, and that therefore the claim ought to be decreed in its entirety against her. But it is obvious that **[296]** it was never intended that the said Mussamut should make herself solely responsible for the whole debt; it was never the plaintiff's case that she made herself so liable, nor do we think it would be equitable in the circumstances of this case to make her liable for the whole debt. It was further argued that under the Mahomedan law, it was competent to the plaintiff to realize the whole of his dues from the said Mussamut, she being in possession of the whole estate in a representative capacity. But the answer to this is that, in the first place, it was never the plaintiff's case that the lady was in possession of the whole estate, nor that she was in such possession in a representative capacity. On the contrary, the plaintiff's case is, that upon Abu Syed's death, there was a distribution of the estate among his heirs, and that both the widows and the children were in possession of their respective shares.

We are, therefore, of opinion that in the circumstances, of the present case, the plaintiff is not entitled to recover more than a proportionate share of the debt from Mussamut Wajibun, namely, a share proportionate to the assets received by her in the estate of Abu Syed.

The result is that the suit, so far as the minors are concerned, will be dismissed; and that a decree will be passed against Wajibun for Rs. 58-5-3.

This order does not in any way interfere with the decree already passed in plaintiff's favour against the defendants Nos. 1 to 8.

As regards the costs, we are of opinion that Bibi Wajibun, in the circumstances of this case, should pay the plaintiff's costs in this Court and in the lower Courts. We allow no costs to the minors.

T. A. P. *Decree varied.*

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[297] APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

MODUN MOHUN DUT AND ANOTHER (*Plaintiffs*) *v.* FUTTARUNNISSA AND OTHERS (*Defendants*).* [8th June, 1886.]

Transfer of Property Act (*IV of* 1882), *ss.* 52, 135—*Sale of immoveable property by person out of possession—Actionable claim.*

A transfer of ownership of immovable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession.

A and *B* being owners of an 8-annas share of certain immoveable property sold it under a kobala to *C* and *D*. At the time of the sale *X* and *Y* were in adverse possession of the share. *Held*, that the transaction was a sale under s. 52 of the Transfer of Property Act, to which the provisions of Chapter 8 of the Act, specially those of s. 135, were inapplicable.

Semble, s. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property.

[F., 11 M. 445 (447); 3 O.C. 215 (227); R., 16 A. 315 (F.B.); 18 A. 265 (F.B.); U.B. R. 1897--1901), Vol. II, 573; 21 C. 568 (F.B.).]

THIS was a suit to recover possession of an 8-annas share of 5 kedars and 2 puns of land. The property was originally in the joint possession of four brothers: Jugul, Obhoy, Nil, and Puddo. Jugul and Obhoy sold the whole property to Futtarunnissa, and the latter then executed a kobala with respect to the land in dispute in favour of Jogomohun and Ramchunder, the principal defendants, who took possession in Bysack 1287 (April 1880). Nil and Puddo, while thus out of possession, sold their 8-annas share of the land to the plaintiffs under a kobala, dated the 9th Kartik 1291 (24th October 1884). The defendants contended that the plaintiffs, their vendors being out of possession at the time of the sale, had purchased an actionable claim as defined by s. 130, Act IV of 1882, and were entitled to no more than the amount of consideration-money actually paid by them and the incidental expenses of the sale. The Munsif, while of opinion that the subject of sale was an actionable claim, decreed the suit in view of cl. (*d*) of s. 135. The Subordinate Judge, differing from the Munsif in his interpretation of cl. (*d*), held that the defendants would be exonerated by the **[298]** payment of the consideration-money and the incidental expenses of sale with interest, and altered the decree accordingly.

On second appeal, it was contended on behalf of the plaintiffs that the transaction between them and their vendors was one of sale under s. 52 of the Transfer of Property Act, to which the provisions of s. 135 were inapplicable.

Baboo *Akhil Chunder Sen*, for the appellants.

Baboo *Taruck Nath Palit*, for the respondents.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows:—

JUDGMENT.

This was a suit to recover possession of an 8-annas share of a certain property. We may take it upon the finding of the lower Courts that the

*Appeal from Appellate Decree, No. 425 of 1886, against the decree of Babu Ram Cumar Pal Chowdhry, Rai Bahadur, Subordinate Judge of Sylhet, dated the 12th December 1885, reversing the decree of Baboo Kali Dhun Chatterji, Munsif of Habigunge, dated the 25th June 1885.

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defendants Nos. 6 and 7 had been the owners of this 8-annas share. It is not disputed that the plaintiffs purchased this property under a kobala from the defendants Nos. 6 and 7, and by the terms of that kobala the ownership was transferred to the plaintiffs. It is also not disputed that at the time of the execution of the kobala the defendants Nos. 6 and 7 were not in possession, but that the property in dispute was in the possession of the principal defendants. Upon these facts the question that was raised in the lower Courts, and that has been raised before us, is whether it was a sale of an actionable claim within the meaning of Chapter 8 of the Transfer of Property Act; and further if it is a sale of an actionable claim, whether s. 135 of that Chapter applies to the present case.

It seems to us that the sale in this case does not come within Chapter 8 of the Transfer of Property Act. Section 130 of the Act says: "A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary." It is therefore evident that it refers to nothing more than to a sale of a claim, but if the transfer be that of the ownership of property it is something more than the transfer of a claim. It is unnecessary for us to define exactly the classes of cases coming within the purview of s. 130; all that we decide is that a transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not [299] be in possession. The Transfer of Property Act is divided into several chapters. Chapter 1 deals with preliminary matters; Chapter 2 deals with general rules relating to the transfer of property. Then from Chapter 3 to Chapter 8 the Act deals with rules of law relating to different kinds of transfer of property: Chapter 3 treats of sales of immoveable property; Chapter 4 deals with mortgages of immoveable property and charges; Chapter 5 with leases of immoveable property; Chapter 6 deals with the subject of exchange; Chapter 7 deals with the subject of gifts; and then comes Chapter 8, which deals with transfers of actionable claims. It is clear from the division of these chapters that it is made with reference to the different classes of transfer, and, therefore, if a particular transfer comes under one chapter, it is necessarily excluded from the other chapters. That being so, it is important to consider whether, under the circumstances stated above, the transaction between the plaintiffs and the defendants Nos. 7 and 8 comes within the definition of a sale of immoveable property; if it does, it appears to us that it would not come under the purview of any of the following chapters, including Chapter 8. The conditions laid down in s. 54, which defines sales of immoveable property, are, in our opinion, fulfilled in the transaction in question. It seems to us that, under s. 54, a sale by registered kobala is valid, although the owner may not be in possession at the time of the sale. Section 54, para 2, says: "Such transfer, in the case of tangible immoveable property of the value of Rs. 100 and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument." Para 3 says: "In the case of tangible immoveable property of a value less than Rs. 100, such transfer may be made either by a registered instrument or by delivery of the property." Comparing these two paras, it seems to us that where a sale is of tangible immoveable property, whether of the value of Rs. 100 and upwards or not, the transfer is complete when the instrument by which the transfer is made is registered; and delivery of possession in that case is not a condition precedent to the validity of the transfer. That being so, the transaction in this case comes within s. 54,

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and it follows, therefore, that it does not come within Chapter 8. But even if it be conceded that it is a sale of an [300] actionable claim, we think that s. 135 is not applicable. That section says that, "where an actionable claim is sold, he, against whom it is made, is wholly discharged by paying to the buyer the incidental expenses" &c. The word *discharged* would be inapplicable to a suit of this description, because it is for possession of land. We are inclined to think that s. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. On the whole, we are of opinion that Chapter 8, and specially s. 135, are not applicable to the facts of this case. That being so, the right of the plaintiffs being found in the judgment of the lower Courts, the decree of the lower appellate Court will be set aside, and the plaintiffs' suit for possession will be decreed with costs in all the Courts.

K. C. M. *Appeal allowed.*

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13 C. 300.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice O'Kinealy.

BROJENDRO KUMAR ROY CHOWDHRY (*Plaintiff*) *v.* RASH BEHARI ROY CHOWDHRY AND OTHERS (*Defendants*).* [3rd August, 1886.]

Right of suit—Cause of Action—Contribution, suit for—Joint wrong-doers—Breach of Covenant—Damages for breach of Contract—Breach of Contract.

In a suit for damages against *A* and others for breach of a covenant not to open a ferry at a particular place, a decree was obtained against all the defendants. The amount of this decree was levied by execution from *A* alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrong-doers, and that no suit for contribution would lie as between them. On second appeal to the High Court—

Held, that the rule of law relied on by the Courts below had no application to the circumstances of the present case, and that the plaintiff was entitled to maintain his action.

[R., 5 C.W.N. 393 (398); D., 24 C. 330 (333).]

IN this case it appeared that a decree had been obtained by one Bhogowan Chunder Chowdhry against the plaintiff and the defendants jointly for the sum of Rs. 352-14-0 as damages for breach of contract. The whole amount was, in execution of the [301] decree, recovered from the plaintiff alone on the 2nd March 1881; and thereafter he, on the 24th August 1883, instituted the present suit for contribution. The Court of first instance held that the plaintiff and the defendants had been joint wrongdoers in breaking the contract upon which Bhogowan Chunder Chowdhry sued, that therefore the present suit for contribution would not lie—*Sreeputty Roy* v. *Loharam Roy* (1); *Suput Singh* v. *Imrit Tewari* (2); *Ruttee Sirder* v. *Sajoo Paramanick* (3). The judgment of the lower appellate Court on appeal is as follows:—

"I think that the judgment of the lower Court ought to be supported for the reasons given by the Munsif. The defendants in the former suit

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* Appeal from Appellate Decree, No. 1555 of 1885, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 20th of April 1885, affirming the decree of Baboo Mohendro Nath Das, Munsif of Manikgunji, dated the 18th of February 1884.

(1) 7 W. R. 384. (2) 5 C. 720. (3) 11 B. L. R. 345=20 W. R. 236.

executed an agreement not to open a ferry in the neighbourhood of a certain existing ferry, and did so open a ferry in violation of the agreement. It seems to me that this constituted them wrongdoers in the sense that they knew or ought to have known that they were doing a wrong or unlawful act. I do not think it can be said at all that they were acting under a claim of right, however ill-founded; the act was a deliberate breach of the agreement into which they had entered, and therefore the Munsif has rightly held that no suit for contribution would lie. The appeals are dismissed with costs."

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The plaintiff appealed to the High Court. The facts of the case are fully set out in the judgment of Mr. Justice Norris.

Dr. *Rash Behary Ghose*, Babu *Srinath Das*, and Babu *Kali Charan Banerjee*, for the appellant.

Babu *Hem Chunder Banerjee*, Babu *Saroda Churn Mitter*, and Babu *Tarruck Nath Paulit*, for the respondents.

The following judgments were delivered by the Court (NORRIS and O'KINEALY, JJ.):—

JUDGMENTS.

NORRIS, J.—The facts of this case are shortly as follows:

The predecessor of one Bhogowan Chander Roy granted a miras settlement of certain lands in Kaunnara to the plaintiff and certain of the defendants. The ekrar contained a covenant by **[302]** the grantees of the settlement not to interfere with or disturb a ferry ghat belonging to the grantor. In breach of this covenant the grantees established a ferry ghat near that of the grantor, who thereupon brought an action against the grantees for breach of covenant and obtained a decree. In execution of his decree the grantor attached certain property of the plaintiff, who, to avoid the sale of his property, satisfied the decree by paying the damages and costs amounting to Rs. 352-14.

The plaintiff's share in the maliki rights under the settlement was four annas, and he admitted that he was liable for ¼th of the Rs. 352-14, one of his co-sharers paid him Rs. 24 odd in respect of his 1a-2g-2k share, and the plaintiff brought this suit to recover the balance with interest from the surviving co-grantees, and the heirs and representatives of some who had died, according to their respective shares. The defendants 1, 4, 5, 6, 7, 8, 9, 10 and 13 did not appear. The defendants 2, 3, 11, 12 and 14 jointly filed a written statement; the defendant 15 filed a separate written statement; the defendants 16, 17 and 18 jointly filed a written statement. The Munsif dismissed the suit as against all the defendants, holding that they were all wrongdoers, and that no suit for contribution lay, and upon the merits he dismissed the suit as against the defendants 10, 12, 14 and 15; he also held that the defendants 1, 2 and 3 were not liable for the costs of the appeals preferred to the lower appellate Court and the High Court against the decree of the Munsif awarding damages to the grantor. On appeal the District Judge upheld the Munsif's decision, and from his judgment the plaintiff has appealed to this Court.

The Munsif found "that the plaintiff and defendants made a conspiracy and opened a ferry ghat in violation of an agreement made by them in favour of the plaintiff in the damage suit, and it is clear that they knew that they were doing an illegal or wrong act; for this reason I hold that this suit is not tenable."

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The District Judge says: "The defendants in the former suit executed an agreement not to open a ferry in the neighbourhood of a certain existing ferry, and did so open a ferry in violation of the agreement; it seems to me that this constituted them wrongdoers in the sense that they knew or ought to have known that [303] they were doing a wrong or unlawful act. I do not think it can be said at all that they were acting under a claim of right; however ill-founded, the act was a deliberate breach of the agreement into which they had entered." I am of opinion that both the Courts below have erred in treating the plaintiff and defendants as wrongdoers, and in their application of the well known legal maxim that no contribution lies amongst wrongdoers. When the Munsif speaks of a conspiracy the utmost that he can mean is that the plaintiff and defendants met together and deliberately agreed to break their covenant and establish a ferry ghat. This is not sufficient to constitute a conspiracy. To constitue a conspiracy there must be an agreement between two or more persons to do something either *malum prohibitum* or *malum in se*, or to do something which they are entitled to do only by illegal means. Suppose *A*, *B*, and *C* contract to deliver to *D* in Calcutta, on 1st January, 1,000 maunds of wheat, at a certain price, and between the date of the contract and the date of delivery wheat has gone up in price, and *A*, *B*, and *C* meet together and say "we shall lose a lot of money on this contract, let us only deliver 500 maunds and leave *D* to sue us for damages." Could this be said to be a conspiracy? I think not; or suppose *A* and *B* agree to sell a piece of land to *C*, and between the date of the contract and the date fixed for the completion of the purchase, *A* and *B* hear that the piece of land is likely to be taken up for a railway or other public work, and that therefore they will in all probability get a much better price than *C* had agreed to give them, and agree not to convey to *C*, but to leave him to bring his action for damages; this would not be conspiracy. Three cases were relied upon by the Munsif, *viz.*, *Sreeputty Roy* v. *Loharam Roy* (1); *Ruttee Sirdar* v. *Sajoo Paramanick* (2); and *Suput Singh* v. *Imrit Tewari* (3); all these cases are cases of tort. Here the plaintiff and defendants were guilty only of a breach of contract. The leading case of *Merryweather* v. *Nixon* (4) points out the distinction between contribution as between joint tort feasors and judgment against several defendants in an action of assumpsit. I am of opinion that the appeal should be allowed.

[304] As the lower appellate Court has not tried the case on the merits, it must be remanded to enable it to do so. Costs will abide the result.

O'KINEALY, J.—I concur in the decision of my learned colleague. The Judge below finds and only finds that the defendants in the former suit violated their agreement, not that they had committed a wrong independently of contract. This finding does not prevent the present suit. See *Power* v. *Hoerz* (5).

P. O'K. *Appeal allowed and case remanded.*

(1) 7 W. R. 384. (2) 11 B. L.R. 345=20 W.R. 236. (3) 5 C. 720.
(4) 2 Smith's L. C. 546. (5) 19 W. R. (Eng.) 916.

13 C. 304.

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CRIMINAL REVISION.

13 C. 304.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

IN THE MATTER OF KALA CHAND AND OTHERS (*Petitioners*) *v.* GUDADHUR BISWAS AND OTHERS (*Opposite Parties*).*

[3rd August, 1886.]

Compensation—Cattle Trespass Act, 1871, ss. 20, 22—*False complaint.*

A complaint was made against certain persons under s. 20 of the Cattle Trespass Act of 1871, charging them with having illegally seized and detained the complainant's cattle. The Assistant Magistrate who heard the complaint found it to be false, and he ordered the complainant to pay Rs. 20 compensation to the accused, and in default to suffer simple imprisonment for 21 days. On application to the High Court,—

Held, that the order was illegal and must be set aside.

[R., 18 A. 353=16 A. W. N. 98.]

IN this case Kala Chand Sheikh and others charged Gudadhur Biswas and others, under the provisions of s. 20 of the Cattle Trespass Act, Act I of 1871, before the Assistant Magistrate of Meherpore, with having illegally seized and detained their cattle. The complaint was investigated by the Assistant Magistrate and found to be false. He acquitted the accused under s. 245 of the Code of Criminal Procedure. He directed that each of the complainants should pay to the accused **[305]** Rs. 20, and in default of paying the fines that they should suffer simple imprisonment for 21 days (s. 250 of the Code of Criminal Procedure), and he sanctioned the prosecution of the complainants and their witnesses for instituting a false case and for perjury.

The District and Sessions Judge of Nuddea quashed that portion of the Magistrate's order granting sanction to prosecute, but he declined to interfere with that portion of the order which awarded compensation to the accused. Kala Chand Sheikh and the other complainants then presented a petition to the High Court, praying that the order of the Assistant Magistrate awarding compensation should be set aside as illegal, and made without jurisdiction, on the ground amongst others, that charging a person falsely with illegally seizing and detaining cattle under s. 20 of the Cattle Trespass Act is not an offence.

Babu *Jushoda Nund Pramanick* and Babu *Doorga Doss Dutt*, for the petitioners.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

For the reasons given in the case of *Pitchi* v. *Aukappa* (1), in which we concur, the award of compensation under s. 270 of the Criminal Procedure Code, ordered by the Magistrate to be paid by the petitioner in consequence of his having made a frivolous and vexatious complaint of illegal seizure of his cattle, must be set aside, and the fine, if paid, must be refunded.

P. O'K.

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*Criminal Revision Case, No. 313 of 1886, against the order passed by Mr. J. Crawford, Sessions Judge of Nuddea, dated the 5th June 1886, rejecting the order of Mr. Hewling Luson, Assistant Magistrate of Meherpore, dated the 9th April 1886.

(1) 9 M. 102.

1886
AUG. 17.

CRIMINAL REFERENCE.

13 C. 305.

13 C. 305.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

ABDUL WAHAB (*Complainant*) *v.* CHANDIA (*Accused*).*
[17th August, 1886.]

Magistrate, Jurisdiction of—Powers of Second Class Magistrates—Reference to District Magistrate—Committal to Court of Sessions—Criminal Procedure Code, s. 239.

An Assistant Magistrate convicted a person under ss. 406 and 417 of the Penal Code, and referred the case to the District Magistrate for sentence under the provisions of s. 349 of the Code of Criminal Procedure. [306] The District Magistrate was of opinion that the offence was one properly punishable under s. 420 of the Penal Code, and one which the Assistant Magistrate had no jurisdiction to deal with, and that therefore the reference under s. 349 was *ultra vires* and illegal. On a reference to the High Court :

Held, that the Assistant Magistrate was not wholly without jurisdiction, as he was competent to commit the accused to the Court of Sessions, though not to hold a trial, and that the District Magistrate might, if he thought proper, commit the accused to the Court of Sessions.

[R. 2 L.B.R. 285 (287-289) (F.B.).]

THIS was a reference to the High Court by the District Magistrate of Patna, under the provisions of s. 438 of the Code of Criminal Procedure. The terms of the reference are as follows :—

"This case was tried by the Assistant Magistrate of Behar, who found the accused person guilty of offences under ss. 417 and 406 of the Penal Code and forwarded her with the proceedings in the case to the District Magistrate in order that a more severe punishment might be imposed than the Assistant Magistrate, who has the powers of a Magistrate of the second class, is empowered to inflict.

"The charge against the accused is that she dishonestly induced the complainant Mussammat Baharun to make over to her cash and ornaments of considerable value by pretending that she could get a charm worked upon them which would have the effect of enabling the owner to rear healthy children. I think it is quite clear that if the accused has committed any offence, it is an offence punishable under s. 420 of the Penal Code, which a second class Magistrate is not competent to try, the delivery of the property being of the very essence of the offence, and that the Assistant Magistrate could not give himself jurisdiction by reducing the offence to one of ordinary cheating under s. 417 of the Penal Code.

"Section 349 of the Criminal Procedure Code only applies to cases dealt with by a Magistrate 'having jurisdiction,' which evidently means jurisdiction to try the case, and as the Assistant Magistrate had not such jurisdiction, his proceedings, so far as the framing of the charge and the reference made under s. 349 of the Criminal Procedure Code are concerned were *ultra vires* and illegal.

"Under these circumstances, I am doubtful whether I can legally deal with the case either by myself, trying the accused for an offence under s. 420 of the Penal Code, or by committing her for [307] trial to the Court of Sessions, inasmuch as, according to my view, the case has not been legally brought before me for disposal. I therefore

* Criminal Reference, No. 147 of 1886, made by C. C. Quinn, Esq., Magistrate of Patna, dated the 21st of July 1886.

solicit the orders of the Court, and would recommend that the charge framed by the Assistant Magistrate and the final order passed by him be set aside, and that he be directed to commit the accused person for trial to the Court of Sessions, the offence being a serious one, and being punishable with imprisonment for seven years.

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"Before making this reference I gave the Assistant Magistrate the opportunity of justifying his order, but he states that he has no remarks or explanation to offer, and refers to the order itself as containing the grounds on which it was passed."

No one appeared on the reference.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

JUDGMENT.

This case has been referred to the District Magistrate under s. 349 of the Code of Criminal Procedure by the Assistant Magistrate who exercises powers of the second class, and has found the accused guilty under ss. 406, 417 of the Penal Code, the sentence which he can pass being in his opinion inadequate. The District Magistrate is of opinion that the offence committed is under s. 420 of the Penal Code, which is an offence beyond the jurisdiction of the Assistant Magistrate to try.

Section 349 of the Code of Criminal Procedure empowers the District Magistrate to pass such judgment, sentence or order in the case as he thinks fit, and as is "according to law." Now, although the Assistant Magistrate was not competent to hold a trial of an offence under s. 420 of the Penal Code, he was competent to hold an inquiry and commit to the Court of Sessions, so that he was not entirely without jurisdiction, and could have committed the case instead of referring it to the District Magistrate. The District Magistrate is, however, competent, in a case of this description, to pass such order as he thinks fit, and as is according to law, and he can consequently, if he thinks proper, commit the accused to the Court of Sessions. We may refer the District Magistrate to the cases of *In the matter of Chinnimarigadu* (1) and *Imperatrix* v. *Abdulla* (2).

P. O'K.

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[308] PRIVY COUNCIL.

PRESENT:

Lord Blackburn, Lord Hobhouse, and Sir R. Couch.

[*On appeal from the High Court at Calcutta.*]

JAGADAMBA CHAODHRANI AND ANOTHER (*Plaintiffs*) *v.* DAKHINA MOHUN ROY CHAODHRI AND OTHERS (*Defendants*).

SARODA MOHUN ROY CHAODHRI (*Plaintiff*) *v.* DAKHINA MOHUN ROY CHAODHRI AND OTHERS (*Defendants*).

[19th, 23rd, 24th, 25th and 26th March and 9th April, 1886.]

Limitation Act (IX of 1871), sch. II, art. 129—Meaning of "suit to set aside adoption."

Article 129 of sch. II, of Act IX of 1871, the Indian Limitation Act of that year, using the expression "suit to set aside an adoption," denoted a suit bringing the

(1) 1 M. 289. (2) 4 B. 240.

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validity of an adoption into question; and the rule of limitation, given by that article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption, in virtue of which the opposite party was in possession.

The plaintiffs, as collateral heirs of a childless Hindu, questioned adoptions purporting to have been made by his widows in pursuance of authority from him; such adoptions having been followed by continuous possession, and having been recognised in formal instruments, proceedings, and decrees to which the plaintiffs were parties. *Held*, on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under art. 129 of sch. II of Act IX of 1871.

Part of the language of the judgment in *Raja Bahadur Singh* v. *Achumbit Lall* (1) referred to, and that case, in which the plaintiffs' claim was not affected by the widow's adoption, distinguished from the present.

[F., 57 P.R. 1891; 20 C. 487 (495) (P.C.); 24 B. 260 (F.B.); 71 P.R. 1901; 26 M. 291; 43 P.L.R. 1904=3 P.R. 1904; **Expl.**, 10 A. 485 (488)=8 A.W.N. 192; 25 B. 337 (350) (P.C.); **Appl.**, 19 Ind. Cas. 596 (608); **Cited**, 10 P.R. 1890; 56 P.R. 1894; **Cons.**, 14 C. 401 (417); 3 C.P.L.R. 32 (34); 9 C.W N. 222; **R.**, 11 B. 381 (396); 11 A. 456=9 A.W.N. 109; 14 A. 53 (56); 16 B. 91 (109); 16 M. 311; 19 C. 629; 109 P.R. 1893; 73 P.R. 1894 (F.B.); 18 M. 145 (148); 19 B. 593; 21 B. 159; 17 A. 167; 20 M. 40=6 M.L.J. 272; 25 C. 354; 11 C.P.L.R. 49 (51); 1 O.C. 30 (35); 1 O. C. 178 (180); 1 Bom. L. R. 799; 27 C. 242=4 C. W. N. 405; 27 C. 379 (401); 67 P.R. 1901; 133 P.L.R. 1902; 6 C.W.N. 863 (865); 26 B. 720 (724); 30 C. 990 (996)=7 C.W.N. 864; 93 P.L.R. 1903=56 P.R. 1903 (F.B.); 33 C. 257=9 C.W.N. 636=1 C.L.J. 408; 1 P.R. 1907=31 P.W.R. 1907; 38 P.R. 1907=13 P.L.R. 1908; 29 M. 390=1 M.L.T. 183=16 M.L.J. 307 (F.B.); 28 A. 727 (P. C.)=10 C. W. N. 1065=8 Bom. L. R 722=3 A. L. J. 695=4 C.L.J. 405=9 O.C. 377=16 M.L.J. 440=1 M.L.T. 265=33 I. A. 158; 6 S.L.R. 210=19 Ind. Cas. 565 (570); 20 Ind. Cas. 162 (170)=15 Bom L. R. 533; 96 P.R. 1908; **D.**, 7 Ind. Cas. 427; 8 A. 644 (645); 9 A. 253; 13 B. 160 (165); 14 M. 26 (28); 23 C. 460 (467); 24 A. 195 (198)=22 A. W. N. 10; 26 A. 40=23 A. W. N. 163.]

CONSOLIDATED appeals from two decrees (25th March 1882) of the High Court, reversing two decrees (5th October 1877) of the Subordinate Judge of Rangpur.

The suits giving rise to these appeals, brought by collateral relations by adoption, alleging title to the possession of the estate of a childless Hindu on his decease, questioned the validity of adoptions made by the widows of the deceased. Limitation under art. 129 of sch. II of Act IX of 1871, the Indian Limitation Act then in force (2), was the ground, amongst **[309]** other grounds, including art. 143 of the Second Schedule of the same Act, of the dismissal of the suits in the Court of first instance. In regard to such other grounds, without special reference to art. 129, which related to adoptions, but viewing the effect of art. 143, which related to suit generally, for the possession of immoveables, differently from the first Court, the High Court reversed the decisions of the lower Court and decreed the claims. The application, however, of art. 129 was again raised as a principal question on the present proceedings, and that article having been held to apply, no other question for decision remained.

(1) 6 I. A. 110.

(2) That art. 129 enacted the following rule of limitation: "To establish or set aside an adoption—twelve years from the date of the adoption or at the option of the plaintiff the date of the death of the adoptive father."

Article 143 enacted: "For possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession—twelve years from the date of the dispossession or discontinuance."

Article 118 of the second schedule of Act XV of 1877: "To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place—twelve years from the time when the alleged adoption becomes known to the plaintiff."

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Three brothers—sons of Anand Mohun Chaodhri, *viz.*, Kali Mohun Chaodhri, who died in 1856; Tarini Mohun, who died in 1833; and Hurro Mohun, who died in 1846—being without sons, all of them either adopted or gave to their widows authority to adopt.

Dakina Mohun, the adopted son of the first of the above, and Tara Mohun, the adopted son of the second, separately brought the suits out of which the present appeals arose, each claiming to be an heir of Hurro Mohun, brother of their respective adoptive fathers.

The object of both suits was the same—to oust, as having no title to Hurro Mohun's estate as against his collateral heirs, the defendant Saroda Mohun, and for the same reason, the defendants Jagadamba, the widow, and Jotindro Mohun, the minor son of Durga Mohun, deceased, alleging that the adoptions, under which the latter and Saroda Mohun had got possession of Hurro Mohun's estate between them, were unauthorized and invalid.

For the defence it was set up that the adoption of Saroda Mohun [310] had been validly made in 1853 by the elder widow Radha Sundari, who died in 1868, and that the younger widow, Hurripria, who died in 1864 had duly adopted Durga Mohun in 1856. The sons so adopted had agreed on coming of age to raise no question as to which was the valid adoption; and held on the footing that, whichever of the two was entitled allowed the other to possess half the estate. They also relied upon limitation under Act IX of 1871, arts. 129 and 143 of sch. II. The first suit was brought by Tara Mohun since deceased, and now represented by Annoda Mohun his son in April 1873, for one half of Hurro Mohun's estate, allowing that Dakhina Mohun was entitled to the other. The second suit was brought more than a year later by Dakhina Mohun for the entire estate. He, however, afterwards admitted, while the appeals were pending in the High Court, what had been done in regard to the adoption of Tara Mohun.

The Subordinate Judge of Rangpur, Baboo Bhagwan Chandro Chakerbatti, dismissed both suits as barred under art. 129. He was also of opinion that both suits were barred under art. 143. He further found that the adoptions, impugned by the plaintiffs, were good and valid. In regard to art. 129, he was of opinion that the suits were in effect to set aside adoptions, as by that means alone could the defendants' titles be defeated; and he referred to *Siddhessur Dutt* v. *Sham Chand Nundun* (1) as showing that the alternative period, *viz.*, the date of the death of the adoptive father, from which a plaintiff might count the twelve years' bar, could not be construed to mean the date of the adoptive mother's death. In regard to s. 143, he found that no one through whom the plaintiffs claimed, had been in possession within the twelve years preceding the claim. The widows' possession had been discontinued; and it was on behalf of the defendants, during their minority, that possession had been held. Hurro Mohun dying in 1253, left an instrument termed *adhyakhya-nama*, or document as to the holding possession of the property, whereby he appointed trustees to be *adhyakhyara*, or holders of the property in trust for each son as might be adopted to him, under the *anumatipatro* to the [311] widows, which he executed on the same date. The effect of this was, in the Subordinate Judge's opinion, practically to disinherit the widows. The above trustees were in possession for about a year, and then, in consequence of disputes with the widows, they relinquished the

(1) 15 B.L.R. 9 = 23 W.R. 285.

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trust, the widows' names being entered in the Collectorate records. The latter state of things continued for about five years. In 1259 (1852), from which date the possession on behalf of any one claiming through the widows' late husband must have ceased, a manager, appointed on behalf of an adopted son (other than the present defendants, and since deceased), was placed in possession of the property now in dispute. Thus there was, in fact, a possession adverse to the present plaintiffs. For these reasons he dismissed their claims.

The plaintiffs severally appealed to the High Court, and a Divisional Bench (Morris and Prinsep, JJ.) reversed the above decision for reasons given as follows :

"As regards the plea that the suits are barred by limitation, we would merely remark that the general rule in all cases of this description, brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow, is that limitation is calculated from the time when the title of the reversionary heir accrues on the death of the Hindu widow. That was admitted to be settled law in the case, before the Privy Council, of *Rajendro Lall Holdar* v. *Jogendro Nath Bonnerjee* (1), and the law has since remained unaltered.

"It has, however, been contended before us, as in the lower Court, that the widows never had possession on their own account, but that on the death of Hurro Mohun, and subsequently, his estate has been held on titles adverse to those of the widows, and that, therefore, their titles, as well as those derived by the ordinary right of inheritance from Hurro Mohun, are barred.

"We cannot accept this view of the case. At Hurro Mohun's death, in accordance with the *adhyakhyanama*, the names of the managers or trustees appointed by him were duly recorded in the Collector's register with those of the widows. The power [312] of the widows was, no doubt, limited by that deed ; but there was nothing in the deed itself which did or could disinherit the widows or confer on any one a title adverse to them. There was conferred on them the power to adopt, and the 'managers' were directed to hold on behalf of sons to be adopted ; but that did not the less vest the estate in the widows until they had adopted. If they never exercised the power of adoption [and we may observe that they could not be compelled to adopt—*Pearee Dayee* v. *Hurbunsee Kooer* (2) ; *Bamun Das Mookerjee* v. *Mussummat Tarini* (3)], the managers would be relieved of their duty unless they were acting for the widows. The Subordinate Judge is wrong in stating that the widows were disinherited. That could not be, except in favour of some living being. They could not be disinherited in favour of some one whom they might never call into existence. The fact, too, that the widows were registered with the managers as proprietors of the estates, shows that they were regarded, not only as joint proprietors, but as in joint possession. Next, if we look to the evidence, we find that very shortly afterwards, the widows succeeded in getting rid of the managers, and were recorded not only as sole proprietors, but in sole possession on their own account ; and this is remarkable, because at that time they had exercised the power to adopt and had begun to dispute with one another regarding their relative rights in this respect. Under such circumstances, we cannot agree with the lower Court that the suits are barred by limitation, inasmuch as they

(1) 14 M.I.A. 67 = 7 B.L.R. 216. (2) 19 W.R. 127. (3) 7 M.I.A. 190.

have been brought within twelve years from the death of Radha Sundari, the elder widow, who survived Hurripria, the younger."

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As to the validity of the adoptions in question, the High Court held that, though a power to adopt had been given, and adoptions had been made, or purported to have been made under it, the power had not been exercised in the manner directed in it, and that the adoptions were, therefore, bad.

The respondents Dakhina Mohun and Annoda Mohun, accordingly, obtained decrees against Saroda Mohun, and the son and widow of Durga Mohun, for possession of the estate.

[313] On the appeals of the defendants, which separately filed in the two suits were four in number, and were consolidated by an order in Council (15th November 1884), Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellants, contended that the High Court had disregarded the law of limitation. Art. 129 of sch. II of Act IX of 1871 was applicable to the suits, which were in substance " to set aside adoptions" within its meaning. If recognized—and as to this the appellants had a good case on the merits—the adoptions could not fail to carry the title to the estate with them ; and therefore these suits, though suits for possession, were in effect suits to set them aside. However inaccurate the expression might be, it was always used to signify not only a question of the validity of an adoption, but a dispute as to its having taken place. In connection with this, reference was made to *Bhyrub Chunder Chowdhree* v. *Kalee Kishwar Raee* (1) ; *Govind Kishore Roy* v. *Radha Madhab Adheekaree* (2) ; *Sooburnomonee Debea* v. *Petumber Dobey* (3) ; *Radha Kissore Dossee* v. *Gutheekissen Sircar* (4) ; *Radhakissen Mahapater* v. *Sreekissen Mahapater* (5) ; *Jogendro Nath Banerjee* v. *Rajender Nath Holdar* (6) ; *Srinath Gangopadhya* v. *Moheshchandra Roy* (7) ; *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea* (8); *Sidhessur Dutt* v. *Sham Chand Nundun* (9) ; *Raj Bahadur Singh* v. *Achumbit Lal* (10) ; *Gopalayyan* v. *Raghupatiayyan* (11) ; *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (12).

As regards art. 143, and the question of possession, the evidence showed that, after Hurro Mohun's death, the estate vested in the managers, and that there had been a possession adverse to those through whom the plaintiffs claimed for more than twelve years before these suits were brought. There was a possession adverse to the widows, who represented their husband's estate ; and it was adverse to them whether the adoptions were valid or invalid. If valid, the adopted sons were in possession **[314]** as of right ; if invalid, their possession, being under supposed right, was none the less adverse to the widows representing the family inheritance. Moreover, in consequence of the adoptions, and what followed them, both the widows themselves were barred under art. 143 : representing, then, as they did, the whole estate, there was nothing left for the present claimants to inherit. A valid adoption, if made, swept away the estate in remainder ; if invalid, the adverse possession was equally subsisting, and upon it limitation operated to bar the claims of others. If a widow exercised an authority to adopt, given to her by her husband, so long as the adoption made by her was recognized, there was a possession adverse to other claimants, the possession being on behalf of the adopted

(1) S.D.A. (1850) 369. (2) S.D.A. (1856) 450. (3) Marsh 221.
(4) W.R. (1864) 272. (5) 1 W.R. 62.
(6) 7 W.R. 357, and on appeal 14 M.I.A. 67. (7) 4 B.L.R.F.B. 3. (8) 15 B.L.R. 1.
(9) 15 B.L.R. 9 = 24 W.R. 285. (10) 6 I.A. 110.
(11) 7 M.H.C. 250. (12) 11 B.H.C. 190.

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son. A suit whether by her, or by the heirs in remainder, if they chose to claim, the widow representing the entire estate for these purposes, must be brought within twelve years from the commencement of the adverse possession. This had been decided in India, and approved by this Committee. Reference was made to *Nobinchunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (1); *Amirtolal Bose* v. *Rajonikant Mitter* (2); *Srinath Kur* v. *Prosunno Kumar Ghose* (3); *Saroda Sundury Dossee* v. *Doyamoyee Dossee* (4).

It was also argued that, inasmuch as under the law of Regulation III of 1793, a title by non-claim accrued to the possessor, after twelve years' adverse possession, so also under the subsequent enactments not only was a suit against him barred, but his title was good against all other titles—*Doe d. Sib Chunder Doss* v. *Sib Kissen Bonnerjee* (5). This remained unaltered under the law of Act XIV of 1859, s. 1, cl. 12. Nor was it altered by the subsequent enactment of Act IX of 1871, at a time when the adopted sons had in this case acquired titles. The latter was a remedial Act, not intended to affect, or interfere with, titles already acquired by prescription at the time when it came into operation. In regard to the operation of Act IX of [315] 1871 upon titles subsisting previously to its enactment, see *Rajrup Koer* v. *Abdul Hossein* (6).

Mr. *T. H. Cowie, Q.C.*, and Mr. *H. Cowell*, for the respondents, argued that the suits were not barred, either by the law of art. 129 or art. 143. As regards art. 129 the suits were neither in form nor in substance to set aside adoptions. The cause of action in these claims for possession did not accrue till the death of the surviving widow; and though a suit for a declaratory decree, which it was discretionary with the Court to entertain or not, might have been open to the respondents within the period prescribed by s. 129, and would now be barred, the direct object of the present suits was not to set aside the adoptions. Their direct object was to set forth a title showing a right to the immediate possession of Hurro Mohun's estate. If the defence set up adoptions, it would be incident to the case that the question of the adoptions should be tried; but this question was one which the defence brought up. To allow that the adoptions were, or might be, effective as family acts, insufficient, however, to defeat the rights of the respondents, was entirely consistent with the claims made by the latter. Limitation under art. 129 must, if it applied at all, be applied to the commencement of the suit; and in the claim made by the plaint, irrespectively of what was put forward for the defence, the right to the proprietary possession was all that was set forth; it being all that was necessary to the plaintiffs' case. There were in effect two tests that could be applied in order to ascertain whether a suit was, or was not, a suit within art. 129. The first was, what was the nature of the decree asked for, or made? In this case it was a decree for possession of the property claimed without reference to the subject of adoption. The second test was, who would be entitled to succeed if no evidence was taken. Now, in this case, the title of the respondents, *prima facie* good, was attempted to be met by the alleged adoptions, which had to be established by the appellants. Reference was made to *Srinath Gangopadhya* v. *Moheshchandra Roy* (7); *Gopal Chunder* [316] *Mitter*

(1) B.L.R. Sup. Vol. 1008=9 W.R. 505. (2) 15 B.L.R. 10=23 W.R. 214=2 I.A. 113.
(3) 9 C. 934. (4) 5 C. 938. (5) 1 Boul. 70.
(6) 6 C. 394=7 I.A. 240. (7) 4 B.L.R.F.B. 3.

v. *Mohesh Chunder Boral* (1); *Jogendra Nath Banerjee* v. *Rajender Nath Holdar* (2).

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It was further contended that the observations in the judgment in *Raj Bahadur Singh* v. *Achambit Lal* (3), were clearly in point and binding.

In reference to the argument for the appellants upon art. 143 of the second schedule, upon the evidence, no adverse possession for twelve years had been shown; and this became clear when the position of the manager, appointed by the Court, was considered. His possession was not on behalf of the sons alleged to have been adopted; but was on behalf of the person, or persons, legally entitled, to whom, according to the judgment of this Committee in *Rao Karan Singh* v. *Raja Bakar Ali Khan* (4), such a possession could not be adverse.

Mr. *R. V. Doyne* replied.

JUDGMENT.

On a subsequent day, April 9th, their Lordships' judgment was delivered by

LORD HOBHOUSE.—Their Lordships have upon consideration found themselves able to dispose of these appeals upon one of the questions which were argued at the Bar very fully, and with great learning and ability with reference to the law of limitation. And though the cases, which embrace many complicated issues, are very voluminous, the facts material for this decision are few and simple.

Hurro Mohun died childless in April 1846, leaving two widows. That he had given them permission to adopt sons is clear; but in what order of priority the permission was given is one of the many points in dispute. What happened was that each of the widows adopted a son who died, and afterwards each of them adopted another. Of course both adoptions could not be valid though both might be invalid, as the plaintiffs contend they were. But during the minority of the adopted sons both were treated as adopted, and after they attained age they agreed to raise no question as between themselves; but to enjoy Hurro Mohun's [317] property in equal shares. If therefore either of the adoptions was valid, both of the adopted sons were safe in their possession.

The plaintiffs in the suits are the persons who, failing adoption, were the heirs of Hurro Mohun at the death of his surviving widow. One suit was instituted by one heir in April 1873, the other by the other heir in August 1874. The defendant Saroda was adopted in December 1853; the defendant Jagadamba is the widow of Durga, who was adopted in August 1856. The surviving widow, Radha Sundari by name, died in July 1868. It thus appears that the earliest suit was brought 18 years after the latest adoption, and the latest suit a little less than six years after the death of the surviving widow.

The Limitation Act in force when these suits were commenced is Act IX of 1871, and it is on the construction of that Act that the question depends. The suits may possibly be considered as falling under one of three articles. They may be considered as suits to set aside an adoption (art. 129), or as suits for possession of immoveable property by Hindus entitled to possession on the death of a Hindu widow (art. 142), or as suits for possession of immoveable property not otherwise specially provided for in the Act (art. 145).

(1) 9 C. 320.
(2) 7 W. R. 357 and on appeal 14 M.I.A. 67.
(3) 6 I. A. 110.
(4) 5 A. 1 = 9 I.A. 99.

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The Subordinate Judge of Rangpur, who heard the suits in the first instance, dismissed them with costs. He decided for the defendants, not only on the ground that one of the adoptions was valid, but also on the ground of limitation. His opinion is found in the record thus expressed, probably with some inaccuracy in the transcription:

"The plaintiffs, although they have only sued for possession of the property as heirs-at-law of their deceased uncle, Hurro Mohun Chaodhri, but as a fact apparent in itself they cannot likely succeed unless and until the adoptions of Saroda Mohun and Durga Mohun be set aside, making the way plain and smooth for the plaintiffs to enter into possession as heirs of Hurro Mohun Chaodhri. The formation of the plaints can render no advantage to the plaintiffs. Whatever terms they might have used in framing the plaints and the consequential relief sought for, they are in effect suits to set aside the adoptions, and should have therefore been brought within the time allowed by law, to be reckoned from the dates of the successive adoptions."

That is a clear statement of reasons for thinking that the suits fall under art. 129, and are therefore each barred by the lapse [318] of 12 years from the date of the adoption which it seeks to set aside.

The High Court reversed the decision of the Subordinate Judge, and gave the plaintiffs the decree they asked for. On the issue of limitation they say :—

"As regards the plea that the suits are barred by limitation, we would merely remark that the general rule in all cases of this description brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow is that limitation is calculated from the time when the title of the reversionary heir accrues on the death of the Hindu widow."

They do not appear to have addressed themselves to the question whether or no art. 129 governs the case.

The plaintiff's Counsel have contended that the case falls under art. 142, or if not, that it is not specifically provided for, and so falls within art. 145, and that in either case time runs against them only from the death of Radha Sundari. The endeavour to apply those articles raises several difficult questions of fact and law, but it is not necessary to pronounce any opinion on them if art. 129 applies to the suits and raises a bar which in each suit is 12 years after the adoption.

It is ingeniously argued for the plaintiffs that they are suing not to set aside any adoption, but to recover possession on their *prima facie* title as heirs, that it is the defendants who have to allege and prove adoption, and that, on their failure to do so, it will not be set aside, but taken as never having existed. But the answer is that the defendants are in possession in the character of adopted sons ; the *prima facie* title is with them, and until that is displaced they ought to retain their possession. It may not make any difference in law, but it does so happen in this case that the plaintiffs have recognized the adoptees as such for many years in formal instruments and proceedings, and even that parts of the property now sued for have been recovered from the plaintiffs in suits instituted on behalf of the adopted sons by the manager of their estate during their minority. Indeed in one of the present suits the plaintiff tells the story of the adoptions, and directly impeaches their validity. In the other the plaint is silent on that point. But whatever the mode of pleading, there is but one issue on the merits of [319] the case, namely, the validity or invalidity of the adoptions, by virtue of which

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alone the defendants hold their property. If the validity is proved, the plaintiffs cannot succeed in their claim. Now art. 129 of the Limitation Act provides that, for a suit to establish or set aside an adoption, the period of limitation shall be either the date of the adoption or the date of the death of the adoptive father. And each of the defendants contends that the true construction of these words is that the validity of his adoption shall not be challenged after 12 years from the later of the two dates assigned as the starting points of time, which in this case is the date of the adoption.

It must be confessed that the words of the article are not such as to prevent doubt or difficulty in its construction. The expression "suit to set aside an adoption" is not quite precise as applied to any suit. An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all.

Very early in the argument their Lordships asked to be informed what is meant by setting aside an adoption. The only answer is in the language of the reports, from which it would seem that the phrase "suit to set aside an adoption" is a short and familiar way of describing a class of suits well known to practitioners and spoken of in those terms with accuracy enough for all ordinary purposes. In the earliest case cited at the Bar from the S. D. A. Reports for 1850 (1) it was held that the plaintiffs had a cause of action when possession was taken under colour of an adoption. Mr. Justice Colvin says: "The plain remedy for the plaintiff was to sue to set aside the succession by adoption as declared and perfected. The present plaint is a mere attempt to evade the consequences of that neglect, and to bring the adoption to an issue under colour of a statement" of continued possession of the adopting widow. In the case cited from the S. D. A. Reports for 1856 (2) the suit was for possession of the property; but the reporter styles it "suit to set aside adoption." In the case cited from the 4th Bengal Law Reports (3), the reporter calls the suit one to recover possession and **[320]** to set aside the adoption. Mr. Justice Kemp calls it a suit to set aside an adoption. Chief Justice Peacock corrects the expression, saying: "Although the suit is said to be a suit to recover possession by setting aside the illegal adoption, the suit is, in fact, a suit by the reversionary heir to recover possession notwithstanding that adoption." In the case cited from 15th Bengal Law Reports (4), where the adopting widow was still living, the suit is called one to set aside an adoption. In his judgment Mr. Justice Jackson refers to the case in the 4th Bengal Law Reports as one in which a Full Bench determined "that the cause of action in a suit for setting aside the adoption accrues after the death of the widow."

It thus appears that the expression "set aside an adoption" is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Article 118 of Act XV of 1877, which corresponds to art. 129 of 1871, so far as regards setting aside adoptions, speaks of a suit "to obtain a declaration that an alleged adoption is invalid or

(1) *Bhyrub Chunder Chowdhree* v. *Kalee Kishwar Raee*, S. D. A. (1850) 369.
(2) *Govind Kishore Roy* v. *Radhamadab Adheekaree*, S. D. A. (1856) 450.
(3) *Srinath Gangopadhya* v. *Moheshchandra Roy*, 4 B. L. R. F. B. 3.
(4) *Mrinmoyee Debea* v. *Bhoobunmoyee Dabea*, 15 B. L. R. 1.

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never in fact took place," and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression "suit to set aside an adoption" to be one of a loose kind, and that more precision was desirable.

If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiffs' counsel [321] were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within 12 years from the adoption, while yet the very same issue is left open for 12 years after the death of the adopting widow, it may be 50 years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession.

Considerable stress has been laid upon a passage in the judgment which this Board delivered in the case of *Raj Bahadur Singh* v. *Achumbit Lal* (1), and which is said to be decisive of the present point. The passage is as follows :—

"Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which but for it a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit."

Detached from its context and from the facts of the case, that would seem to be a strong authority in favour of the plaintiffs in the present case. But when read with what goes before, it has no such effect. The suit in question was brought by the heir of Doorga Pershad to recover possession of his estate after his widow's death. The real contest was whether he had given an absolute interest to his widow which she could transmit to the defendant. But she had executed an instrument called a deed of adoption, which their Lordships decribe thus : "This document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but of merely an adoption of heirs to herself, and in fact a disposition of her property very much in the nature of a will to them after her [322] death. . . . On the above view of the document the words of the Statute would seem scarcely applicable to it." And then follows the passage above quoted. It is clear, therefore, that in that case the plaintiff was not embarrassed by the widow's adoption of the defendant. He could

(1) 6 I. A. 110.

recover the estate of Doorga Pershad without in any way disturbing the adoption. And to apply the remarks there made, in somewhat general terms, to a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor, is to put upon them a meaning they were never intended to bear.

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The result is that for the foregoing reasons their Lordships agree with the opinion expressed by the Subordinate Judge on this point. They think that the High Court should have dismissed with costs the appeal from that Judge's decree, and they will now humbly advise Her Majesty to make a decree to that effect.

The respondents, who are in the interest of the original plaintiffs, must pay the costs of these appeals.

Appeals allowed with costs.

Solicitors for the appellants : Messrs. *Barrow & Rogers.*

Solicitors for the respondents : Messrs. *Watkins & Lattey.*

C. B.

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13 C. 322.

CIVIL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Grant.

OO NOUNG AND ANOTHER (*Plaintiffs*) v. MOUNG HTOON OO AND OTHERS (*Defendants*).* [16th July, 1886.]

Equitable Mortgage—Deposit of title deeds—Contract of Mortgage—Letter stating terms of Equitable Mortgage, Effect of—Equitable Mortgagee, his proper remedy.

A and *B* executed a joint and several promissory note in favour of the plaintiffs. On the same day *A* deposited with the plaintiff the title-deeds of his property a collatoral security, and received conjointly with *B* a part of the consideration money for the promissory note. Shortly afterwards *A* [323] addressed a letter to the plaintiff to this effect : "As collateral security for the due payment Rs. 2,000 secured by a promissory note of even date * * I herewith hand you the title deeds of my property * * money borrowed and received in pledge of house," and obtained the balance.

In a suit on the basis of the documents for foreclosure, or for sale of the property, or in the alternative for a conveyance of the legal estate :

Held, that the letter itself was not a contract of mortgage, and was without registration admissible in evidence of the equitable mortgage which had been completed upon deposit of title-deeds.

Held, also, that the fact of the letter would not prevent the plaintiff from giving any other evidence in proof of his claim. *Kedar Nath Dutt* v. *Sham Lall Khettry* (1) followed.

Held, further, that the plaintiff was not entitled upon the transaction to a conveyance of the legal estate, his proper remedy being by sale of the mortgaged property.

[R., 17 B. 235 ; 53 P.W.R. 1907.]

REFERENCE under s. 54 of the Burma Courts Act, 1875.

This was a mortgage suit. On the 9th September 1884, Moung Htoon Oo and another executed a joint and several promissory note in favour of

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* Civil Reference, No. 8 of 1886, made by C. E. Fox, Esq., Officiating Additional Recorder of Rangoon, dated the 11th of May 1886.

(1) 11 B.L.R. 405.

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Oo Noung and Mah Bwin, the plaintiffs, for the sum of Rs. 2,000. On the same day Moung Htoon Oo deposited with Oo Noung the title-deeds of a piece of land in Rangoon known as 5th class, lot No. 134, Block Y1, and shortly afterwards wrote the following letter to the plaintiffs :—

"As collateral security for the due payment of Rs. 2,000 and interest, secured by a promissory note of even date, executed by me in your favour, I herewith hand you the title-deeds of my property in Lammadaw quarter, built on 5th class, lot No. 134, in Block Y1, with all the buildings thereon, which you are authorized to hold against all persons until the said sum of Rs. 2,000 and interest are fully paid and satisfied.

At the foot of the above there was this note : "Money borrowed or received on the 5th decreased moon of the month of Tawthalin 1246 in pledge of house situated in Lammadaw quarter, rupees two thousand and the title-deeds of the house are deposited with Oo Noung and Mah Bwin." Then there was the signature of Moung Htoon Oo. The letter was an unregistered document. The consideration-money (Rs.2,000) was paid in two instalments. The sum of Rs. 1,000 was paid to Moung Htoon Oo and his co-executant of the promissory note immediately on the deposit of the title-deeds, **[324]** and about two hours afterwards, the balance, Rs. 1,000, was paid to Moung Htoon Oo upon his having signed the above letter.

Oo Noung and Mah Bwin brought a suit in the Court of the Recorder of Rangoon, for foreclosure or for sale of the property, or in the alternative for a conveyance of the legal estate covered by the title-deeds.

For the defence it was contended that the plaintiffs acquired no rights in the property in consequence of the letter of deposit not having been registered, and that by reason of s. 91 of the Evidence Act no other evidence but the letter could be given to prove the equitable mortgage. The following cases were relied upon :—*Dwarka Nath Mitter* v. *Sarat Kumari Dasi* (1); *Valaji Isaji* v. *Thomas* (2); *Ganpat Pandurang* v. *Adarji Dada Bhai* (3) ; *The Bengal Banking Corporation* v. *Mackertich* (4) ; *Ex parte Leathes* (5) ; *Ex parte Heathcoate* (6) ; *Daw* v. *Terrell* (7) ; *In re Wight's Mortgage Trust* (8); *Credland* v. *Potter* (9); *Copland* v. *Davies* (10); *The Agra Bank* v. *Barry* (11).

On the other hand, it was urged on behalf of the plaintiffs (*a*), that the letter did not require registration; (*b*), that even if it did other evidence than the letter could be given to prove the mortgage ; and (*c*), that in any case it was admissible in evidence for the purpose of substantiating their claim to a conveyance of the legal estate :—*Kedar Nath Dutt* v. *Shan Lall Khettry* (12) ; *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (13); *The Bengal Banking Corporation* v. *Mackertich* (4). The Additional Recorder who tried the case was of opinion (*a*) that on the authority of *Kedar Nath Dutt* v. *Sham Lal Khettry* (12) the letter of deposit was admissible in evidence in proof of the equitable mortgage ; (*b*), that upon the facts as found by him, the letter or memorandum of deposit was not admissible in evidence in proof of the right which the plaintiffs claimed to a conveyance of the **[325]** legal estate and (*c*) that the letter or memorandum of deposit was

(1) 7 B.L.R. 55. (2) 1 B. 190. (3) 3 B. 312.
(4) 10 C. 315. (5) 3 D. and C. 112. (6) 2 M.D. and De. Gex. 711.
(7) 33 Beav. 218. (8) L.R. 16 Eq. 41. (9) L.R. 10 Ch. App. 8.
(10) L.R. 5 H.L. 358. (11) L.R. 7 H.L. 135.
(12) 11 B.L.R. 405. (13) 5 B. 143.

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"only a writing" which was evidence of the fact from which the contract was to be inferred, and that any other evidence might be given of the same fact.

But entertaining doubts on the points, the additional Recorder referred the following questions to the High Court :—

(1) Whether the unregistered letter or memorandum of deposit is admissible in evidence in proof of the equitable mortgage claimed.

(2) In the event of the first question being answered in the negative, whether the letter of deposit is admissible in evidence in proof of the right which the plaintiffs claim to a conveyance of the legal estate.

(3) Whether, in consequence of the letter of deposit, the plaintiffs are precluded from giving any other evidence in proof of their claims mentioned in the second question.

Mr. *Sale* (instructed by Messrs. *Harris* and *Simmons*) for the plaintiffs.

No one appeared for the defendants.

The opinion of the High Court (MITTER and GRANT, JJ.) was as follows :—

OPINION.

We think that the present case is entirely governed by the judgment in *Kedar Nath Dut* v. *Sham Lal Khettry* (1). As in that case, so in this, the question is, whether the memorandum or the letter of deposit referred to in the questions submitted to us was itself a contract of mortgage, or simply evidence of a fact from which the mortgage could be inferred. We think for the reasons given in *Kedar Nath Dutt's case* that the letter of deposit, as it is called in the questions submitted to us, was not a contract of mortgage between the parties. The equitable mortgage was effected by the deposit of the title-deeds by the defendant No. 1 before the writing of that letter of deposit took place. In that letter it is simply recited that an equitable mortgage had been effected by the deposit of title-deeds.

Not only is the present case supported by the judgment of the appellate Court in the case of *Kedar Nath Dutt*, but it may also be supported by the reasons given in the judgment of **[326]** Mr. Justice Macpherson, who heard the case of *Kedar Nath Dutt* in the original Court. There the transaction, according to the view taken by the appellate Court, was not completed till the debtor in that case executed the note of hand, but in this case the execution of the note of hand preceded the deposit of the title deeds, and the letter of deposit was written about two hours after. That being so we think that in this case the transaction was completed before the letter of deposit was written. Upon both these grounds we agree with the learned Recorder in the answers to be given to the questions submitted to us. But with reference to the second question we desire to say that we by no means endorse his view that the plaintiffs would be entitled to a conveyance to them of the legal estate. This question has not been referred to us, but if it were, we should be inclined to hold that the proper remedy is by sale of the mortgaged property.

The record will be returned to the lower Court, and under s. 57 of Act XVII of 1875 the costs of this reference shall be considered as costs in the suit.

K. M. C.

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(1) 11 B.L.R. 405.

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JULY 26.

APPEL-
LATE
CIVIL.

13 C. 326.

13 C. 326.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

HIRA LAL CHATTERJI (*Plaintiff*) *v.* GOURMONI DEBI (*Defendant*).* [26th July, 1886.]

Civil Procedure Code, 1882, *s.* 244—*Suit to recover purchase money on reversal of decree under which Sale in Execution took place—Separate suit—Party to proceedings in execution.*

G instituted a suit against *H*, *C* and *P*, which was dismissed with costs, but an appeal was preferred. Pending the appeal, however, *C* took out execution of the decree for costs, and brought to sale a house belonging to *G* of which *H* became the purchaser, paid the purchase money, and got possession. Subsequently the decision dismissing the suit was reversed on appeal, and the defendants in that suit were ordered to pay a certain sum to *G* with costs. *G* then applied for restitution of her house which had been sold under the decree reversed, and eventually obtained an unconditional order for possession, *H* being left to any remedy open to [327] him in respect of the purchase-money. *G* having obtained possession of the house, *H* brought a suit against her to recover the purchase-money. *Held*, that notwithstanding s. 244 of the Civil Procedure Code, he was entitled in this suit to recover the purchase-money as money received to his use, the consideration for it having failed. *H* was not, in his character as an auction-purchaser, a party to the execution proceedings, and for the purpose of the suit was to be treated as a third person.

[R., 13 B. 34 (37); 15 B. 290 (292); 16 C. 33 (37); 24 A. 519 (520) = 22 A.W.N. 144; 113 P.L.R. 1904 = 45 P.R. 1904; D., 18 M. 13 (18).]

THE facts of this case were that the defendant Gourmoni had, on the death of her daughter-in-law, succeeded to the estate of her son Jodu Nath Chatterji, and instituted a suit against Hira Lal Chatterji, the present plaintiff, and two other persons, Charu and Petambur, to recover two Government promissory notes belonging to that estate, which she alleged were being withheld from her by fraud. That suit was in the first Court dismissed with costs, but on appeal that decision was reversed, and the three defendants were directed to pay her the sum of Rs. 2,500 with costs. Before the decision in appeal, however, the defendant Charu took out execution of the decree of the first Court for costs, and brought to sale a house belonging to Gourmoni, of which the present plaintiff Hira Lal became the purchaser. After the reversal of the first Court's decision on appeal, Gourmoni applied for restitution of her property which had been sold under the decree reversed, and eventually obtained an unconditional order for possession of the house, Hira Lal being left to any remedy open to him in respect of the purchase-money. Gourmoni having obtained possession of the house, Hira Lal brought this suit against her to recover the purchase-money with interest, and the costs of certain improvements made while it was in his possession.

The main defence was that the plaintiff had no cause of action, and that the suit was not maintainable with respect to s. 244 of the Civil Procedure Code, the purchase-money being only recoverable in the execution proceedings.

The lower Court found that the suit was not unsustainable on that ground, but that equitably the plaintiff was not entitled to recover the purchase-money; he therefore dismissed the suit.

*Appeal from Original Decree, No. 530 of 1885, against the decree of Baboo Sharoda Prosad Chatterji, Rai Bahadur, Subordinate Judge of Hooghly, dated the 8th of September 1885.

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The plaintiff appealed to the High Court.

[328] Baboo *Nil Madhab Bose*, for the appellant.

Dr. *Guru Das Banerjee*, and Baboo *Boidyo Nath Dutt*, for the respondent.

The following judgments were delivered by the Court (PETHERAM, C.J. and GHOSE, J):

JUDGMENTS.

PETHERAM, C.J.—This is a suit which has been brought by the plaintiff against the defendant to recover a sum of Rs. 2,750 and interest, and various other sums. The lower Court has dismissed the suit altogether, and so the matter comes before us now in appeal.

The facts of the case are that, some time ago, the present defendant brought a suit against the present plaintiff, and two other persons, to recover a certain sum of money. It is immaterial to enquire what that suit was about. The Court of first instance dismissed that suit with costs, which amounted to Rs. 300 and odd. The plaintiff in that suit appealed from that decision, and while the appeal was pending, the defendants in that suit sued out execution of their decree for costs, and in the execution proceedings the house, in which the then plaintiff was living, was sold and purchased by the present plaintiff, one of the defendants in that suit, for Rs 2,750. Out of that amount the costs, on account of which the execution had been taken out, were satisfied, and the balance, amounting to Rs. 2,429, was paid into Court, whereupon the plaintiff (the present defendant) applied to have that amount paid out to her, and that was accordingly done.

The state of things, therefore, was this ; that the house had passed into the hands of the auction-purchaser, who happened to be also the execution-creditor, the costs for which execution had been issued were satisfied, and the balance of the purchase money, the Rs. 2,429, had passed into the hands of the plaintiff in that suit, that is, of the person whose house it was that had been sold.

That being the state of things, the next thing that happened was, that the appeal, which had been preferred by the then plaintiff, came on for hearing. The appellate Court was of opinion that the decree under which the house had been sold [329] was wrong, and that there ought to have been a decree, in favour of the then plaintiff. The Judge, therefore, set aside that decree, and decreed the plaintiff's suit, and consequently that decree being gone, the sale was gone too, and had to be got rid of in some form or other.

It being borne in mind that the person who had purchased the house in execution was one of the defendants, and consequently a party to the cause, an application was made by the now defendant, who was the plaintiff in that suit, under the provisions of the Code of Civil Procedure, for restitution of her property. This application appears to have been resisted by the auction-purchaser to this extent that he stated that, if the house were restored to the plaintiff, the purchase-money should be refunded to him. It is true that this does not appear directly, but the owner of the house having, in that proceeding, objected to return the money, it may be inferred that the person who had paid the money had made some such objection as that.

However that may be, the Judge before whom the matter came seems to have held that, as between the parties to the suit, he was entitled to order the restitution of the house because the decree had been set aside,

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but that he was not in a position to say that, if that were so, the money should be paid back as well. But whether he came to that conclusion or not, at all events he refused to make the order that the money should be returned to the purchaser, although he ordered that the house should be re-conveyed to the plaintiff in that suit by her.

The state of things, therefore, now is that the house having been re-conveyed by the purchaser to the then plaintiff, she remains in the position of having both the house and the money, which was paid as the consideration for it, and of which she applied to have her share paid out of Court to her, and which was so paid; and the question arises, whether, under such circumstances, the person who paid the money for the purchase of the house can recover it from her, the owner of the house, as money received to his use, the consideration for it having failed.

I am of opinion that he can. I think that the money was money which was paid by him into Court, in consideration that this particular house should be conveyed to him; and I think that [330] when the owner of the house applied to the Court and took the money out, she in a manner confirmed the sale; as between herself and the purchaser she made the transaction her own; and, therefore, I think, that when she put the law in motion to cancel the sale and take the house back again, she placed herself in the position of a person having in her possession money which belonged to another, the consideration for which had failed and so came within the ordinary rule of law that a person under these circumstances can be made to refund the money to the person fairly entitled to it.

I think, therefore, that notwithstanding the provisions of the Code of Civil Procedure, which provide that all matters between parties to the execution proceedings shall be decided in the execution department, we are entitled to do justice and say that this money must be returned to the plaintiff, and a sufficient reason to give for that is that the plaintiff, in the character in which he appears in this suit, was not a party to the execution proceedings. His character, with reference to this transaction, was that he was an auction-purchaser. It is a mere accident that he was an auction-purchaser in a suit in which he was one of the parties. In this suit he must be treated as a third person. He is therefore, I think, entitled to maintain this suit without reference to the provisions of s. 583 taken along with s. 244 of the Code of Civil Procedure.

Under these circumstances I am of opinion that the decree of the Court below must be varied by giving the plaintiff a decree for the sum of Rs. 2,429, with interest thereon at the rate of six per cent. per annum from the 15th March 1885 to this date. The costs will be in proportion to the amounts decreed and disallowed respectively.

GHOSE, J.—I agree to the decree which my lord proposes to pass in this case.

J. V. W. *Decree Varied.*

13 C. 331.

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[331] APPELLATE CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

LALIT MOHUN SHAHA (*Plaintiff*) *v.* SRINIBAS SEN (*Defendant*).*
[29th July, 1886.]

Arrears of rent, Suit for—Payment by Durputnidar to stay sale—Regulation VIII of 1819—*Bengal Act VIII of* 1869, *s.* 62.

The zemindar of an estate, in which the plaintiff and defendant respectively had purchased putni and durputni tenures, obtained decrees for arrears of rent accruing before their purchases, though one of the decrees was obtained subsequently to defendant's purchase, and in execution of these decrees he advertised the putni for sale, and the amounts due were paid into Court by the defendant to protect the tenure from sale. In a suit by the putnidar against the durputnidar for arrears of rent accruing due subsequently to the defendant's purchase: *Held*, that the defendant was, on the construction of s. 13 of Regulation VIII of 1819, and s. 62, Bengal Act VIII of 1869, entitled to set off such payments against the plaintiff's claim. *Nobogopal Sircar* v. *Sreenath Bandopadhya* (1) followed.

THIS was a suit for arrears of rent in which the defendant claimed to set off against the plaintiff's demand sums paid by him, as he alleged, on behalf of or for the benefit of the plaintiff, to save the estate from sale. The plaintiff and defendant had become by purchase respectively putnidar and durputnidar under the same zemindar. The amounts the defendant claimed to set off were payments into Court made by him in satisfaction of decrees obtained by the zamindar against the putnidar, under whom the defendant's durputni was held, one of these decrees being previous, and the other subsequent, to the date of the defendant's purchase, which was admittedly made at an auction sale of the tenure for its own arrears.

The Munsif found that the defendant was not entitled to set off the amount paid in respect of the decree obtained before the defendant's purchase, but he allowed the set-off in respect of the other decree. He therefore decreed the plaintiff's claim in part only.

On appeal, however, the Judge allowed the whole set-off claimed by the defendant.

From this decision the plaintiff appealed to the High Court.

[332] Baboo *Nil Madhab Bose* and Dr. *Gurudas Banerjee*, for the appellant.

Baboo *Durga Dass Dutt*, for the respondent.

The judgment of the Court (PETHERAM, C. J., and GHOSE, J.) was as follows:—

JUDGMENT.

PETHERAM, C.J.—The plaintiff in this suit is a person who, in the month of Srabun 1289 (July 1882), purchased a putni by private sale. At the time of his purchase, the land, which was the subject of the putni, was in the possession of the defendant as durputnidar, he having bought it at an auction sale for arrears of rent due upon the tenure, some six months

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* Appeal from Appellate Decree, No. 898 of 1886, against the decree of H. F. Matthews, Esq., Judge of Nuddea, dated the 2nd of February 1886, modifying the decree of Babu Girindra Mohun Chuckerbutti, Munsif of Kooshtea, dated the 12th of September 1885.

(1) 8 C. 877.

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previously, and at the time of these purchases there was due to the zemindar, or the superior landlord of the whole, three years' rent at the rate of Rs. 43 a year, that rent having become due before either the plaintiff or the defendant had got on to the land.

By the terms of the durputni under which the former durputnidar, whose tenure has now passed to the defendant, held the property, he was to pay to the putnidar, who, since the purchase, is represented by the plaintiff, the sum of Rs. 73 annually; Rs. 43 was to be paid to the zemindar in discharge of the putni rent; and the remaining Rs. 30 to his (the defendant's) immediate landlord, the putnidar, now represented by the plaintiff.

That being the state of things, the zemindar obtained a decree against the plaintiff's predecessor in title, or at all events, in the name of the plaintiff's predecessor in title (he being the person whose name appeared in his sherista), for the three years' arrears which were due from the putnidar to him, and in satisfaction of that decree he advertized the putni for sale. The plaintiff, the then putnidar, did not pay the money covered by the decree, but it was the defendant who did so, and thus saved the putni from being sold.

It must be borne in mind that the decree was for a sum of money for which the putni was liable to be sold in whosesoever hands it might be found, and upon the sale of the putni, all the subordinate interests, including that which had come into the hands of the defendant, would have fallen in, and the zemindar would have been in a position to turn out all under-tenants and take the land into his own hands.

[333] It must also be borne in mind that the person who was *personally* liable to the zemindar for the rent at the time when it became due was the former putnidar. Under these circumstances, it is clear that the present plaintiff could not be personally liable for the rent, because he made no contract with the zemindar to pay it, and his interest only came into existence after the money became due.

If this were a matter to be decided without reference to legislation, I should be disposed to say that the defendant was not entitled to set these payments against the plaintiff's claim for rent, which became due subsequent to his, the defendant's, purchase of the durputni. But this is not a matter which can be decided in that way: it must be decided with reference to s. 13 of Regulation VIII of 1819 as extended by s. 62 of Bengal Act VIII of 1869 to under-tenures under this Act, and then the question arises, whether the meaning of those sections is that the holder of a subordinate tenure of this kind who for the protection of the whole tenure, makes a payment to the zemindar, which the owner of the tenure above his ought to have paid, is entitled to deduct the amount so paid from the rent payable to his putnidar, in whosesoever hands the putni may be, or to treat the sum as a loan made to the person who, at the time of the payment, happens to be the owner of the putni.

This Regulation has received judicial interpretation. In the case of *Nobogopal Sircar* v. *Srinath Bandopadhya* (1) this Court held that the durputnidar is to treat the proprietor of the putni as his debtor, whether the original rent accrued in his time or not. I think that that decision, unless we are clearly of opinion that it is wrong, is binding upon us; and

(1) 8 C. 877.

having regard to that fact, and also to the fact that, reading that Regulation carefully, it seems that the meaning of the Legislation was that which is put upon it by the Judges of this Court; and bearing also in mind that the tenure held by the plaintiff was primarily liable for the claim of the zemindar, I think that we must follow that case; and in that view I think that the appeal must be dismissed with costs.

J. V. W. *Appeal dismissed.*

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[334] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

UMER ALI (*Complainant*) v. SAFER ALI AND ANOTHER (*Accused*).*
[19th August, 1886.]

Criminal Procedure Code, ss. 191, 202, 203—*Complaint—Magistrate, Power of—"May take Cognizance of," Meaning of.*

The use of the term "may take cognizance of any offence" in s. 191 of the Criminal Procedure Code does not make it optional with a Magistrate to hear a complaint, but refers rather to the action of the Magistrate in taking cognizance of an offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant and then can either issue summons to the accused or order an enquiry under s. 202, or dismiss the complaint under s. 203.

[F., 4 O.C. 127 (131).]

THE material portion of the reference to the High Court in this case was as follows:—

"On the 2nd June the complainant presented a complaint against Safer Ali and another, charging them with offences under ss. 323 and 352 of the Penal Code before the Joint Magistrate of Chittagong, Mr. S. J. Douglas. That Magistrate recorded an order to the following effect: 'I decline to take cognizance of this frivolous matter. Complainant seems to have freely abused the man who cuffed him.' Against this order an application was made by the complainant before the late Officiating Sessions Judge, Mr. R. H. Greaves, who called upon the Joint Magistrate to inform him whether complainant had been examined before his complaint was dismissed. The Joint Magistrate in his reply informed him that the complaint had not been dismissed at all, but that under s. 191 of the Criminal Procedure Code he had declined to take cognizance of the offences stated in the complaint, that section by the use of the words 'may take cognizance of an offence upon receiving a complaint of facts which constitute such offence' authorizing a Magistrate to use his discretion in so taking cognizance. With this view of the law the late Officiating Sessions Judge disagreed, and a further explanation was called for [335] from the Joint Magistrate: that explanation has since been received. The opinion of the late Officiating Sessions Judge was that the matter should be referred to the High Court, and as I am of the same opinion as he was, I am adopting this course.

"It appears to me that s. 191 of the Criminal Procedure Code does not contemplate such a procedure as that which has been adopted by the

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*Criminal Reference, No. 154 of 1886, made by F. H. Harding, Esq., Sessions Judge of Chittagong, dated the 22nd of July 1886, against the order passed by S. J. Douglas, Esq., Joint Magistrate of Chittagong, dated the 2nd of June 1886.

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Joint Magistrate. It specifies the circumstances in the existence of any one of which a Magistrate may take cognizance of an offence, and in the absence of which he is precluded from taking such cognizance. The words "take cognizance" are not defined in the Criminal Procedure Code. In the present instance the petition was received by the subordinates of the Joint Magistrate's Court, and the stamp was punched. It appears to me that, having gone so far, the Joint Magistrate was bound to record the examination of the complainant under s. 200, after which he could have dealt with the case under ss. 202 and 203 if he thought proper.

"The matter is one with which I am not able to deal under s. 437, for the complaint has not been dismissed under s. 203. That s. 191 was not intended to confer upon Magistrates the power of dealing with complaints in the manner adopted by the Joint Magistrate is, I think, apparent from the fact that, whilst s. 437 gives the Court of Session power to order an enquiry into a complaint which has been dismissed under s. 203, it gives it no such power with regard to cases of which the Magistrate has refused to take cognizance. That this is an omission is very improbable, for this asserted power of refusing to take cognizance under s. 191 is even more likely to be abused than that of dismissal given under s. 203.

"The matter is one of considerable importance, and I think it desirable on this account to have an authoritative decision on the point."

No one appeared for either party on the reference.

The opinion of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

OPINION.

The Joint Magistrate has taken an erroneous view of the law regarding proceedings to be taken on receipt of a complaint made under s. 191 of the Code of Criminal Procedure. He is not competent **[336]** to refuse to take cognizance of an offence on receipt of a complaint of facts constituting an offence, but he is rather bound to examine the complainant. He can then proceed to issue summons on the accused or to order an enquiry under s. 202, or to dismiss the complaint under s. 203. The use of the term "may take cognizance of any offence" does not make it optional with a Magistrate to hear the complainant. It refers rather to the action of a Magistrate in taking cognizance of an offence in either of these specified courses in which the facts, constituting an offence, may be brought to his notice. The case must be tried.

J. V. W.

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APPELLATE CIVIL.

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Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Ghose.

KEDAR NATH COONDOO CHOWDHRY (*Defendant No. 1*) v. HEMANGINI DASSI (*Plaintiff*).* [29th July, 1886.]

Hindu law—Maintenance—Maintenance of mother on partition between her son and step-sons.

A widowed mother on a partition taking place between her son and her step-sons, of the property left by her husband, is not entitled to have the whole property charged with her maintenance, but only that portion of it which is allotted to her son on the partition.

A separation in food and worship took place between a Hindu widow, her son and her two step-sons, after which the widow lived as a member of her son's family, and was maintained by him. A partition of the moveable property having been made, a suit was brought by the son against the step-sons for partition of the immoveable property, and a decree was made defining the shares of the parties therein. That suit was brought and decreed pending a suit by the widow against her son and step-sons for maintenance from the date of the separation, and for fixing her future maintenance, in which suit she sought to have the maintenance charged on the whole estate left by her husband. *Held*, that, from the separation to the decree in the partition suit, the widow was entitled to maintenance charged on the whole estate; and subsequently to the decree to a charge on her son's share only. But inasmuch as she had during the former period been maintained by her son, and could not claim maintenance over again from her step-sons, whatever [337] claim her son might have against them for contribution for her maintenance during that time, the suit as against them must be dismissed.

Where the annual value of the whole estate was found to be Rs. 70,000, and the proportionate annual value of her son's portion was Rs. 23,333, Rs. 150 a month was held under the circumstances to be a suitable maintenance.

[F., 11 C.W.N. 239 (242); R., 15 C. 292 (312); 19 C. 26 (33); 5 C.L.J. 310 (315)=11 C.W.N. 698; Cons., 1 N.L.R. 33 (38).]

THE facts of this case are sufficiently stated in the judgment of the Court (PETHERAM, C.J., and GHOSE, J.)

Mr. *Woodroffe* and Baboo *Troilokya Nath Mitter*, for the appellant.

Mr. *Evans*, Babu *Guru Das Banerjee*, and Baboo *Karuna Sindhu Mukherji*, for the respondent.

JUDGMENT.

These two appeals arise out of a suit brought by Sreemutty Hemangini Dassi, widow of the late Tara Churn Coondoo, for maintenance. The said Tara Churn Coondoo had two wives—Prosunnomoyi and Hemangini, the plaintiff. Prosunnomoyi predeceased Tara Churn, and the latter died on the 8th Bysack 1272 (19th April 1865), having executed a will on the 5th Bysack 1272, and leaving Hurish Chunder Coondoo, the defendant No. 2, his son by Hemangini, and two other sons, Kedar Nath, the defendant No. 1, and Annoda Pershad. The latter died in June 1882, leaving a will by which Kedar Nath, his whole brother, was appointed executor of his estate; so that Kedar Nath is the defendant in this suit, not only on his own behalf, but also as representing the estate left by Annoda Pershad.

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* Appeals from Original Decrees, Nos. 396 and 414 of 1885, against the decree of Baboo Bhuban Chunder Mookerjee, Rai Bahadoor, Subordinate Judge of Hooghly, dated the 30th of March 1885.

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The present suit, as already mentioned, is by Hemangini Dassi, the mother of Hurrish Chunder, the Defendant No. 2, for maintenance, and it is a suit not only against her own son, but also against her step-son Kedar Nath, and the legal representative of Annoda Pershad, the other step-son. It seeks to establish a charge for her maintenance against the whole estate left by her husband Tara Churn Coondoo. The plaint states that, on the 12th Falgoon 1290 (23rd February 1884), the family became separate, and since then the plaintiff has been obliged to provide herself with the expenses of her maintenance and the performance of religious ceremonies; that she served the defendants with a notice in respect to her claim for maintenance, and that the defendants not having complied with the requisition contained in the said notice, she has [338] been compelled to bring the suit. And she prays that a sum of Rs. 500 per month be determined to be the proper allowance for her maintenance, and the expenses for religious ceremonies and pilgrimages, and that it be declared to be a charge upon the estate left by her husband. She also prays that Rs. 3,000, being the amount of her maintenance at the above rate since the date of the separation until the date of the institution of the suit, may also be decreed.

It appears that since the institution of this suit, which was on the 13th September 1884, and the filing of the written statement by Kedar Nath on the 6th December 1884, the plaintiff's son Hurrish Chunder instituted two suits for partition of the family estate; one was against Kedar Nath and the legal representative of Annoda Pershad, as also against Gooroo Dass Coondoo and others who are the cousins of Kedar Nath and Hurrish Chunder, and who represent a collateral branch of the family, in respect of the properties which then belonged jointly to both the branches of the family, and of which a six annas share belongs to Tara Churn's branch of the family; and the other suit was against Kedar Nath and the representative of Annoda Pershad, in respect to such properties as belonged exclusively to Tara Churn and his descendants; and it appears that one of the main grounds upon which the present suit was defended by Kedar Nath Coondoo was that, there having been already a separation in food and worship, as admitted by the plaintiff, and also by reason of the said partition suits then pending in Court, the plaintiff was not entitled to any decree for maintenance against him, but that her claim could only lie against her own son, and that the same could only be realized out of the share of the joint property which was to be allotted to her son upon the partition. The defendant also pleaded that, upon the terms of the will left by Tara Churn Coondoo, the suit could not be maintained, and that the plaintiff since the separation had been living in joint mess with her son, and all her expenses were being supplied by him; and that lastly the amount of maintenance claimed by her was too exorbitant. Hurrish Chunder Coondoo, the plaintiff's son, made no defence in the suit; and it would appear upon the conduct of the parties that it is a suit not really against her step-son [339] *as also* her own son, but her step-sons alone; and that had it not been for the suit for partition by her son, which was then evidently contemplated, the present suit would not most likely have been instituted.

The Subordinate Judge has substantially found that the plaintiff's allegation that she was obliged to provide herself for her own maintenance since the separation is untrue, and that, as a matter of fact, she has been residing with her own son, who is prosecuting the case. He has accordingly disallowed her suit so far as back maintenance was concerned. He

is, however, of opinion that the plaintiff's maintenance being a charge upon the whole estate left by Tara Churn, and the estate having not been actually partitioned, she is entitled to a declaration of her right to maintenance as against the entire estate; and being also of opinion that the terms of the will executed by Tara Churn do not preclude the plaintiff from maintaining this suit, and that Rs. 180 per month is a suitable allowance for her separate maintenance, ordinary *brotus*, extraordinary *brotus*, pious acts and pilgrimages, he has given a decree to the plaintiff declaring that the said amount is to be a charge upon the estate left by her husband now in the hands of the defendant No. 1 and the defendant No. 2, in the proportion of two-thirds and one-third share, that is to say, the defendant No. 1, Kedar Nath Coondoo, to pay Rs. 120 per month, and her own son, defendant No. 2, Rs. 60 per month.

It would appear from the evidence on oath given by Kedar Nath Coondoo in the cause that, at the time when the decree was passed by the Subordinate Judge, there had already been a division between the plaintiff's son and her step-son of the cash and Government securities, and it would further appear from the two judgments in the said partition suits and copy of the plaints in the said suits that were produced before us at the hearing, and which were received in evidence by the consent of both parties, that a decree has been passed on the 20th February of the present year determining in the suit of Hurrish Chunder against both the branches of the main family the share of Hurrish Chunder to be 2 annas and of Kedar Nath and his nephews to be 4 annas out of the 6 annas' share in properties belonging jointly to the whole [340] family. The share of Hurrish Chunder in the separate properties of Tara Churn Coondoo's branch of the family has also been determined, we take it, upon the same principle, the judgment in the other suit having been referred to in the judgment which related to the exclusive properties of Tara Churn and his descendants, that is to say, the share of Hurrish Chunder being one-third and that of Kedar Nath and his nephews being two-thirds. It would further appear from the above two judgments that the shares of the parties being defined, accounts have been ordered to be taken by the Commissioners, and partition made between the parties.

In this state of things, the question that arises for consideration is, that in view of the said decree for partition, what is the relief which the plaintiff is entitled to in regard to her maintenance?

This question, we may say, seems to be one almost of the first impression, there being no distinct text in the Hindu law-books nor any distinct authority upon the matter.

There can be no doubt that, under the Hindu law, the maintenance of a widow is a charge upon the inheritance, that is to say, upon the whole estate which, upon the death of the last owner, devolves upon his legal heirs, and in that view, so long as the estate left by Tara Churn Coondoo remained joint and undivided, there can also be no doubt that the plaintiff would be entitled to claim her maintenance out of the whole estate held by the defendants. But then the question is, what would be the rights of the plaintiff, and the true position of the parties, if there be a partition as between the plaintiff's son on the one hand and her step-sons on the other hand? No doubt, as matters at present stand, there has not been a complete partition between the parties, but it is clear at the same time that their shares have been ascertained and defined, and as a matter of fact there has been a partial division of the properties, which has the

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effect in law of making the plaintiff's son Hurrish Chunder a separate member of the family and entitled to a separate and defined share of the family property.

It was contended by the learned counsel for the plaintiff that the rights and liabilities of the parties were to be determined [341] and regulated by facts as they existed at the time when the suit was brought, and not as they occurred subsequent thereto; and that the question raised by the defendant in this case should be left to be determined in the partition suit in which the mother was one of the defendants. But we cannot accept this view of the matter. We think we cannot shut our eyes to the fact which appears upon the record and upon the two judgments adverted to above, *viz.*, that there has been a definition of the shares of the plaintiff's son and of the defendants, and also a partial partition in accordance with such shares; and it therefore seems to us that we are called upon in this suit to make such a decree as would be consistent with the true state of the family as it exists at present. The parties to the suit are governed by the Bengal school of law, and we have to determine what, under the law as it is administered in Bengal, the true rights of the plaintiff are in respect to the maintenance claimed by her.

The rights of a Hindu widow as a widow arise out of the marriage, and upon the death of her husband, in the event of there being no sons, she succeeds, under particular texts, to the estate left by her husband. Where the husband leaves a son or sons, all that she is entitled to is maintenance out of the estate. When during the lifetime of her husband there is a partition of the family property, she gets if she is sonless, but not if she has a son (in which case her son alone is entitled to a share), an equal share with the sons of her husband; but where there is no such partition during the lifetime of her husband, what she is entitled to get, when the estate, upon her husband's death, passes to the sons, whether she has a son or sons born of her, or not, is only maintenance out of the estate, and when the Hindu law prescribes a share being allotted to a woman after her husband's death, upon a partition amongst her sons, it is a share which is given to her simply in lieu of maintenance, and not because she is a coparcener in the estate, or that she has any pre-existing rights, and the share which is thus given to her reverts upon her death to those heirs of her husband out of whose portion the said share was taken [see Shama Churn's *Vyvasta Darpana*, Edition 1883, pp. 488, 521-522, and the authorities quoted [342] therein; Strange's Hindu Law, Edition 1830, Vol. II, p. 307, and *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1).]

The question that then arises is, what may be her rights upon a partition taking place between the sons? In the case of many sons of one individual by different mothers, where the number of sons is equal, the partition, according to certain texts, may be made by them by allotment of shares to the mother, that is to say, there being no difference in the son's shares, each of the mothers takes a share for her sons. If, however, the sons are unequal in number, then a division, with reference to their mothers, cannot be made, and in that event the partition is made with reference to the number of sons themselves (see Dayabhaga, Ch. III, Sec. I, V. 12 and 13; Vyvasta Darpana, pp. 461-463, and the texts quoted therein.) When the partition is made between the different groups of sons born of different mothers, their mothers, whether they be their own mothers or stepmothers,

(1) 9 W.R. 62.

get no share whatsoever, and this is apparently upon the principle that they are not the natural mothers of all the sons (see Vyvasta Darpana, 518, and the authorities cited therein, and Col. Dig., Vol. 3, pp. 98-102). When subsequently, each group of sons come to a partition among themselves it is then that their respective mothers get a share, but a mother having no son, or only one son, gets no share at all, but simply maintenance. If, however, at the time of partition with half brothers, the uterine brothers also come to a partition amongst themselves, their mother would be entitled to a share out of her own sons' shares (see Vyvasta Darpana, pp. 518 and 519 ; Dayabhaga, Ch. III, Sec. 2, V. 29 and 30) ; *Joymonee Dassee* v. *Attaram Ghose* and *Seebchunder Bose* v. *Gooroopersaud Bose* (1). In the case of the number of sons by different mothers being equal, the partition, as already observed, may take place with reference to the mothers, the principle evidently being that each of the mothers and her sons become by the separation and partition the members of a distinct and separate family, holding as it were in common the share which is allotted to them ; likewise in the case of a partition, where the number of sons in unequal,and where **[343]** the separation is between the several groups of sons, each of the groups becomes one joint family, and their mothers become members of their respective families, and continue to be so until there is a separation and partition among her sons. This seems to be almost the universal practice in Bengal, and no instance, as far as we are aware, has occurred where, notwithstanding such a separation and partition, a mother has claimed her maintenance against her step-sons. Having become a member of her own sons' family, she would naturally look to her sons, and not to her step-sons, for her maintenance, and indeed that was the view that was thrown out by Sir Francis Macnaghten so early as the year 1824 (see pp. 42 and 59 of his book ; as also Strange's Hindu law, Vol. II, pp. 291 and 309) ; and this seems to be but consistent with the Hindu Law ; for in the event of a partition taking place amongst her own sons, she gets a share out of her sons' shares and not out of her step-sons' shares. In this view of the matter the mother can only claim maintenance in her sons' family, whether she has only one son or more sons than one ; the only difference being that in the latter case, upon a partition amongst the sons, she gets a share in lieu of her maintenance, whereas in the former case, there being no partition possible, she cannot possibly get a share, but must be content with a maintenance. In the case of *Joymonee Dassee* already referred to, it will be found, upon an examination thereof, that upon a partition between Lakshi Priya's son Atmaram and his three half-brothers, it was understood and admitted, and it was accordingly declared that his mother Lakshi Priya was not entitled to any separate property, but was to look to her son for her maintenance. It is indeed true that Lakshi Priya, the mother, was at the time of the suit not subject to the jurisdiction of the Supreme Court which dealt with the case, and as such the above declaration was not binding upon her, but we do not refer to the said declaration as a precedent in this case, but simply as showing what, so late back as in December 1823, was fully understood to be the true position of a mother, situated as the present plaintiff is.

So long as there is no partition between the several groups of sons, a mother has indeed the security of the whole estate left by

(1) Macnaghten's Cons. of H. L., pp. 64-72.

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her husband for her maintenance, and this is just and proper, [344] because, so long as the estate remains joint, she is not in a position to predicate which particular share of the family property is to be charged for her maintenance ; but the moment such a partition takes place, she is in a position to predicate it, because the share which is eventually to come to her in lieu of maintenance, when such a share does come to her by the act of her own sons, is to come out of her sons' share of the family property ; so that it is but consistent with reason, equity and justice that, upon the partition taking place, her maintenance is to attach to that share of the estate which is allotted to her sons. By the separation and partition she becomes a member of her sons' family, and it would not seem to be reasonable that she should be allowed to claim maintenance against another family of which her step sons become members ; and, indeed, if she could claim such a right, the partition itself would be but an imperfect one.

It was argued before us that the same principle which governs the rights of a sonless widow, ought to govern the case of a widow who may have a son or sons, that is to say, whereas a sonless widow gets no share but only maintenance which is to come out of the whole estate, so in the case of a mother having a son or sons, a decree should be made charging the whole estate, or charging any particular portion of the estate which may be adequate for her maintenance. But it appears to us that the case of a sonless stepmother is very different indeed from the case of a mother having son or sons, because upon a separation and partition taking place, the step-mother does not become the member of any particular family, but she continues, as it were, a member of all the families into which the original family is divided ; and she is therefore not in a position to predicate which particular share of the family property ought to provide for her maintenance. In the present case, it seems clear that the plaintiff upon a separation and partition between her son and step-sons does become, and has in fact become, as substantially found by the Sub-Judge, a member of her son's family ; and she is in a position to predicate which of the shares of the family property determined by the partition ought to provide for her support.

Upon all these considerations it seems to us that up to the time of the decree for partition defining the separate shares of the members [345] of the family, the plaintiff would be entitled to claim her maintenance against the whole estate, and subsequent thereto against the share allotted to her son. But then it appears that since the separation in 1290 she has been maintained in the family of her son, and as such cannot justly claim maintenance over again from her step-sons, or the share which now belongs to them. Possibly her son could claim contribution from her step-sons for the money spent by him for her maintenance, but that is not the matter now before us. The result, therefore, is that, so far as her step-sons are concerned, this suit must fail.

The plaintiff's son has preferred no appeal against the decree passed by the lower Court ; and inasmuch as her maintenance is to come out of the share which has devolved upon him, and also because it is optional with her either to remain in joint mess with her son or not, it becomes necessary to determine what may be a suitable allowance for her. Mr.Strange, in his book on Hindu law, see Vol.I, p. 171, observes as follows: "It," meaning maintenance, " may be supplied by assignment of land or an allowance of money, in either case proportioned to her support and that of those defendant upon her, including the performance of charities and the

discharge of religious obligations ; and this always with reference to the amount of the property so as at the utmost (as has been said) not to exceed a son's or other parcener's share. In whatever way the provision is made, care should be taken to have it secured. The manner of doing this is discretionary, there being no special law directing how provision is to be made. See also Shama Churn's Vyvasta Darpana, p. 152, and cases quoted in Vol. II, pp. 359—361 and 368. In view of the principles enunciated above, and bearing also in mind that the performance of religious ceremonies, acts of piety, and pilgrimages, are for the benefit of the soul of her departed husband, and also for her own spiritual benefit, we think that without following the details which have been adopted by the Subordinate Judge, and without expressing any opinion as to the necessity or otherwise of performing any particular religious ceremonies, or undertaking any particular pilgrimages, we think that, regard being had to the social position of the family and the annual value of the entire estate which has been found to be Rs. 70,000, and to the **[346]** proportionate annual value of her son's portion of the estate, *viz*, Rs. 23,333 or thereabouts, that Rs. 150 a month is a suitable allowance for her, and this she will be entitled to receive from the time when she may separate from her son.

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We therefore direct that the decree of the lower Court be set aside ; the suit, so far as the defendant No. 1 and the representatives of Annoda Pershad are concerned, be dismissed ; the plaintiff's claim for back maintenance be also dismissed, but that a declaratory relief be granted to her as expressed above, as against the share of the estate left by Tara Churn Coondoo now in the hands of her son, the defendant No. 2.

As regards the costs, we think that the defendant No. 1 is entitled to his costs both in this and the lower Court and as against him the suit is dismissed with costs.

J. V. W. *Decree varied.*

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13 C. 346.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

RAKHAL CHUNDER BOSE AND OTHERS (*Petitioners*) *v.* DWARKA NATH MISSER (*Decree-holder*) AND KALLY DASS MISSER (*Auction-purchaser*) AND OTHERS (*Judgment-debtors*).*
[22nd June, 1886.]

Civil Procedure Code, s. 311—*Application to set aside sale*—"*Person whose property has been sold*"—*Mortgagee*—*Transfer of Property Act* (*IV of* 1882), *ss.* 86, 87.

The mortgagees of a certain tenure obtained, on 11th September 1884 under s. 86 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April, 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under s. 311 of the Civil Procedure Code, to have the sale set aside for material irregularity, *Held*, that, under s. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within

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* Appeal from Order, No. 298 of 1885, against the order of Baboo Kanti Chunder Bhadhuri, Munsif of Satkhira in Khoolnah, dated the 5th of September 1885.

1886 JUNE 22. — APPELLATE CIVIL. — 13 C. 346.

the words of s. 311, "person whose property has been sold," and entitled them to make the application.

[F., 23 B. 450 (453); Cons., 5 C.W.N. 821 (F.B.)=29 C. 1 ; R., 15 C. 488 (492) (F. B.) ; 21 M. 416 (417) ; 23 B. 181 (184) ; D., 5 C.W.N. 63 (64).]

IN this case the judgment appealed from was as follows :—

[347] " This was an application to set aside a sale on the ground of material irregularity in publishing or conducting that sale. The application was made under s. 311 of the Code of Civil Procedure. The applicants are the mortgagees, and the question is whether the words 'any person whose immoveable property has been sold' in s. 311 of the Code of Civil Procedure do or do not include a mortgagee. The case of *In the matter of the petition of Bhagbati Churn Bhattacharjee Chowdhry* (1) is in point. It has been there decided that the word 'property' in those words means property *de facto* and not property *de jure*. The mortgagee, in my opinion, is not the owner of the property *de facto*, but he is master of it *de jure*. He no doubt has a charge on the property, and even on the surplus of the proceeds of sale after payment of the rent, etc., for the arrears of which it was sold. This being so, the petitioners cannot apply to the Court under s. 311 of the Code of Civil Procedure, and the application is therefore rejected and the sale is confirmed."

From this decision the mortgagees appealed to the High Court.

Baboo *Troilokya Nath Mitter*, for the appellants.

Baboo *Rash Behari Ghose* and Baboo *Sharoda Pershad Roy*, for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows :—

JUDGMENT.

The appellants, who are the mortgagees of a certain tenure, obtained a decree for foreclosure under s. 86 of the Transfer of Property Act. That decree was made on the 11th September 1884, and declared that, on failure to pay the amount due, the mortgagor's right of redemption should be barred on the 11th March 1885. In that month the mortgagor applied to the Court under s. 87 to enlarge the time, and on the 6th April, the Court made an order fixing the 30th idem as the date on which the foreclosure would become absolute in the event of non-payment.

Meantime, the superior holder of the tenure obtained a decree against the mortgagor for rent, and in execution of that decree the tenure itself was sold on the 6th April, 1885 (apparently) [348] free of incumbrances. On the 10th April, the mortgagees applied under s. 311 of the Civil Procedure Code, to have the sale set aside, and on the 5th September following the Court disposed of that application, holding on the authority of the case of *In the matter of the petition of Bhagabati Churn Bhuttacharjee Chowdhry* (1), that a mortgagee was not a person whose property had been sold within the meaning of that section. Against that order the mortgagees now appeal.

It is pressed upon us on their behalf that a decree for foreclosure having been made on the 11th September 1884, the proprietary right in the tenure passed to the mortgagees on that date, or if not then, at any rate on the 11th March 1885, the date on which the foreclosure was to become absolute—it being contended that the order of the 6th April enlarging the time could not have retrospective effect. On the other hand, it is urged

(1) 8 C. 367=10 C.L.R. 441.

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that the proprietary right does not pass to the mortgage until the foreclosure decree is made absolute, and that no such absolute decree has yet been made in this case.

We think that, looking to the terms of s. 86 of the Transfer of Property Act, it may fairly be said that the mortgagees had such an interest in the property as entitled them to make an application under s. 311 of the Code. A decree under s. 86 virtually has the effect of declaring the mortgagees' right to the property subject to the liability to "transfer" it to the mortgagor on payment of the sum found due within a certain date. If payment is not made on or before the date fixed, the mortgagor is "absolutely debarred of all right"—not to the property, but —"to redeem the property."

In such a state of things it would be as difficult to hold that, after a foreclosure decree, the property still belongs solely to the mortgagor, as it would be to hold that it is the property of the mortgagee. We think that either the mortgagor or the mortgagee, under such circumstances, would be entitled to apply to the Court under s. 311 of the Code if he had reason to believe that the property had been irregularly or collusively sold. Were we to hold otherwise and to say that the mortgagee had no right to intervene under that section, the result would be that a mortgaged [349] property might be sold behind the back of the mortgagee for a very inadequate sum, and he might thus be deprived of the security for which he had already obtained a conditional decree, or driven to institute fresh legal proceedings to set aside the fraud that had been practised upon him.

We accordingly set aside the order of the Munsif of the 5th September last, and direct that the appellants' application be heard. Appellants will have their costs in this appeal.

J. V. W. *Appeal allowed.*

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13 C. 349.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ABDUL HAMID *v.* THE EMPRESS.* [7th September, 1886.]

Forgery—Penal Code, s. 464—Intention in fabricating documents—Fraudulent and dishonest fabrication.

The accused, who was a copyist in the Subdivisional Office at *B*, applied for a clerkship then vacant in that Office. An endorsement on his application recommending him for the post and purporting to have been made by the Subdivisional Officer of *B* was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Subdivisional Officer at *B*, informing that latter Officer that he, the Collector, had selected the accused for the vacant post. The Subdivisional Officer, having some suspicion as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office, the accused fabricated a third document, purporting to be a letter from the Subdivisional Officer to the postmaster, asking him to stop the despatch of the demi-official letter. The accused was charged with, and convicted in the Sessions Court of, the offence of forgery, under s.464 of the Penal Code, in respect of the three documents. *Held*, the conviction was right with regard to the two first documents, but with regard

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* Criminal Appeal, No. 491 of 1886, against the sentence passed by J. B. Worgan, Esq., Sessions Judge of Cuttack, dated the 28th of June 1886.

1886 SEP. 7. — APPELLATE CRIMINAL. — 13 C. 349.

to the third document, it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of that section.

[Diss., 35 C. 450=12 C.W.N. 581=7 Cr. L J. 378; F., L.B.R. (1893-1900) 266; 22 B. 768 (769); D., Rat. Unrep. Cr. Cases 627.]

THE facts of this case are sufficiently stated in the judgment of the Court (MITTER and GRANT, JJ.).

Baboo *Umbica Churn Bose*, for the appellant.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

JUDGMENT.

[350] The learned vakeel for the appellant has not contested the finding of the Sessions Judge, but has contended that upon that finding the Sessions Judge ought not to have held that the appellant made a false document within the meaning of s. 464 of the Indian Penal Code in respect of documents X, C, and K, which formed the subject of the charges framed against the appellant. The facts of the case are these: The third clerkship in the Sub-divisional Office at Budruck having fallen vacant, an application, purporting to have been made by the appellant who was a copyist in that office, reached the Collector of Balasore applying for the post. At the foot of this application there was an endorsement, purporting to have been made by the Sub-divisional Officer of Budruck recommending the applicant for the post. The document marked X is the endorsement in question, and it has been found to have been falsely made by the appellant. The document marked C purports to be a letter from the Collector of Balasore to the Sub-divisional Officer at Budruck, informing the latter officer that he, the Collector, had selected the appellant for the vacant post. This is also found to have been fabricated by the appellant. A suspicion having arisen in the mind of the Sub-divisional Officer of Budruck as to the genuineness of this document, he wrote a demi-official letter to the Collector of Balasore to ascertain whether the document marked C was genuine. This letter was posted in the local post office. The appellant having got an inkling of this fact fabricated a letter purporting to be written by the Sub-divisional officer to the address of the post-master, asking him to stop the despatch of his demi-official letter. This document is marked K, and it has been also found that it was fabricated by the appellant. The appellant has been found guilty of forgery in respect of all these three documents, and has been sentenced by the Sessions Judge to three years rigorous imprisonment, that is to say, rigorous imprisonment for one year in respect of the forgery of each of these three documents. It has been found, and it is clear, that the object of the appellant in fabricating two of these documents was to obtain the vacant clerkship by deceiving the Sub-divisional officer of Budruck and the Collector of Balasore. Upon these facts it was con-[351]tended before us that, under s. 464 of the Indian Penal Code, the appellant could not be held to have made a false document in any one of the three instances mentioned above. The contention of the learned vakeel is that, although he fabricated these documents, still it cannot be said that he fabricated them either dishonestly or fraudulently within the meaning of the definition of these two words given in ss. 24 and 25 of the Indian Penal Code.

We are of opinion that this contention is not sound as regards the documents X and C. Whether or not, under the circumstances mentioned above, the appellant may be said to have fabricated these two

1886 Sep. 7. — Appellate Criminal. — 13 C. 349.

documents "dishonestly," it is clear to us that he fabricated them fraudulently within the meaning of the definition of that word given in the Indian Penal Code. As already remarked, his object was to obtain the vacant post in the Sub-divisional Office at Budruck. His intention, therefore, in making these two false documents was to obtain some pecuniary advantage by deceiving the Sub-divisional Officer as well as the Collector. In fabricating X his intention was to deceive the Collector of Balasore; in fabricating C his intention was to deceive the Sub-divisional Officer of Budruck. He, therefore, made these two documents falsely with a view to deceive the Collector of Balasore and the Sub-divisional Officer of Budruck respectively and with the intention of gaining a pecuniary advantage by securing his appointment to the post which was vacant in the Sub-divisional Office of Budruck. That being so, we think that he made these documents fraudulently within the meaning of s. 25 of the Indian Penal Code; but, as regards K, we are of opinion that the contention of the learned vakeel is correct. The intention with which the appellant made this false document was evidently to screen himself from detection of the fraud, which he had already committed by fabricating the documents X and C. That being the intention with which K was fabricated, it cannot be said that he made that document falsely either "dishonestly" or "fraudulently." His intention was not to cause any wrongful loss to another, or wrongful gain to himself, or to derive some pecuniary advantage to himself. The conviction, therefore, as regards K must be set aside, but **[352]** the convictions as regards X and C will stand. Having regard to the gravity of the offence committed by the appellant we are of opinion that no lighter sentence than the one awarded by the Sessions Judge would meet the ends of justice. We, therefore, sentence the appellant to two years rigorous imprisonment in respect of the forgery of X, and leave the sentence as regards C unaltered.

The result is that the cumulative sentence of three years rigorous imprisonment awarded by the Sessions Judge will stand.

J. V. W.

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13 C. 352 (F.B.).

FULL BENCH.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice O'Kinealy and Mr. Justice Macpherson.

SURENDER NATH PAL CHOWDHRY AND OTHERS (*Defendants*) v. BROJO NATH PAL CHOWDHRY AND ANOTHER (*Plaintiffs*).*
[14th August, 1886.]

Res judicata—*Admissibility in evidence of decree in former case.*

The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by the defendants.

The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against the same defend-

* Full Bench Reference in Appeals from Appellate Decree, No. 1740 and 1741 of 1885, from the decrees of J. Crawford, Esq., Officiating Judge of Zilla Nuddea, dated the 13th May 1885, reversing the decrees of Baboo Jogendra Nath Mitter, Munsif of Ranaghat, dated 25th October 1884.

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ants for the rent of the same tenures, and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession and were liable to pay to the then plaintiff his share of the rent

Held, (MITTER, J., dissenting) that the decree in the former suit was not a *res judicata* or even admissible as evidence in the present suit.

[F., 24 C. 330 (333); 28 M. 457 (464) = 14 M.L.J. 404 (F.B.); 10 C.W.N. 1084; **Commented on**, 25 C. 522 (F.B.) = 2 C.W.N. 501; **R.** 12 A. 1 (F.B.); 24 B. 591 (597) = 2 Bom. L.R. 386 = 9 C.W.N. 402 (413); 6 C.L.J. 621 (628); **D.**, 23 C. 693 (697).]

THIS case was referred to a Full Bench by MCDONNEL and GHOSE, JJ., on the 21st April 1886, with the following opinion:—

The plaintiffs, who are the proprietors of 1 anna 8 gundas share of a certain estate, Turf Ranaghat, sued to recover from the defendants Surender Nath Pal Chowdhury and others, their share of the rent said to be due on account of certain tenures [353] held by them by right of purchase. The main defence of the defendants was that the tenures had not been properly described in the plaint, nor were their boundaries and areas given, and hence they were unable to say whether the said tenures were in their possession. The result of this defence was that the plaintiffs were put to proof that the tenures alleged in the plaint were in the defendants' possession. It appears that another co-sharer of the same estate had previously brought a suit against these defendants for the rent of these very tenures, and in that suit the present plaintiffs and the other co-sharers of the estate were made co-defendants. The defence was almost identically the same as is raised in this case, and the Court which had to try the suit found that these defendants were in possession of the tenures and were liable to pay to the plaintiffs in that suit their share of the rent.

The plaintiffs in this suit, in support of their case, adduced as evidence, the judgment in the above case, and the main question that has been discussed before us is, whether the said judgment is evidence or not.

The lower appellate Court has to a great extent relied upon the said judgment as evidence showing that the defendants are in possession of the tenures in question, and has accordingly given the plaintiffs a decree.

The appellants have contended before us that the said judgment is no evidence whatever under the Evidence Act, and that the result of the Full Bench decision in the case of *Gujju Lal* v. *Fatteh Lal* (1) is to the same effect. It is argued, and it seems to us that this argument is well founded, that what the said Full Bench practically decided was that, except in the case of judgments *in rem* and judgments relating to matters of public nature, a judgment in order to be evidence must be such as would operate by way of estoppel or *res judicata*.

A recent Full Bench of this Court, in the case of *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2), has ruled in a case where the parties were not arrayed as plaintiff and defendant in a previous suit, but as co-defendants, that the judgment in that suit is not *res judicata*. But the questisn was not [354] therein raised whether the said judgment, though not *res judicata*, was evidence or not.

If the result of the Full Bench decision in the case of *Gujju Lal* be as the appellants contend, then certainly the judgment adduced in this case should not have been received and acted upon as evidence. But then it appears that the authority of the said Full Bench case has been shaken by the subsequent Privy Council decision in the case of *Run Bahadur Singh*

(1) 6 C. 171.

(2) 12 C. 580.

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v. *Lucho Koer* (1) and by the decisions of this Court in the case of *Peari Mohun Mukerji* v. *Drobomoyi Dabia* (2), and in the case of *Hira Lal Pal* v. *Hills* (3). In the case before the Privy Council, although the Judicial Committee held that the previous judgment between the parties was not *res judicata*, they still treated such judgment as evidence in the case. It would also appear that the judgment in a certificate case under Act XXVII of 1860, and a proceeding before the Magistrate in a recognizance case, were also relied upon as evidence by the Judicial Committee, and this they could not do if the contention raised by the appellants in the present case were correct. In this case of *Peari Mohun Mukerji* v. *Drobomoyi Dabia* (2) a judgment although not *inter partes* was held to be admissible as evidence as showing the nature of the possession of the defendant: and in the last-mentioned case, *viz.*, the case of *Hira Lal Pal* v. *Hills* (3) a rent decree of a similar character was used as evidence for the purpose of showing that rent was successfully claimed for the lands which were in the subsequent suit alleged to be lakheraj.

We do not understand why, if the judgments which were dealt with in the two cases of *Peari Mohun Mukerji* and *Hira Lal Pal* could be properly used as evidence for one purpose or another, the judgment adduced in this case could not be used as evidence for the purpose of showing that, in the suit of another co-sharer of the same estate, it was found that the defendants were in possession of the tenures in question.

It seems to us that the question raised before us is of considerable importance, and one which often arises in our Courts; and we therefore think it necessary to refer the following [355] question to a Full Bench: Whether, under the circumstances stated, the judgment in the previous case is evidence or not.

Baboo *Rash Behari Ghose* and Baboo *Beprodas Mukerji*, for the appellants.

Baboo *Srinath Das* and Baboo *Kisshori Lal Sircar*, for the respondents.

Baboo *Rash Behari Ghose*, for the appellants.—The judgment referred to operates either as *res judicata* or is no evidence at all in the present case. It has not the effect of *res judicata*—*Brojo Behari Mitter* v. *Kedar Nath Mazumdar* (4). Therefore it is not admissible as evidence—*Gujju Lal* v. *Fatteh Lal* (5); *Davies* v. *Lowndes* (6) explained.

Baboo *Srinath Dass* for the respondents.—The decision in *Gujju Lal* is contrary to the provisions of the Evidence Act. It is clear from the concluding portion of s. 43 of the Act that judgments, although they may not operate by way of *res judicata*, are admissible in evidence if they are relevant under any other section of the Act. The authority of *Gujju Lal* (5) is narrowed down by subsequent decisions which govern the present case—*Run Bahadur Sing* v. *Lucho Koer* (1); *Peari Mohun Mukerji* v. *Drobomoyi Dabia* (2); *Hira Lal Pal* v. *Hills* (3).

Baboo *Kissori Lal Sircar* on the same side.—The present case is distinguishable from *Gujju Lal* (5). Without calling in question the authority of *Gujju Lal*, the judgment here is good evidence as showing the identity of the land in dispute, and is admissible under s. 9 of the Evidence Act. It is also admissible under s. 13, cl. (*b*) of the Act. *See* s. 13, Explanation V of the Civil Procedure Code; the judgment referred to is not only evidence, but operates by way of *res judicata*.

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(1) 11 C. 301. (2) 11 C. 745. (3) 11 C.L.R. 528.
(4) 12 C. 580. (5) 6 C. 171. (6) 1 Bing. N.C. 606.

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Baboo *Rash Behari Ghose* in reply.—*Peari Mohun Mukerji* v. *Drobomoyi Dabia* (1) and *Hira Lal Pal* v. *Hills* (2) are not applicable.

[356] The following opinions were delivered by the Full Bench :—

OPINIONS.

MITTER, J.—I would answer the question referred to us in the affirmative. For the reasons given by me in my judgment in *Gujju Lal* v. *Fatteh Lal* (3), I think that the judgment in the previous case is evidence under s. 9 of the Evidence Act bearing upon the question of the identity of the tenure in respect of which the present suit has been brought with the tenure in respect of which the previous suit was brought.

PETHERAM, C.J.—The plaintiffs claim to be entitled, by purchase, to a 1 anna 8 gundas share of an estate, under which estate they allege that the defendants hold certain tenures; and this suit is brought to recover their share of the rent of the tenures. The question referred to us is whether a decree obtained in a former suit by another sharer in the same estate against the same defendants is admissible in evidence, the object being to prove the defendants' possession of the tenures.

When that decree is examined, all that appears from it (and nothing but the decree itself was put in) is this: that the plaintiff in that suit had acquired also by purchase, a share in the same estate in which the now plaintiffs say they have a share, and he sued defendants for their separate share of the rent of the same tenures now in question, making the now plaintiffs co-defendants; they did not appear. Two defences were raised; first, a denial, or at least a refusal to admit possession of the tenures. This was found against the defendants. The second defence was limitation, on the ground that the person entitled to the particular share of the rent then sued for had not received any rent for more than twelve years. As to this, the Court said, first that there was some evidence of receipt of that share of the rent within twelve years; and, secondly, that however that might be, the defendants being in possession of the tenures were liable for the zemindari rent, and could not therefore repudiate any particular share of it. On this we think it clear that no question of *res judicata* can possibly arise. The test is mutuality. If the former suit had been dismissed, could it have been said that the now plaintiffs were barred? Might they not have said, we had and [357] have to do with our own shares, we neither knew nor cared about other people's shares: why should we have meddled in their suit?

Apart from *res judicata*, the question whether the decree referred to was admissible in evidence is, we think, concluded by the two Full Bench cases, *Gujju Lal* v. *Fatteh Lal* (4) and *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (4).

As the judgment in question was the ground of decision in the lower appellate Court this appeal must prevail. The decree of that Court will be set aside, and that of the first Court affirmed with costs in all Courts.

K. M. C. *Appeal allowed.*

(1) 11 C. 745.
(2) 11 C. 528.
(3) 6 C. 171.
(4) 12 C. 580.

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Act (VII of 1870), which says that a certificate under Act XL of 1858 (among other documents) "shall not be filed, exhibited, or recorded in any Court of Justice, or received or furnished by any public officer," unless a certain fee be paid, means that such certificate cannot come into existence until the person who has the permission of the Court to obtain it deposits the requisite amount of stamp duty. Independently of this section, however, the preparation of such a certificate after the order granting it is not a purely ministerial act; it must then be applied for by the grantee; and it is from the date of the certificate being actually taken out, and not from the date of the order granting it, that a guardian of the person and property of a minor is to be considered as appointed under Act XL of 1858. Where, therefore, on a petition for such a certificate by *J*, an order was made that the "application be allowed," and in a suit on certain bonds in which suit the minor, in respect of whose person and property the petition for a certificate was made, was a defendant, he was represented by *J*, by whom no certificate had been actually taken out: *Held*, in a suit by the minor to set aside the decree as not binding on him, that without the certificate *J* had no authority to appear on behalf of the minor, and the latter not having been properly represented in the suit brought against him was entitled to have the decree set aside. SAHAI NAND v. MUNGNIRAM MARWARI, 12 C. 542 ... 368

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Ss. 8, 9—*Restraint on anticipation—Transfer of Property Act* (IV *of* 1882), *s.* 10.—S. 8 of Act III of 1874 extends to the separate property of married woman subject to a restraint upon anticipation. S 10 of the Transfer of Property Act merely excepts from the general rule laid down in that section the particular case of a married woman, and does not give to a restraint upon anticipation any greater force than it had before the passing of the Act, but merely preserves to it the effect it had previously, leaving the Married Woman's Property Act of 1874 and the decisions upon it untouched. J. HIPPOLITE v. C. STUART, 12 C. 522 ... 355

Act XIV of 1874 (Scheduled Districts).

See REVISION, 12 C. 536.

Act IX of 1875 (Majority).

S. 3—See GUARDIAN, 12 C. 612.

Act XVII of 1875 (Burma Courts).

(1) *S.* 49—*Restitution of Conjugal Rights—Appeal from decree of Recorder of Rangoon—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 540.—The proviso in s. 49 of the Burma Courts Act amounts to an express declaration that it is a condition precedent to the right of appeal from the Recorder's Court that the suit shall be one which has an amount or value capable of being estimated in money, and that that amount or value must fall within certain specified limits. A suit for the restitution of conjugal rights is incapable of being valued, and no appeal therefore in such a suit will lie under the Burma Courts Act from a decision of the Recorder of Rangoon. GOLAM RAHMAN v. FATIMA BIBI, 13 C. 232 ... 654

(2) *Ss.* 49, 97—*Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 3, 4, 540—*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 156.—An appeal from the Court of the Recorder of Rangoon to the High Court is an appeal under the Civil Procedure Code, and must be made within the time prescribed by art. 156, sch. II of the Limitation Act. AGA MAHOMED HAMADANI v. COHEN, 13 C. 221 ... 646

Act IV of 1879 (Railways).

Ss. 17, 31—*Passenger not producing season ticket when called upon—Travelling without a ticket—Order for recovery of fare.*—A passenger who has obtained a monthly ticket is liable to be called upon to produce it at any time on the journey which it covers, and if he does not so produce it, he is liable under ss. 17 and 31 of the Railway Act to pay the fare for the journey between the stations for which his ticket was issued. The order under s. 31, in case of his refusal to pay it, should be one merely for recovery of the amount due as the fare, and not an order to pay such sum or any other sum as if it were a fine. A passenger who has such a ticket which is still in force and in his possession, cannot be said to be travelling without a ticket within the meaning of s. 31, merely because he does not happen to have the ticket with him, and therefore cannot produce it when called upon to do so. IN THE MATTER OF THE PETITION OF E. G. BUSKIN. IN THE MATTER OF THE PETITION of C. F. THOMAS. E. W. HART v. E. G. BUSKIN. E. W. HART v. C. F. THOMAS, 12 C. 192 ... 130

Act V of 1881 (Probate and Administration).

Ss. 18 *to* 23, 37, 44, 45, 46, 83 *and* 86—*Debutter property—Administration in respect of Idol—"Beneficiary"—Trustee with power of appointment—Administration, grant of, letters of to idol's property where probate has been previously granted of Will dedicating the property.*—A testatrix by her will dedicated certain immoveable property to the *sheba* of an idol, and appointed an executrix, whom she also constituted *shebait*, and to whom she gave power to appoint the next *shebait*. The executrix died without having made any such appointment, and thereupon an application was made by the sister's son of the testatrix, for letters of administration, with a copy of the will annexed, to be granted to him with respect to the *debutter* property. *Held*, that s. 45 of the Probate and Administration Act authorized such a grant to be made, inasmuch as no *shebait* having been appointed, there still remained some portion of the estate of the testatrix to be administered. *Held*, also, that the idol, being the *cestui que trust* was a "beneficiary" within the meaning of that term as used

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in s. 37 of the Act, and that as it could not undertake the management of the estate under that section, administration might be granted to some person on its behalf *Held*, further, that the applicant, the sister's son of the testatrix, being the heir in the absence of other nearer heirs, as such, was entitled to letters of administration, as the original grant in respect of the *debutter* property might have been made to him. RANJIT SINGH v. JAGANNATH PROSAD GUPTA, GANGADHUR DASS RAE v. JAGANNATH PROSAD GUPTA, 12 C. 375 ... 255

Act VIII of 1882 (Penal Code Amendment).

S. 4—See SENTENCE, 12 C. 495.

Act XV of 1882 (Small Cause Court, Presidency Town).

S. 18—*Jurisdiction—Army Act of* 1881 (44 *and* 45 *Vic.*, *c.* 58), *ss.* 148, 151—*Leave to sue.*—The jurisdiction given to Small Cause Courts by Act XV of 1882 is not affected by 44 and 45 Vic., c. 58, s. 151. WALLIS v. TAYLOR, 13 C. 37. ... 521

Act VIII of 1885 (Bengal Tenancy).

S. 5—See APPEAL—SECOND APPEAL, 13 C. 86.

2.—Bengal Acts.

Act VIII of 1869 (Bengal Landlord and Tenant and Procedure).

(1) S. 6—See RIGHT OF OCCUPANCY, 12 C. 115.

(2) *Ss.* 26, 64—*Suit for possession by unregistered purchaser after ejectment-Effect of sale of tenure by shareholder in zemindari-Onus of proof.-K*, the recorded tenant of a *mourasi mokurari* tenure, died, leaving *G*, his son and heir, who sold the tenure, which eventually came into the hands of the plaintiffs' father, and afterwards on his death became vested in the plaintiffs, but neither they nor their father, though they made attempts to do so, ever obtained the registration of their names as tenants. *R*, one of the two shareholders in the zemindari, brought a suit for arrears of rent of the tenure against *G*, and in execution of the decree he obtained in that suit the tenure was sold and purchased by the other zemindar, by whom the plaintiffs were dispossessed. *Held*, that the plaintiffs were not precluded by the fact that their names were not registered as tenants, under s. 26 of the Rent Act, from bringing a suit to recover possession of the tenure. The holder of the decree, in execution of which the tenure was sold, assuming him to be only a shareholder in the zemindari right, had no right under s. 64 to sell the tenure, but only the interest of the person against whom the decree was passed. The onus was on the defendant to show that the sale under the decree for rent was of such a nature as to give him priority over the plaintiffs. KRISTO CHUNDER GHOSE v. RAJ KRISTO BUNDYOPADHYA, 12 C. 24 ... 16

(3) *S.* 27—*Limitation—Suit for possession—Question of title.*—Where the plaintiff alleged that he was the holder of a jote under the defendant by whom he had been forcibly dispossessed and sued for declaration of his title and for restoration to possession; and the defendant did not question the plaintiff's tenure nor his original title, but denied the forcible dispossession, and alleged that the plaintiff had relinquished the land: *Held*, that the suit was not one to try a question of title, but was governed by the one year's period of limitation prescribed by s. 27, Bengal Act VIII of 1869. SRINATH BHATTACHARJI v. RAM RATAN DE, 12 C. 606 ... 412

(4) *S.* 27—*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 69—*Suit for money paid in excess of road cess.*—In a suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road cess: *Held* (reversing the decisions of the Courts below), that the suit was governed not by the special law of limitation contained in s. 27 Beng. Act VIII of 1869, but by art. 96, sch. III of the Limitation Act XV of 1877. MATHURA NATH KUNDU v. O. STEEL, 12 C. 533 ... 362

(5) *S.* 29—*Limitation—Suit for arrears of rent.*—The defendant held a putni in respect of a share in a zemindari, which share was held and the putni granted by a Hindu widow who died in Pous 1281. The plaintiffs were the heirs who succeeded to the zemindari on the death of the widow. In

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Pous 1284 they brought a suit against the defendant for the purpose of setting aside the putni, and on the 16th Pous 1285, obtained a decree declaring the putni invalid, and giving them khas possession with mesne profits. This decree was, however, reversed on appeal on the 16th Srabun 1288, and their suit was dismissed. In a suit for arrears of rent from 1282 to 1288, *held*, that the plaintiff was not protected from the operation of the law of limitation during the pendency of his suit to set aside the putni, and that his suit was barred except as to the arrears accruing within three years preceding the suit. W. SHERIFF v. DINA NATH MOOKERJEE, 12 C. 258 ... 175

(6) S. 30—See LIMITATION ACT (XV OF 1877), 12 C. 357.

(7) *S.* 38—*Measurement of waste lands—Bengal Civil Courts Act* (*VI of* 1871), *s.* 22—*Appeal.*—An application for the measurement of a whole estate under s. 38 of Bengal Act VIII of 1869 cannot be granted where waste lands in that estate have been brought into cultivation by various ryots, and the landlord is unable to ascertain which of the ryots have appropriated such waste lands as part of their jotes. Before a measurement can be ordered under that section, it is necessary to establish by evidence, the facts set out in the petition for measurement; and to show that the lands sought to be measured are known but that the tenants liable to pay rent in respect of such lands are unknown. LALLA CHEDI LAL v. RAMDHUNI GOPE, 13 C. 57 ... 535

(8) *S.* 52—*Decree for rent, Execution of—Appellate Court, Decree of, effect of—Libility to ejectment.*—A decree under s. 52, Beng. Act VIII of 1869 provided that unless the amount due was paid within 15 days from the date thereof, the tenant (judgment-debtor) would be liable to ejectment. That decree was confirmed in appeal, no step *to execute it having been taken* in the meantime. The tenant paid the decretal amount into Court within 15 days of the appellate decree. *Held*, that inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree, and was the only decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within 15 days of that decree was protected from ejectment. NOOR ALI CHOWDHURI v. KONI MEAH, 13 C. 13 ... 505

(9) Ss. 59, 60, 66—See BURDEN OF PROOF, 13 C. 1.

(10) S. 62—See ARREARS OF RENT, 13 C. 331.

(11) *S.* 64—*Landlord and Tenant—Sale of portion of under-tenure—Suit for arrears of rent.*—There is nothing in s. 64, Beng. Act, VIII of 1869, which necessarily leads to the conclusion that under that section a share of an under-tenure cannot be sold, so as to render the sale binding upon the judgment-debtor; and there is no substantial difference between the sale of a portion of an under-tenure under that section and under the Civ. Pro. Code. Where, therefore, a plaintiff, who was the owner of a share in a zemindari, had obtained a decree against X, who held a taluk in such zemindari, for arrears of rent due in respect of such share, and in execution of such decree brought a share of such taluk to sale, corresponding with his share in the zemindari and himself became the purchaser; and where such plaintiffs subsequently instituted a suit against X, who was also the owner of a *howla* and *nimhowla* under the said taluk for arrears of rent due in respect of the share of the taluk so purchased by him, and where it appeared that the sale at which the plaintiff became the purchaser was afterwards confirmed, and that he had obtained a sale certificate; *Held*, that such suit was not liable to be dismissed, merely on the ground that the plaintiff had brought a share of an under-tenure to sale, in execution of a decree for arrears of rent under s. 64 of Beng. Act VIII of 1869, and had thereby acquired nothing by such purchase, there being nothing in that section to support such a conclusion. ASHANULLA KHAN BAHADUR v. RAJENDRA CHANDRA RAI, 12 C. 464 ... 315

Act X of 1871 (Bengal District Road-cess).

Ss. 3, 9, 10, 23, 25 *and* 26—*Sale for arrears of Road-cess, Effect of—Right of purchaser—Interpretation clause, Construction of.*—In a suit on a bond by which certain land, admittedly lakheraj, was mortgaged, the purchaser of a portion of the mortgaged property at an auction sale for arrears of road-

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cess due under Bengal Act X of 1871 was added as a defendant, and the lower Courts holding that the effect of such a sale was to pass the property to the defendants free of encumbrances, made a decree excluding that portion from liability in respect of the mortgage bond. *Held* on the construction of Beng. Act X of 1871, that the sale had no such effect, and that the whole of the property was liable to be sold in satisfaction of the plaintiffs' claim. Although the effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places in the Act in which that word occurs, it is not the effect of an interpretation clause that the thing defined has annexed to it every incident which may seem to be attached to it by any other Act of the Legislature. It does not follow, therefore, that because lakheraj property is defined in the Road Cess Act, 1871, to be a tenure all the interests and consequences attached by other Acts to tenures, generally, or to particular classes of tenures, become annexed to lakheraj property. UMACHURN BAG v. AJADANNISSA BIBEE, 12 C. 430 ... 292

Act V of 1875 (Bengal Survey).

Ss. 40, 41, 59, 60, 62—See BOUNDARY DISPUTE, 13 C. 230.

Act IV of 1876 (Calcutta Municipal Consolidation).

(1) See RIGHT OF WAY, 13 C. 136.

(2) S. 248—*Conviction for keeping animals—Without license—Continuing offence between date of summons and date of conviction—Second prosecution for same offence on different date before conviction.*—Under s. 248 of Bengal Act IV of 1876, a milkman, who has been convicted and fined for keeping an animal without a license, cannot again be prosecuted for the continuance of the same offence before conviction, nor can he be separately prosecuted for the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction. In a summons taken out on the 27th March against a milkman for an offence under s. 248, Bengal Act IV of 1876, the offence was stated to have been committed on the 16th March; the case was fixed for the 8th April, when the defendant was convicted and fined by the Magistrate. Another summons had been taken out against him on the same day (27th March) for a similar offence stated to have been committed on the 25th March. *Held*, that he could not be convicted on the second charge. IN THE MATTER OF THE CORPORATION OF THE TOWN OF CALCUTTA v. MATOO BEWAH, 13 C. 108 ... 571

Act V of 1876 (Bengal Municipal).

S. 32—*Municipal Corporations—Commissioners—Right of way—Compensation—Land Acquisition Act* X *of* 1870.—S. 32 of Act V of 1876, the Beng. Municipal Act, enacts that "all roads, bridges, embankments, tanks, ghats, wharves, jetties, wells, channels, and drains in any Municipality (not being private property), and not being maintained by Government or at the public expense, now existing or which shall hereafter be made, and the pavements, stones and other materials thereof, and all erections, materials, implements and other things provided therefor, shall vest in and belong to, the Commissioners." *Held* that the word "roads" in this section does not include the soil beneath the roads. CHAIRMAN OF THE NAIHATI MUNICIPALITY v. KISHORI LALL GOSWAMI, 13 C. 171. 613

Act VII of 1880 (Bengal Public Demands Recovery).

(1) *Ss.* 6(*b*) *and* 10—*Suit to set aside certificate—Mode of service of notice.*—Although no special provision is made in Beng. Act VII of 1880 as to the manner of service of the notice prescribed in s. 10, it is not to be presumed that the Legislature intended that service of a less effectual character should be sufficient than it has expressly provided for similar processes under the Civ. Pro. Code. Before, therefore, a service under Beng Act VIII of 1880, can be effected by posting it on the residence of the party on whom it is wished to serve it, it must be shown that some attempt has been made to effect personal service and that such personal service for reasons stated could not be made. In such a case when the fact of service of notice is denied, the onus is on the party alleging service to prove it. RAKHAL CHANDRA RAI CHOWDHURI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 12 C. 603 ... 409

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(2) *Ss.* 10, 23—*Attachment under certificate procedure*—"*Estate*," *Meaning of* —*Act* XI *of* 1859, *ss.* 5, 6—*Notification of Sale, Specification of*.—The certificate and notice referred to in s. 10, Beng. Act VII of 1880, are executive acts, and an attachment, which is the result of those acts, is not a judicial, but an executive proceeding. The meaning of s. 23 of that Act, which lays down that a Collector "in the discharge of his functions shall be deemed to be a person acting judicially within the meaning of Act XVIII of 1850," is, that for the purpose of protecting him from personal liability his action is to be regarded as judicial. Under s. 6 of Act XI of 1859, it is not necessary that a notification should specify the owners of an estate or the owners of sharers in the estate. All that is necessary under that section is that the notification should specify the estate or shares in the estate to be sold, and in selling a share in an estate it is unnecessary to specify the shares or mouzahs of which that share is composed. The word "estate," as there used, ordinarily means "mehal;" but the term also applies to a portion of a mehal with regard to which a separate account has been opened, but not to an undivided portion of a mehal as to which separate accounts are not kept. RAM NARAIN KOER v. MAHABIR PERSHAD SINGH, 13 C. 208. ... 638

Act IX of 1880 (Bengal Road cess).

Ss. 52, 53—*Evidence Act, s.* 114—*Presumption.*—Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done: *Held*, that the notice provided by s. 52 of the Road Cess Act did not come within the presumption of s. 114, cl. (*e*) of the Evidence Act, and must be proved. ASHANULLAH KHAN BAHADUR v. TRILOCHAN BAGCHI, 13 C. 197 ... 630

Actionable Claim.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 13 C. 297.

Actual Possession.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 521.

Adding Defendant.

See LIMITATION, 12 C. 642.

Additional Evidence.

In Court of Appeal.—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 37.

Adjustment.

See REGULATION VIII OF 1819, 12 C. 185.

Administration.

In respect of Debutter Property—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 12 C. 375.

Admissibility.

See RES JUDICATA, 13 C. 352.

Admission.

See LIMITATION ACT (XV OF 1877), 13 C. 62; 13 C. 78; 13 C. 266.

Adverse Possession.

(1) See LIMITATION, 12 C. 484.

(2) See LIMITATION ACT (XV OF 1877), 12 C. 614; 13 C. 101.

Affidavit.

(1) See DISCOVERY, 12 C. 265.

(2) See INSOLVENCY, 12 C. 67.

Agent.

(1) See CONTRACT OF GUARANTEE, 12 C. 143.

(2) See LIMITATION ACT (XV OF 1877), 12 C. 357.

Agreement. PAGE

(1) *For Partition, Effect of*—See HINDU LAW—PARTITION, 12 C. 96.

(2) Of guardian to sell land of minor contingent on permission of Court—See SPECIFIC PERFORMANCE, 12 C. 152.

(3) Registered—See LIMITATION ACT (XV OF 1877), 12 C. 357.

Alteration.

See DOCUMENT, 12 C. 313.

Animal.

See ACT IV OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION), 13 C. 108.

Anticipation, Restraint on.

See ACT III OF 1874 (MARRIED WOMAN'S PROPERTY), 12 C. 522.

Appeal.

1.—GENERAL.

2.—CROSS APPEAL.

3.—SECOND APPEAL.

4.—SPECIAL APPEAL.

5.—TO PRIVY COUNCIL.

—— **I.—General.**

(1) *Civ. Pro. Code (Act XIV of 1882), ss. 2 and 396—Order for partition in execution of decree.*—An order under s. 396 of the Code of Civil Procedure, declaring the rights of the parties in a partition suit, but leaving their shares to be determined in execution of the decree is a "decree" within the meaning of s 2 of the Code, and an appeal therefore lies from such order. IN THE MATTER OF THE PETITION OF BHOLA NATH DASS. BHOLA NATH DASS v. SONAMONI DASI, 12 C. 273=10 Ind. Jur. 334 ... 185

(2) *Civ. Pro. Code, (Act XIV of 1882), ss. 2 and 396—Order in partition suit leaving proceedings to be taken in execution of decree.*—The proceedings contemplated by s. 396 of Act XIV of 1882 are proceedings in a suit before decree, and in order to enable the Court in that suit to determine exactly the terms of that decree. Where those proceedings, however, were left to be taken in execution of the decree, the High Court, treating it as an error in point of form and without deciding whether or not an objection if it had been taken would have been fatal to the proceedings, dealt with the case in the same way as was done in 7 C. 318, regarding the further proceedings taken after decree declaring the rights of the several parties as proceedings to obtain a decree on further consideration. Where in a partition suit an order was made in the course of such proceedings by which the position of some of the parties to the suit was determined, but no declaration was made of the exact rights of each of the parties, *held*, it was a mere interlocutory order and no appeal would lie from it. *Semble*, such an order is not a decree within the terms of s. 2, Act XIV of 1882. BHOOBUN MOYI DABEA v. SHURUT SUNDERY DABEA, 12 C. 275. ... 187

(3) *Civ. Pro. Code, ss. 32 and 588, cl. 2—Order rejecting application to be made a party.*—An order rejecting an application under s. 32 of the Civ. Pro. Code to be made a party to a suit is not appealable under cl. 2, s. 588. ABIRUNNISSA KHATOON v. KOMURUNNISSA KHATOON, 13 C. 100 ... 565

(4) *Dismissal of appeal for default—Pleader present, but unprepared to go on with case—Civ. Pro. Code, 1882, ss 556, 558.*—Where when an appeal is called on the pleader is not absent, but is unprepared to go on with the case the dismissal is a dismissal for default within s. 556 of Act XIV of 1882, and the appeal can therefore be re-admitted under s. 558. SHIBENDRA NARAIN CHOWDHURY v. KINOO RAM DASS, 12 C. 605. ... 411

(5) *Execution of decree—Security Bond—Order staying execution pending appeal—Civ. Pro. Code, Act XIV of 1882, ss. 545, 588.*—The Court which passed a certain decree ordered execution thereof to be stayed pending appeal, on the debtor's furnishing security to the amount of Rs 70,000, under the provisions of s. 545 of the Code of Civil Procedure. The debtor objected to the amount of security required, and appealed to the High Court on that ground. The decree-holder contended that no appeal lay. *Held*, that the order was appealable. *Held*, also, on the facts, that the security required was excessive. UDEYADETA DEB v. GREGSON, 12 C. 624 ... 424

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(6) Ex parte *Order—Admission of Appeal.*—An *ex parte* order admitting an appeal is subject to reconsideration on the hearing of the appeal. MOSHAULLAH v. AHMEDULLAH, 13 C. 78 ... 550

(7) *Order of remand made without jurisdiction—Civ. Pro. Code (Act XIV of 1882) ss. 562, 588—Proceedings taken by first Court pending appeal from order.*—In a case where neither of the parties desired to have a local investigation, though suggested by the Court, the lower Court dealt with the case on the materials before it, and made a decree. On appeal the appellate Court remanded the case for the purpose of a local investigation being held at the cost, in the first instance, of the plaintiff. The lower court thereupon made an order that the plaintiff should deposit the costs of the local investigation, and on default being made by the plaintiff, it dismissed the suit. The order of remand was found to be invalid as made without jurisdiction. *Held*, that all proceedings taken by the Court of first instance, after the remand, and pending the hearing of the appeal against the remand order, were null and void, inasmuch as the jurisdiction of that Court to hear the case upon remand depended upon the validity of the remand order An appeal, therefore lay from the order of remand, notwithstanding the Court of first instance had subsequently made what purported to be a final decree in the case. JATINGA VALLEY TEA COMPANY v. CHERA TEA COMPANY, 12 C. 45 ... 30

(8) *Order staying execution of decree—Civ. Pro. Code,* 1882, *ss.* 2, 243, 244—*Decree.*—An order under s. 243 of the Civ. Pro. Code, staying execution of a decree determines a question relating to the execution of the decree within the meaning of s. 244, and is therefore a decree within the meaning of s. 2. An appeal therefore lies from such order. O. STEEL & Co. v. ICHCHAMOYI CHOWDHRAIN, 13 C. 111 ... 573

(9) *Sale in Execution of Decree—Civ. Pro. Code, s.* 294—*Application for leave to bid—Decree-holder.*—No appeal lies from an order passed under s. 294 of the Civ. Pro. Code, refusing permission to a decree-holder to bid at a sale in execution of his decree. JODOONATH MUNDUL v. BROJO MOHUN GHOSE, 13 C. 174. ... 614

(10) *Summary Procedure under Registration Act* (XX *of* 1866—*Appeal from order in execution of decree under Act* XX *of* 1866)—*Act* XX *of* 1866, *ss.* 53, 55.—An appeal from an order or decree passed in proceedings had in execution of a decree made under s. 53 of Act XX of 1866, is not barred by anything in s. 55 of that Act. SRIBULLAV BHATTACHARJEE v. BABURAM CHATTOPADHYA, 12 C. 511 (F.B.) ... 347

(11) *Valuation of suit—Costs—Return of plaint—Jurisdiction—Code of Civil Procedure, ss.* 15 *and* 57.—On the hearing of a suit in the Court of first instance, the Court came to the conclusion that the value of the property in dispute placed the claim beyond the jurisdiction of the Court. The suit was therefore dismissed with costs. On appeal this decision was reversed with costs, on the ground that the plaint ought to have been returned to the plaintiff for presentation in the proper Court. The defendant appealed to the High Court. *Held*, that the defendant ought to have been allowed his costs in both Courts, and that he was entitled to an appeal on that ground. MOSHINGAN v. MOZARI SAJAD, 12 C. 27 ... 184

(12) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 13 C. 57.

(13) See ACT XVII OF 1875 (BURMA COURTS), 13 C. 232.

(14) See ARBITRATION, 12 C. 173.

(15) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 209.

(16) See LIMITATION ACT (XV OF 1877), 13 C. 78 ; 13 C. 266.

——2.—Cross-Appeal.

See ACCOUNT, 13 C. 124.

——3.—Second Appeal.

(1) *Civ. Pro. Code,* 1882, *s.* 584—*Appeal from order dismissing appeal as presented out of time—Limitation Act,* 1877, *s.* 4.—An order dismissing an appeal as being presented out of time under s. 4 of the Limitation Act, 1877, is a

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" decree passed in appeal " within the meaning of s. 584 of the Civ. Pro. Code, 1882. A second appeal will therefore lie from such order. GUNGA DAS DEY v. RAMJOY DEY, 12 C. 30 ... 20

(2) *General Clauses Act* (I *of* 1868), *s.* 6—*Effect of Repeal—Proceedings—Bengal Rent Act* (VIII *of* 1885), *s.* 5.—The words " any proceedings commenced before the repealing Act shall have come into operation " in s 6 of the General Clauses Act (I of 1868) include an appeal against a decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit. In a suit between landlord and tenant, a decree was passed by the lower appellate Court on the 28th of July, 1885. Under the provisions of the Act then in force, namely, Beng. Act VIII of 1869, s. 102, a second appeal to the High Court was prohibited. That Act was repealed by Act VIII of 1885, which came into force on the 1st of November, 1885, this latter Act allowing an appeal to the High Court in suits similar to the one in question. A second appeal to the High Court in that suit was filed on the 18th of November, 1885. *Held*, that no appeal lay. HURROSUNDARI DABI v. BHOJOHRI DAS MANJI, 13 C. 86. 556

(3) *Ground of appeal—Question of law—Sufficiency of Evidence.*—It is a question of law for the Court to decide on second appeal whether there is evidence before the Court, on which a Court could properly arrive at any given conclusion of fact BIDHUMUKHI DEBEA CHOWDHRAIN v. KEFYUTULLAH, 12 C. 93 ... 63

(4) *Order allowing purchaser of decree to execute it—Civ. Pro. Code,* 1882, *ss* 2, 232, 244.—On an application under s. 232 of the Civ. Pro. Code, by the purchaser of a decree to be allowed to execute it, two of the judgment-debtors objected that the purchase was benami for the other judgment-debtor, and that they had paid of the decree to the original decree-holder. The Munsif found both objections against them, and allowed the purchser to execute the decree. *Held*, that the question was one between the parties to the suit or their representatives relating to the execution, discharge, or satisfaction of the decree, and that the decisien of that question was a decree under ss. 2 and 244 of the Code, and therefore appealable, and a second appeal lay therefrom to the High Court. AFZAL v. RAM KUMAR BHUDRA, 12 C. 610 ... 415

(5) See APPEAL—SPECIAL APPEAL, 12 C. 179.

(5-*a*) See ARBITRATION, 12 C. 173.

(6) See JUDGMENT, 12 C. 199.

(7) See SALE, 12 C. 597.

——4.—Special appeal.

Costs—Order in discretion of Court—Special Appeal.—When a question of costs is purely in the discretion of the lower Court no appeal will lie, but when a matter of principle is involved an appeal will lie. Where *A* was sued upon the allegation that he had instigatad his co-defendant *B* to refuse to deliver up a document, for the recovery of which the suit was brought, and where no relief was prayed as against *A*, but the lower Courts awarded a decree in favour of the plaintiff directing *A* to pay half the costs of suit: *Held*, that the question was one of principle, and that a second appeal lay to the High Court against the decree directing *A* to pay such costs. BUNWWARI LALL v. CHOWDHRY DRUP NATH SINGH, 12 C. 179. 122

——5.—To Privy Council.

(1) *Practice—Appeal struck off for want of prosecution—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 598, 599, 600.—*A* on the 8th September 1885 filed his petition of appeal to Her Majesty in Council against a decree obtained against him by *B* on the 19th May 1885. On the 11th September 1885, *A's* attorney received for approval from the Registrar the usual draft notice calling upon *B* to show cause why the case was not a fit and proper one for appeal to Her Majesty in Council; this draft notice was never returned as approved or otherwise to the Registrar, and no further steps were taken to prosecute the appeal. On the 1st April 1886,

Appeal—5.—To Privy Council—(*Concluded*). PAGE

B applied to have the appeal struck off for want of prosecution,—*Held* that he was entitled to the order. MOORAJEE POONJA v. VISRANJEE VISENJEE, 12 C. 658 ... 447

(2) *Security for costs of respondent—Execution of decree against surety—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 253, 602, 603, 610.—A plaintiff having preferred an appeal to Her Majesty in Council was called upon to furnish security. Thereupon A, on behalf of appellant, executed a security bond for the costs of the respondent. The appeal was dismissed with costs by Her Majesty in Council. On an application (by the respondent in the appeal) for execution to issue against the estate of A, the surety (who had died in the meantime)—*Held*, that the liability of the surety under the security bond could not be enforced in execution of the decree of Her Majesty in Council. RADHA PERSHAD SINGH v. PHULJURI KOER, 12 C. 402 ... 273

Appealable Order.

See CIVIL PROCEDURE CODE ACT XIV OF 1882), 12 C. 209.

Appellate Court.

(1) *Power to vary decree as made in the lower Court—Decree confined to rights in issue between parties—S.* 565 *of the Code of Civil Procedure*, 1877.—After the trial of issues raising the question whether the plaintiff was, or the defendants were, entitled te zemindari rights in certain mehals, a decree was made affirming the title of the plaintiff, the evidence in support of the defendants' case being discredited, and the latter were declared by the decree to be the "plaintiff's under-tenure-holders of the said mehals." This was modified on appeal by the declaration that "the defendants are putnidars of the same mouzahs." *Held*, that it was unnecessary on this appeal to consider whether the appellate Court was right in its conclusion that the defendants were putnidars, because, upon the case which had been set up for the defendants, and upon the issues framed and tried in the lower Court, the appellate Court could not properly make such a declaration: the defendants could not be in a better position than they would have been in had they claimed to be putnidars, in which case an issue as to that title would have been framed and tried. S. 565 of Act X of 1877 does not enable an Appellate Court to declare a right in favour of one of the parties, where no issue has been fixed on the point, and the right has not been set up in the lower Court. THE OFFICIAL TRUSTEE OF BENGAL v. KRISHNA CHANDRA MOZUMDAR, 12 C. 239 (P.C.) = 12 I. A. 166 = 1 Ind. Jur. 339 = 4 Sar. P.C.J. 657. ... 162

(2) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE) 13 C. 13.

(3) See ARBITRATION, 12 C. 173.

(4) See REMAND, 12 C. 225.

(5) See STAMP ACT (I OF 1879), 12 C. 64.

Application.

(1) By decree-holder for leave to bid, Order-refusing—See APPEAL—GENERAL, 13 C. 174.

(2) For copy of decree—See LIMITATION ACT (XV OF 1877), 12 C. 441; 12 C. 608.

(3) For execution of decree—See EXECUTION OF DECREE, 12 C. 161.

(4) To set aside sale—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 346.

(5) Order to remove obstruction—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 137.

Appointment.

Trustee with power of—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 12 C. 375.

Apportionment.

(1) Of compensation, Notice of Proceedings for—See LAND ACQUISITION ACT (X OF 1870), 12 C. 33.

(2) Of liability of purchasers of portions of mortgaged property—See POSSESSION, 12 C. 414.

Appropriation. PAGE

See INTEREST, 13 C. 164.

Arbitration.

Reference to Arbitration by Court of Appeal—Order by Appellate Court remitting case to Original Court to pass decree upon award—Appeal—Second Appeal —Award made out of time—Arbitration award, Legality of—Civ. Pro. Code (Act XIV *of* 1882), ss. 2, 506, 514, 582.—An appeal was preferred against a decree of an Original Court dismissing a suit, and the Appellate Court send the case back for the purpose of certain evidence being taken and certified to it. Pending that being done, the parties applied to the Appellate Court to refer the case to arbitration, and that Court referred that application to the Original Court for disposal, although the case was still pending in its own file for disposal Subsequently another application was made to the Original Court to refer the case to arbitration, and on the 10th May the record was sent to the arbitrator with directions to submit his award within seven days. On the 12th September, as the award had not been sent in, the Original Court passed an order, recalling the record, and subsequently the award of the arbitrator, dated the 12th September, was filed. The Original Court thereupon forwarded the record to the Appellate Court for its decision. Objections were taken to the award but overruled, and the Appellate Court passed an order directing the case to be sent back to the Original Court, with orders to pass a formal decree in accordance with the award of the arbitrator. *Held*, that a second appeal lay against the last mentioned order, inasmuch as it amounted to a decree under the provisions of s. 2 of the Civ. Pro. Code Held also, that the award was bad in law, because the time within which it was directed to be made had never been enlarged, and the Court's order of the 12th September recalling the record could not be taken as an indication that the time was enlarged. *Semble*, an Appellate Court has the power to refer a case to arbitration at the instance of the parties under s. 582 of the Code of Civil Procedure, 1882. BHUGWAN DASS MARWARI v. NUND LALL SEIN, 12 C. 173. ... 118

Army Act, 1881, 44 and 45 Vict., c. 58.

(1) *Ss.* 148 *and* 151—*Courts of Request, their jurisdiction—Court of Small Causes, Power of—Construction of*, s. 151, *cl.* 1, *of the Army Act.*—The Army Act (44 and 45 Vict., c. 58) gives jurisdiction to a Court of Small Causes in all actions of debt and personal actions against persons subject to military law (other than soldiers in the regular forces) over which such Court would ordinarily exercise jurisdiction, and provides a Court of Requests (s. 148) for those cases only where an action of the value of Rs. 400 or under has to be brought against such persons at a place lying beyond the jurisdiction of any Small Cause Court. *Held*, also, that the words "within the jurisdiction" in s. 151, cl. 1 referred to "actions" and not to "persons." SHERE ALI v. C.L. PRENDERGAST, 13 C. 143 ... 594

(2) Ss. 148, 151—See ACT XV OF 1882 (SMALL CAUSE COURTS PRESIDENCY TOWNS), 13 C. 37.

Arrears of rent.

(1) *Suit for—Payment by Durputnidar to stay sale—Reg.* VIII *of* 1819—*Bengal Act* VIII *of* 1869, *s.* 62.—The zemindar of an estate, in which the plaintiff and defendant respectively had purchased putni and durputni tenures, obtained decrees for arrears of rent accruing before their purchases, though one of the decrees was obtained subsequently to defendant's purchase, and in execution of these decrees he advertised the putni for sale, and the amounts due were paid into Court by the defendant to protect the tenure from sale. In a suit by the putnidar against the durputnidar for arrears of rent accruing due subsequently to the defendant's purchase: *Held*, that the defendant was, on the construction of s. 13 of Reg. VIII of 1819, and s. 62, Bengal Act VIII of 1869, entitled to set off such payments against the plaintiff's claim. LALIT MOHUN SHAHA v. SRINIBAS SEN, 13 C. 331 ... 721

(2) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 12 C. 258 ; 12 C. 464.

(3) See EXECUTION OF DECREE, 12 C. 161.

(4) See SALE, 12 C. 597.

Arrest. PAGE

(1) *Escape—Release on Recognizance—Surrender under recognizance—Recognizance, Expiry of—Arrest, Fresh application for—Civ. Pro Code (Act* XIV *of* 1882), *ss.* 239, 241, 341, 349, 357—*Writ of attachment—Crim. Pro. Code (Act* X *of* 1882), *s.* 491.—A Judgment-debtor once arrested and imprisoned in exeution of a decree cannot, under the Civ. Pro. Code, be again arrested under a fresh writ of attachment on the same decree. SECRETARY OF STATE FOR INDIA IN COUNCIL v. JUDAH, 12 C. 652... 443

(2) See ESCAPE, 12 C. 190.

Assignee.

Of decree. See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 105.

Assignment

Of mortgage. See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 505.

Attached Property.

Claim to—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 108.

Attachment.

(1) *Execution of decree—Sale at instance of one attaching decree-holder during the pendency of other attachments—Priority of attaching creditors—Rival decree-holders—Civ. Pro. Code (Act* VIII *of* 1859), *ss.* 240, 242 *and* 270 *and (Act* XIV *of* 1882), *ss.* 284 *and* 295.—When a property is sold in execution of a decree it cannot be sold again at the instance of another decree-holder, who may have attached it before the attachment effected by the decree-holder under whose decree it is actually sold, and when a judicial sale takes place, all previous attachments effected upon the property sold fall to the ground. KASHY NATH ROY CHOWDHRY v. SURBANAND SHAHA, 12 C. 317 ... 216

(2) See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY), 13 C. 208.

(3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 333; 12 C. 546; 12 C. 696.

(4) See ARREST, 12 C. 652.

Attestation.

See DOCUMENT, 12 C. 313.

Attorney and Client.

See PRACTICE, 12 C. 551.

Avoidance of tenure.

See SALE, 12 C. 327.

Award.

See ARBITRATION, 12 C. 173.

Benami Property.

See ACT XI OF 1859 (BENGAL LAND REVENUE SALES), 12 C. 302.

Benami Purchase.

See RIGHT OF OCCUPANCY, 12 C. 82.

Benami Purchaser.

See ACT XI OF 1859 (BENGAL LAND REVENUE SALES), 12 C. 302.

Benami Transaction.

(1) *Purchase in the name of Hindu Wife.*—The question for decision was whether a purchase in 1842, in the name of a Hindu wife, of an interest in part of her husband's ancestral estate, was for herself, or for her husband, her name being used *benami* for him. The High Court, at the hearing in appeal, considered certain previous decisions in cases arising out of *benami* transactions. But in arriving at its conclusion, which was that the property was the wife's, it proceeded entirely on the evidence in the particular case. The judgment of the Judicial Committee, which also went upon the evidence, was, on the contrary, that the husband was, in fact, the purchaser, the purchase being *benami* in his wife's name. DHARANI KANT LAHIRI CHOWDHRY v. KRISTO KUMARI CHOWDHRANI, 13 C. 181 (P.C.) = 13 I.A. 70 = 10 Ind. Jur. 270 = 4 Sar. P.C. J. 709 ... 620

(2) *See* CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 204.

Bench of Magistrates. PAGE

Order irregularly made—Hearing of part of case by one Bench and decision by another.—Where in a summary case a Bench of Magistrates, after recording the evidence for the prosecution, postponed the case for the hearing of evidence for the defence ; and on the day fixed for hearing another Bench of Magistrates, none of whom had been members of the former Bench, recorded the evidenee for the defence and acquitted the accused ; *held*, on a reference to the High Court, that the order must be set aside as being irregularly made. RAM SUNDER DEY v. RAJAB ALI, 12 C. 558 ... 379

Beneficiary.

See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 12. C. 375.

Bill of Lading.

See LIMITATION ACT (XV OF 1877), 12 C. 477.

Birth.

Proof of—See EVIDENCE ACT (I OF 1872), 13 C. 42.

Bond.

(1) *Possession of, by Obligor—Presumption of payment.*—The presumption of payment of a bond which arises from its possession by the obligor loses much of its force when raised, not between the original creditor and the debtor, but between the debtor and the purchaser of the debt at an execution sale. DEBENDRA KUMAR MANDAL v. RUP LALL DASS, 12 C. 546 ... 371

(2) See INTEREST, 12 C. 569 ; 13 C. 200.

(3) See STAMP ACT (I OF 1879), 13 C. 268.

Boundary Dispute.

Possession, evidence of—Bengal Act V of 1875, ss. 40, 41, 59, 60, 62—Suit based on Title.—A formal decision on the question of boundary in a boundary dispute under s. 62 of Bengal Act V of 1875, although conclusive as to possession, is no bar to a suit based upon title. KALA CHARA TEA CO., LD. v. SUKUL SINGH, 13 C. 280 ... 686

Breach of Contract.

(1) *Alleged breach of warranty by vendor on a sale and delivery of goods—Burden of proof after acceptance, following upon an examination by purchaser.*—Under five contracts for the sale of good Burma cutch, to be delivered to a Calcutta firm in Calcutta by the vendors, who knew that it was bought for the export market, delivery and acceptance followed upon a searching examination of the cutch by the purchasers. The latter having sent advices of this purchase to a New York firm, with which they were in partnership, parcels of cutch were sold to different buyers in America, to whom, under such "forward" contracts, the cutch was shipped in separate shipments by the Calcutta firm. On the arrival of the cutch objection was taken to its quality by the American buyers, who refused to take delivery. The Calcutta firm, thereupon, sued the vendors under the five contracts above mentioned. The burden of proof being upon the plaintiffs, who had accepted the cutch after full examination in Calcutta, to prove the breach of contract by the vendors by cogent evidence sufficient to rebut the presumption of due performance that arose from such acceptance, *held*, that this presumption was not rebutted in the absence of evidence as to the treatment of the cutch on its re-shipment by the plaintiffs, on the voyage from India to America, and at the port of arrival. GAN KIM SWEE v. RALLI BROTHERS, 13 C. 237 (P.C) = 13 I.A. 60 = 10 Ind. Jur. 352 = 4 Sar. P.C.J. 722 ... 657

(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 339.

(3) See LIMITATION ACT (XV OF 1877), 12 C. 357 ; 12 C. 477.

(4) See RIGHT OF SUIT, 13 C. 300.

Breach of covenant.

See RIGHT OF SUIT, 13 C. 300.

Breach of Warranty.

By vendor on sale and delivery of goods—See BREACH OF CONTRACT, 13 C. 237.

Burden of Proof. PAGE

(1) *Ejectment, Suit for—Sale for arrears of rent—Avoidance of under tenure—Incumbrances—Bengal Act* VIII *of* 1869, *ss.* 59, 60, 66.—In a suit by the purchaser of an under-tenure, under ss. 59 and 60 of the Rent Act (Bengal Act VIII of 1869), to obtain possession of lands held by the defendant, on the ground that the holdings are incumbrances which have accrued thereon by an authorized act of the previous holder of the under-tenure, it lies upon the plaintiff to show that the defendant's holdings are such incumbrances as the plaintiff is entitled to avoid under s. 66 of the Rent Act. GOBIND NATH SHAHA CHOWDHURI v. G. M. REILY, 13 C. 1 ... 497

(2) *Resumption, Suit for—Rent-free lands—Landlord and tenant.*—In a suit for resumption of lands where the defendants alleged that the lands are *lakheraj*, the *onus* is on the plaintiff, in the first instance, to show that the lands are *mal*, and if he fails to make out a *prima facie* case, the suit should be dismissed. NARENDRA NARAIN RAI v. BISHUN CHANDRA DAS, 12 C. 182 ... 124

(3) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 12 C. 24.

(4) See BREACH OF CONTRACT, 13 C. 237.

(5) See HINDU LAW—JOINT FAMILY, 12 C. 262.

(6) See LIMITATION ACT (XV OF 1877), 12 C. 477.

Cause of Action.

(1) *Defamation--Slander--Damages--Consequential damage.*—A suit for damages, for defamation of character involving loss of social position and injury to reputation will lie without proof of special damage. TRAILOKYA NATH GHOSE v. CHUNDRA NATH DUTT, 12 C. 424 ... 288

(2) *Slander—Defamation—Verbal abuse—Special damage.*—A suit to recover damages for verbal abuse of a gross character may be maintained without proof of consequential damage. IBIN HOSAIN v. HAIDAR, 12 C. 109 ... 74

(3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 60; 12 C. 339.

(4) See JOINDER OF PARTIES, 12 C. 555.

(5) See LANDLORD AND TENANT, 13 C. 96.

(6) See LIMITATION ACT (XV OF 1877), 12 C. 389.

(7) See RIGHT OF SUIT, 13 C. 300.

Ceremonies.

See HINDU LAW—MARRIAGE, 12 C. 140.

Certificate.

(1) *Of administration—Act* XXVII *of* 1860—*Right to recover debts of deceased person.*—Where payment of a debt is not being withheld for fraudulent or vexatious motives, but from a reasonable doubt as to the party entitled to it, the person desirous of recovering the amount of the debt is bound to produce a certificate under Act XXVII of 1860 before he can obtain a decree, or execute a decree already obtained by the deceased; though he may institute his suit, or apply for execution without such certificate, provided a certificate is filed before decree or before execution issues. JANAKI BALLAV SEN v. HAFIZ MAHOMED ALI KHAN, 13 C. 47 ... 528

(2) Of guardianship—See ACT XL OF 1858 (MINORS), 12 C. 542; 13 C. 219.

(3) Ordered but not issued, Effect of—See ACT XL OF 1858 (MINORS), 13 C. 219.

(4) Act XL of 1858, under—See MINOR, 12 C. 48; 12 C. 131.

(5) Suit to set aside sale—See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 12 C. 603.

Charitable Gift.

See WILL, 13 C. 193.

Civil Procedure Code, Act VIII of 1859.

(1) S. 12—See REMAND, 12 C. 225.

(2) S. 92—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 515.

(3) Ss. 240, 242 and 270—See ATTACHMENT, 12 C. 317.

Civil Procedure Code, Act X of 1877. PAGE

(1) S. 13—See RES JUDICATA, 12 C. 484.

(2) *S.* 43—*Splitting claims.*—A decree for damages in a suit instituted on 2nd June 1879 (27th Joist 1286 F.) on a breach of contract for not having given possession of land according to the terms of a zar-i-peshgi potta, awarded the profits of the land for 1283, F., which would have been received by the plaintiff had the contract been performed. The decree-holder then brought the present suit (14th June, 1880 or 21st Joist 1287, F.), for damages on the breach of the same contract, claiming the profits accrued during 1284, 1285 and 1286 F. (1876-77 to 1878-79). *Held*, that the High Court had rightly decided that, in regard to Act X of 1877, s. 43, the plaintiff could not recover so much of the profits as had already accrued at the date of the institution of the prior suit, inasmuch as the claim in respect of such profits might have been included therein, *viz.*, the profits for the two years 1284 and 1285 F., which had expired when that suit was brought. MADAN MOHAN LAL v. LALA SHEOSANKER SAHAI, 12 C. 482 (P.C.) = 4 Sar. P.C.J. 674 ... 327

(3) S. 565—See APPELLATE COURT, 12 C. 239.

Civil Procedure Code, Act XIV of 1882.

(1) Ss. 2, 53, 54, 442—See MINOR, 13 C. 189.

(2) Ss. 2, 232, 244—See APPEAL—SECOND APPEAL, 12 C. 610.

(3) *Ss.* 2, 396—*Decree for partition—Order directing commission of partition to issue—Appeal from—Appealable order.*—Where an appeal Court made a decree or order directing a commission to issue directed to an Amin to make a partition of certain property into certain specified shares and to allot the shares to the parties to the suit, *held*, that such order amounted to a decree within the meaning of s. 2 of the Code of Civil Procedure, and that, though called a decree, it was in fact an order in the terms of s. 396 of the Code and was a proper order to make. BEPIN BEHARI MODUCK v. LAL MOHUN CHATTOPADHYA, 12 C 209 ... 143

(4) Ss. 2, 506, 514, 582—See ARBITRATION, 12 C. 173.

(5) Ss. 2 and 396—See APPEAL, 12 C. 273 ; 12 C. 275.

(6) Ss. 3, 4, 540—See ACT XVII OF 1875 (BURMA COURTS), 13 C. 221.

(7) S. 13—See RES JUDICATA, 12 C. 563; 13 C. 17.

(8) Ss. 15 and 17—See APPEAL—GENERAL, 12 C. 271.

(9) S. 28—See JOINDER OF PARTIES, 12 C. 555.

(10) S. 28—See MULTIFARIOUSNESS, 13 C. 147.

(11) S. 32—See APPEAL—GENERAL, 13 C. 100.

(12) S. 32—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 90.

(13) S. 32—See PARTIES, 13 C. 90.

(14) Ss. 32, 363, 364—See LIMITATION, 12 C. 642.

(15) *S.* 43—*Breaches of one term in a contract how sued upon—Cause of action—Contract.*—*Per* GARTH, C.J.—A claim for the price of goods sold is a cause of action of a different nature from a claim or damages for non-acceptance of goods pursuant to a contract. Such claims, therefore, although arising under one and the same contract, may be sued upon separately, s. 43 of the Code of Civil Procedure notwithstanding. *Per* WILSON, J.—Where there is one contract for the purchase of goods and the purchaser takes some of the goods, but breaks his contract in part by not paying for the goods he takes, and in part by not taking and paying for the remainder, and both breaches occur before any suit is brought, the claim of the person suing is one arising out of one cause of action; and the whole claim must be included in one suit. ANDERSON, WRIGHT AND CO. v. KALAGARLA SURJI-NARAIN, 12 C. 339 ... 231

(16) *S.* 43—*Relinquishment of part of claim—Suit for maintenance and suit for a share of the inheritance distinguished—Cause of action—Election, Doctrine of—Succession Act* (X *of* 1865), *s.* 172, *excep.*—A testator bequeathed all his property to his nephew, in which he included the share of his brother's widow in the ancestral property ; but at the same time made a suitable provision for her maintenance and worship. The widow at first sued for and obtained the allowance allotted to her under the will, and afterwards

Civil Procedure Code, Act XIV of 1882—(*Continued*). PAGE

brought a suit for a share, in the ancestral property. *Held*, that, although having regard to the doctrine of election, (Succession Act, s. 172), the widow was precluded from again bringing a suit for a share of the ancestral property, it could not be said that the suit was barred under the provisions of s. 43 of the Code of Civil Procedure, inasmuch as the two claims were distinct and indeed inconsistent, and did not arise out of the same cause of action. PRAMADA DASI v. LAKHI NARAIN MITTER, 12 C. 60 ... 42

(17) *S.* 43—*Splitting, Cause of action—Suit for declaration of title—Subsequent suit for possession.*—When a suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession of the land at the time of instituting the suit, a subsequent suit on the same title to recover possession is not barred under s. 43 of the Civ. Pro. Code. A cause of action consists of the circumstances and facts which are alleged by the plaintiff to exist, and which, if proved, will entitle him to the relief or to some part of the relief prayed for, and is to be sought for within the four corners of the plaint. NONOO SINGH MONDA v. ANAND SINGH MONDA, 12 C. 291... 197

(18) *S.* 43—*Suit for arrears of rent—Application of the Civ. Pro. Code to suits in Revenue Courts—Relinquishment of part of claim.*—The plaintiff sued under the provisions of Act X of 1859 to recover arrears of rent for the years 1287, 1288 and 1289, (1880—82) after having obtained a decree for the rent due for the year 1286 (1879) in a suit instituted after the rent for the year 1289 (1882) had become due. *Held*, that the provisions of s. 43 of the Civ. Pro. Code applied, and that the second suit was consequently barred. ADHIRANI NARAIN KUMARI v. RAGHU MAHA PATRO, 12 C. 50 ... 34

(19) S. 209—See INTEREST, 12 C. 569.

(20) Ss. 223, 239, 248—See LIMITATION, 13 C. 257.

(21) S. 230—See EXECUTION OF DECREE, 12 C. 559.

(22) *Ss.* 232 *and* 244—*Execution of decree—Assignee of decree—Separate suit—Questions for Court executing decree.*—Three out of six decree-holders sold their share in the decree to A, who thereafter made an application to the Court under s. 232 of the Code of Civil Procedure. This application was dismissed on the ground that A's purchase was made *benami* for some of the judgment-debtors. In a subsequent suit brought by A and the persons who were said to be the real purchasers, it was contended that a separate suit was barred under the provisions of s. 244, cl. C of the Code of Civil Procedure. *Held*, that A was not a party to the suit in which the decree was passed, nor the representative of any such party, and that the suit was not barred. HALODHAR SHAHA v. HAROGOBIND DAS KOIBURTO, 12 C. 105 ... 71

(23) Ss. 235, 237, 245—See EXECUTION OF DECREE, 12 C. 161.

(24) Ss. 239, 241, 341, 349, 357—See ARREST, 12 C. 652.

(25) *S.* 244—*Suit to recover purchase money on reversal of decree under which sale in execution took place—Separate suit—Party to proceedings in execution.*—G instituted a suit against H, C and P, which was dismissed with costs, but an appeal was preferred. Pending the appeal, however, C. took out execution of the decree for costs, and brought to sale a house belonging to G, of which H became the purchaser, paid the purchase money, and got possession. Subsequently the decision dismissing the suit was reversed on appeal, and the defendants in that suit were ordered to pay a certain sum to G with costs. G then applied for restitution of her house which had been sold under the decree reversed, and eventually obtained an unconditional order for possession, H being left to any remedy open to him in respect of the purchase money. G having obtained possession of the house, H brought a suit against her to recover the purchase money: *Held*, that notwithstanding s. 244 of the Civ. Pro. Code, he was entitled in this suit to recover the purchase money, as money received to his use, the consideration for it having failed. H was not in his character as an auction-purchaser, a party, to the execution proceedings, and for the purpose of the suit was to be treated as a third person. HIRA LAL CHATTERJEE v. GOURMONEY DEBI, 13 C. 326 ... 718

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(26) *S.* 244, *cl.* (*c*)—*Execution of decree*—"*Representative*" *of judgment-debtor.*—The word "representative" as used in cl. (*c*), s. 244 of the Code of Civil Procedure, means any person who succeeds to the right of any of the parties to the suit after the decree is passed. A Hindu widow mortgaged certain properties, and afterwards by an *ekrarnama* made them over to B, the next heir. The *ekrarnama* contained a condition that B was to be liable for the widow's debts. Subsequently the mortgagee brought a suit against the widow on the mortgage and joined B as a party, on the ground that he was in possession of the mortgaged properties. That suit resulted in a money decree being passed on appeal by the High Court against the widow personally, the property in the hands of B being held not to be liable. The case was taken on appeal to the Privy Council, and pending the hearing of that appeal the widow died, and B was brought on the record as her legal representative. The decree of the High Court was ultimately confirmed by the Privy Council. In execution of the decree it was sought to make B liable to satisfy the amount out of the properties which he had obtained under the *ekrarnama*, the mortgagee not having been aware of the conditions of that document before the decree of the High Court. *Held*, that so far as these properties were concerned, he was not the legal representative of the widow, as he inherited them as heir-at-law of her husband, and that his title to them under the *ekrarnama* was not that of a "representative" within the meaning of cl. (*c*) of s. 244. *Held*, further, that the question of *B's* liability under the *ekrarnama* did not fall within the scope of the provisions of cl. (*c*) of s. 244 as being a question to be decided between the "parties" to the suit as although *B* was a party to the suit, the only claim against him was that the property in his hands was liable, as having been previously hypothecated, and as the suit was dismissed so far as that claim was concerned, it was not a question relating to the execution of the decree. KAMESHWAR PERSHAD v. RUN BAHADUR SINGH, 12 C. 458 ... 311

(27) Ss. 253, 602, 603, 610—See APPEAL TO PRIVY COUNCIL, 12 C. 402.

(28) *Ss.* 268, 274—*Attachment and sale of mortgage bond*—*Lien of purchaser on mortgaged property after attachment under s.* 268.—In execution of a decree obtained by them against *J* and *M* the plaintiffs attached a decree obtained by *J* and *M* against *D*, and on the allegation that *J* and *M*, in order to avoid the consequence of this attachment, executed a *benami* conveyance of their interest under the attached decree to *B* and *P*, and afterwards with the same object took in adjustment and satisfaction of that decree two bonds in favour of *R* and *I* respectively, by which immoveable property was pledged as collateral security, the plaintiffs attached these two bonds by prohibitory order, under s. 268 of the Civ. Pro. Code, and purchased them at the sale in execution of their decree. In a suit on the bonds against *D* as the principal defendant with *J*, *M*, *B*, *P*, *R*, and *I* joined as parties: *Held*, that the plaintiffs were entitled to enforce the lien created by the bonds against the immoveable property specified in them, notwithstanding that no attachment had been made in accordance with the provisions of s. 274 of the Code; a debt secured by a mortgage lien on immoveable property not being "immoveable property" within the meaning of that section. DEBENDRA KUMAR MANDEL v. RUP LALL DASS, 12 C. 546 ... 371

(29) *Ss.* 278, 283—*Claim to property under Attachment*—*Damages for wrongful Attachment.*—Suits under s. 283 of the Code, although they are brought for the purpose of establishing rights which have been negatived in execution proceedings are neither described in the Code nor are dealt with in practice as appeals from the orders of lower Courts; they are substantive suits to all intents and purposes, and must be tried like any other suits subject to the ordinary rules of procedure and evidence. There is nothing in the provisions of ss. 278 to 283 of the Code limiting in a suit under s. 283 a plaintiff's right to compensation for his loss, or the defendant's responsibility for his wrongful act; and if the existence of the summary procedure (in ss. 278 to 282) leads to delay, and that delay to further loss, the consequences must fall upon the defendant. KISHORI MOHUN RAI v. HURSOOK DASS, 12 C. 696 ... 471

(30) Ss. 280, 283—See LIMITATION ACT (XV OF 1877), 12 C. 453.

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(31) *Ss.* 281, 283—*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 11—*Claim to attached property—Separate suit.*—The order contemplated by s. 281 of the Code of Civil Procedure is an order made after investigation into the facts of the case, and it is only when the order is made after such investigation that the limitation of one year is applicable to a subsequent suit under s. 283 of the Civ. Pro. Code. CHANDRA BHUSAN GANGOPADHYA v. RAM KANTH BANERJI, 12 C. 108 ... 73

(32) Ss. 284, 295—See ATTACHMENT, 12 C. 317.

(33) *Ss.* 284, 295, 315—*Execution of decree—Payment out of proceeds before confirmation of sale—Interest on purchase-money from date of sale to date of confirmation.*—Although there is no express provision in the Code laying down that a decree-holder may take out of Court the proceeds of an execution sale before the date on which the sale is confirmed, yet s. 315 of the Code implies that this may be done. The Court, however, under special circumstances, may refuse to pay over to the decree-holder, the purchase money until the sale is confirmed, but in such case it should provide for due payment of interest on the money detained. *Held*, that under the special circumstances of this case the decree-holder was not entitled to receive interest from his judgment-debtor from the date of the sale to the date on which the sale was confirmed. JOGENDRO NATH SIRCAR v. GOBIND CHANDAR ADDI, 12 C. 252 ... 171

(34) *Ss.* 285, 295—*Jurisdiction—Sale by inferior Court pending an unknown attachment by a superior Court.*—At an execution sale held by an inferior Court, at the instance of the decree-holder, (the Court itself, the decree-holder, and the auction-purchaser being unaware of any objection to the exercise of a jurisdiction which the Court would ordinarily be competent to exercise), A purchased certain property and this sale was confirmed. It appeared subsequently that this same property had two years previous to the sale been attached by a superior Court. On a sale of this property being advertised by the superior Court, A objected on the ground that he had already purchased it; this objection was overruled, and a sale was held by the superior Court, at which A again became the purchaser. A then brought a suit against the decree-holder and the judgment-debtor in the inferior Court to recover as damages the sum paid by him at the sale. The suit was dismissed. *Held* that although the superior Court had been wrong in insisting on the second sale and in not requiring the amount received by the inferior Court to have been deposited in the superior Court, and then rateably distributed amongst the creditors of the judgment-debtors, yet the sale by the inferior Court was a good and valid sale; and A's suit was therefore rightly dismissed. BYKANT NATH SHAHA v. RAJENDRO NARAIN RAI, 12 C. 333 ... 227

(35) S. 294—See APPEAL (GENERAL), 13 C. 174.

(36) *Ss.* 294, 295—*Rateable distribution of sale proceeds—Allowance of set-off of purchase-money against amount of decree—Suit for share of sale proceeds—Limitation—Principle of distribution.*—In execution of a decree against M the plaintiff attached and advertised for sale certain property in mouzah A. At the time there were pending proceedings in execution of two other decrees obtained against M by the first and second defendants, respectively. These two decrees were obtained on a bond executed by M, by which an eight annas share of mouzah A was hypothecated as collateral security; and in execution of those decrees the defendants brought to sale, and themselves purchased, not an eight annas share only, but the whole of mouzah A, and were allowed by the Court to set off the purchase-money against the amounts due to them under their decrees At the same time the plaintiff's execution case was struck off on 30th June, 1880. In a suit brought by the plaintiff under s. 295 of the Civ. Pro. Code for his share of the sale proceeds of mouzah A, in which the plaintiff alleged fraud on the part of the defendants in selling the whole mouzah under their decrees, of which he only became aware in July, 1882, from which time he dated his cause of action, the defendants denied the fraud and contended that the suit should have been brought within a year of the order of the 30th June 1880; that a set-off having been allowed to the defendants, the plaintiff was not entitled to any rateable distribution; and that if any rateable distribution were allowed, they were entitled to have an allowance

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made in respect of a mortgage which the plaintiff held in a two annas share of mouzah A, which they had paid off subsequently to the transactions now in question. *Held*, that the existence of the order of the 30th June 1880 was not inconsistent with the plaintiff's right, and the suit was therefore not barred as not having been brought within one year of that order. *Held*, also, that the fact of the set off being allowed in exercise of the power given in s. 294 of the Code, instead of actual payment into Court, did not alter the substantial nature of the transaction, so as to render the purchase-money less applicable to the satisfaction of the debts of other attaching creditors. *Held*, further, that the defendants were not entitled to deduct the sum paid by them to clear off the plaintiff's mortgage from the amount of the purchase-money, before the Court could determine the amount rateably distributable among the parties concerned. *Quaere*—Whether they were even entitled to reckon the amount so paid as one of the claims in respect of which, with others, a rateable distribution should be made? TAPONIDI HORDANUND BHARATI v. MATHURA LALL BHAGAT, 12 C. 499 ... 338

(37) *S. 295—Rateable distribution of sale proceeds—Same judgment-debtor—Sale in execution of decree—Execution Proceedings*—Where a judgment-creditor has obtained a decree against two judgment-debtors *A* and *B*, and in execution of that decree has attached and caused to be sold joint property belonging to such judgment-debtors, another judgment-creditor holding a decree against *A* alone, who has also applied for execution, is not entitled to claim under the provisions of s. 295 of the Civ. Pro. Code, to share rateably in the sale proceeds, the decree not being against the same judgment-debtor, and a Court having no power in execution proceedings to ascertain the respective shares of joint judgment-debtors. In 9 Calc., 920, it was not intended to lay down that a person who has obtained a decree for money against a single judgment-debtor is entitled to come in and share rateably with a person who has obtained a decree against the same judgment-debtor and other persons. DEBOKI NUNDUN SEN v. HART, 12 C. 294 ... 200

(38) S. 295—See LIMITATION ACT (XV OF 1877), 13 C. 159.

(39) *Ss. 295, 622—Rateable distribution—Assets realized "by sale or otherwise."*—The words of s. 295 of the Code of Civil Procedure "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors. The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civ. Pro. Code. SEW BUX BOGLA v. SHIB CHUNDER SEN, 13 C. 225 ... 649

(40) *S. 311—Application to set aside sale—"Person whose property has been sold"—Mortgagee—Transfer of Property Act* (IV *of* 1882) *ss.* 86, 87.—The mortgagees of a certain tenure obtained, on 11th September 1884, under s. 86 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April, 1885. On the 6th April, 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under s. 311 of the Civ. Pro. Code to have the sale set aside for material irregularity. *Held*, that under s. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of s. 311, "person whose property has been sold," and entitled them to make the application. RAKAL CHUNDER BOSE v. DWARKA NATH MISSER, 13 C. 346 ... 731

(41) *S. 317—Benami transaction—Fraud—Suit against purchaser buying benami—Sale certificate granted in name of benamidar*—Certain property belonging to a judgment-debtor was brought to sale and purchased by a person in the *benami* name of her daughter, then an infant, and the sale certificate was made out in the name of the latter. Subsequently, the mother mortgaged the property, and the mortgage brought a suit, obtained a decree, and had the property sold, and purchased it himself. Upon his being resisted by the daughter in attempts to get his name registered as pro-

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prietor, he instituted a suit against both mother and daughter to establish his rights to the property. The daughter thereupon objected that the suit would not lie by reason of the provisions of s. 317 of the Civ. Pro. Code. *Held*, that the provisions of that section, which were intended to prevent fraud, were inapplicable to the facts of the case, and that the suit was maintainable. KANIZAK SUKINA v. MONOHUR DAS, 12 C. 204 ... 139

(42) S. 318—See POSSESSION, 12 C. 169.

(43) S. 375—See COMPROMISE, 13 C. 170.

(44) S. 435—See PLAINT, 12 C. 41.

(45) S. 440—See MINOR, 12 C. 131.

(46) *S.* 492—*Civ Pro. Code*, 1859, *s.* 92—*Injunction to stay sale pending suit to establish title—Superintendence of High Court under s.* 622, *Civ. Pro. Code*, 1882.—A claim by *R* to certain property which had been attached by *B* in the course of execution proceedings in the Court of the First Subordinate Judge of Dacca having been rejected, *R* instituted a suit in the Court of the Second Subordinate Judge to establish his title to the property. In that suit he applied to the Court in which his suit was brought for an injunction under s. 492 of the Civ. Pro. Code to stay the sale of the property attached by *B* in the execution proceedings; but that application was rejected, and *R* thereupon applied for and obtained from the Court of the First Subordinate Judge an order staying the sale of the attached property until the hearing of the suit brought by him to establish his right to it. *Held*, in an application under s. 622 of the Code, to set the latter order aside, that s. 492 of the Code of 1882 has, and was intended to have, a wider application than s. 92 of Act VIII of 1859 had, and provides a remedy where property is "in danger of being wrongfully sold" if the circumstances justified it an order could have been obtained under that section from the Court of the Second Subordinate Judge to stay the sale. There being this alteration in the law, and such a remedy provided, and no express provision in the Code for stay of execution by a Court executing a decree on the application of a third party, the order of the First Subordinate Judge was made without jurisdiction, and should be set aside. *In the matter of the petition of* BROJENDRA KUMAR RAI CHOWDHURI. BROJENDRA KUMAR RAI CHOWDHURI v. RUP LALL DOSS, 12 C. 515 ... 349

(47) S. 540—See ACT XVII OF 1875 (BURMA COURTS), 13 C. 221; 13 C. 232.

(48) Ss. 545, 568—See APPEAL (GENERAL), 12 C. 624.

(49) Ss. 556, 558—See APPEAL (GENERAL), 12 C. 605.

(50) Ss. 562, 588—See APPEAL (GENERAL), 12 C. 45.

(51) *S.* 568—*Additional evidence in first Court of Appeal—Procedure in second Court of Appeal.*—The provision in s. 568 of Act XIV of 1882, as to an Appellate Court recording its reasons for admitting additional evidence, is directory merely and not imperative. Where the first Court of Appeal has admitted additional evidence, the hearing in the second Court of Appeal will not be treated as a first appeal so as to allow the pleaders to go into the facts. GOPAL SINGH v. JHAKRI RAI, 12 C. 37 ... 25

(52) Ss. 574, 584—See JUDGMENT, 12 C. 199.

(53) S. 582—See LIMITATION ACT (XV OF 1877), 12 C. 590.

(54) S. 584—See APPEAL—SECOND APPEAL, 12 C. 30.

(55) S. 588, cl. 3—See APPEAL (GENERAL), 13 C. 100.

(56) S. 590—See INSOLVENCY ACT, 11 & 12 VIC., C. 21, 12 C. 629.

(57) Ss. 598, 599, 600—See APPEAL TO PRIVY COUNCIL, 12 C. 658.

(58) *S.* 622—*Material irregularity affecting merits of case.*—The words "a material irregularity," in s.622 of the Code of Civil Procedure include an irregularity of procedure materially affecting the merits of the case. An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section. SEW BUX BOGLA v. SHIB CHUNDER SEN, 13 C. 225 ... 649

(59) S. 622—See CIV. PRO. CODE (ACT XIV OF 1882), 12 C. 515.

(60) *Ss.* 622 *and* 32—*Interpleader suit, Application to be made a party to—Power of High Court on Revision—Erroneous construction of Act.*—A merely

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erroneous construction of the provisions of an Act is not a ground for relief under s. 622 of the Civ. Pro. Code. M.J. instituted an interpleader suit against two rival claimants N and A, in respect of a sum of Rs. 20,000. R subsequently claimed a portion of the money and applied to be made a party to the suit; but was opposed by M. J. and N. The Subordinate Judge refused the application on the ground that, though it was probably made under s. 32 of the Civ. Pro. Code, R's right or claim not having been admitted by the plaintiff nor asserted to his knowledge, she was not a necessary party under the special provisions of Chapter XXXIII of the Civ. Pro. Code, and referred her to a regular suit. *Held*, that the order, though based upon an erroneous construction of the provisions of s. 32 of the Code, did not come within the scope of s. 622, inasmuch as it could not be said that the Subordinate Judge had failed to exercise a jurisdiction vested in him by law. RABBABA KHANUM v. NOOR JEHAN BEGUM *alias* DALIM SHAHIBA, 13 C. 90 ... 558

(61) S. 623—See REVIEW, 13 C. 62.
(62) S. 624—See REVIEW, 13 C. 231.

Claim.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 108; 12 C. 696.
(2) See COURT FEES ACT (VII OF 1870), 13 C. 162.

Client.

See COMPROMISE, 13 C. 115.

Collusion and Fraud.

See EVIDENCE ACT (I OF 1872), 12 C. 156.

Commission.

See INSOLVENCY, 13 C. 66.

Commissioners.

See ACT V OF 1876, (BENGAL MUNICIPAL), 13 C. 171.

Committal.

To Court of Sessions—See MAGISTRATE, 13 C. 305.

Companies Act (VI of 1882).

S. 41—See PLAINT, 12 C. 41.

Company.

See PLAINT, 12 C. 41.

Compensation.

(1) *Cattle Trespass Act*, 1871, ss. 20, 22—*False complaint.*—A complaint was made against certain persons under s. 20 of the Cattle Trespass Act of 1871, charging them with having illegally seized and detained the complainant's cattle. The Assistant Magistrate who heard the complaint found it to be false, and he ordered the complainant to pay Rs. 20 compensation to the accused, and in default to suffer simple imprisonment for 21 days. On application to the High Court: *Held*, that the order was illegal and must be set aside. *In the matter of* KALA CHAND v. GUDADHUR BISWAS, 13 C. 304 ... 703
(2) See ACT V OF 1876 (BENGAL MUNICIPAL), 13 C. 171.
(3) See LAND ACQUISITION ACT (X OF 1870), 12 C. 33.

Complaint.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 13 C. 334.

Compromise.

(1) *Compromise made notwithstanding dissent of client—Counsel's powers to compromise—Consent decree set aside.*—Where counsel, after consulting with his attorney and client as to the advisability of compromising a case, and after receiving instructions from the attorney "to do the best he could for his client," compromised the case, notwithstanding the express prohibition of the client; and the client before the consent decree was drawn up notified her dissent to the other side: *Held*, that the consent decree must be set aside. CARRISON v. RODRIGUES, 13 C. 115 ... 576

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(2) *Compromise extending beyond the terms of the suit—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 375—*Compromise, Modification of terms of.*—The only compromise which a Court can in any case be bound under s. 375 of the Code of Civil Procedure to enforce, is one which adjusts, wholly or in part, the suit; matters going beyond the suit cannot, if included in a compromise, be so enforced. A Court refusing to grant a decree on a compromise going beyond the suit, cannot however grant a decree modifying the terms of the proposed compromise, but must leave the parties to proceed with the suit as they may be advised. FAJALEH ALI MIAH v. KAMARUDDIN BHUYA, 13 C. 170 612

Confirmation.

(1) See LIMITATION ACT (XV OF 1877), 12 C. 441.

(2) See SALE, 12 C. 597.

Confiscation

and Restoration of Lands in Oudh in 1858 *and of immoveables in Lucknow—Gift —Title.*—On a claim for a share in property consisting of (*a*) immoveables in Lucknow, and (*b*) revenue paying land in a district of Oudh, the defence was title by gift, with possession from the former owner, a member of the family through which the plaintiff claimed. As to the immoveables in Lucknow, they having been included in the confiscation which, having followed the capture of the town in 1858, was subsequently abandoned without any intention on the part of Government to make a re-grant in favour of any person, the result in regard to the present question was the same as if no such event had occurred. The other property (*b*) came under the general confiscation of Oudh lands in 1858, and also was restored through subsequent settlement operations in which the final order, relating to the land in question, was to the effect that settlement should be made with the "heirs" of the previous owner. *Held*, that the above did not preclude the defence of exclusive title by gift; the order last mentioned, on its true construction, only designating all those who might take under and through the previous owner (deceased at the time of settlement), without excluding any claimant, save those who might claim adversely to such title. The Government did not, in the settlement which followed the confiscation, make any arbitrary, or wholly new, re-distribution of estates, or proceed as if the existence of previous titles (although they had been brought to an end) was to go for nothing. The enquiry in most cases was as to who would have been entitled, had there been no confiscation. As to both classes of property, the gift was maintained. JEHAN KADR v. AFSAR BAHU BEGUM, 12 C. 1 (P.C.) = 12 I.A. 124 = 9 Ind. Jur. 322 = 4 Sar. P. C.J. 630 = Rafique and Jackson's P.C. No. 91 ... 1

Conjugal Rights.

See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Consent.

See HINDU LAW—MARRIAGE, 12 C. 140.

Consent Decree.

See COMPROMISE, 13 C. 115.

Consequential Damage.

See CAUSE OF ACTION, 12 C. 424.

Construction.

See HINDU LAW—GIFT, 12 C. 663.

See POTTAH, 12 C. 117.

Continuing Offence.

Between date of summons and conviction—See ACT IX OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION), 13 C. 108.

Contract.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 339.

(2) See CONTRACT OF GUARANTEE, 12 C. 143.

(3) See LIMITATION ACT (XV OF 1877), 12 C. 357, 477.

(4) See SPECIFIC PERFORMANCE, 12 C. 152.

Contract Act (IX of 1872). PAGE

(1) See MORTGAGE—GENERAL, 13 C. 262.

(2) Ss. 60, 74—See INTEREST, 13 C. 164.

(3) Ss. 69, 70—See VOLUNTARY PAYMENT, 12 C. 213.

(4) S. 74—See INTEREST, 13 C. 200.

(5) Ss. 133—139—See PRINCIPAL AND SURETY, 12 C. 330.

Contract of Guarantee.

Construction of contract guaranteeing contract of person employed as agent of the guarantor—Liability for loss resulting from such agent's misconduct towards his employer.—Upon the construction of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor, *held*, that the loss to be recoverable in a suit against the guarantor must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement. The khezanchi of a District Treasury guaranteed the Government against loss arising from the misconduct of the stamp darogah, appointed as his agent. The latter became a party to frauds by putting off upon the public forged stamps, in addition to the genuine ones issued from the Treasury into which, however, all the proceeds of sales were paid. The darogah, on whose indent the stamps were issued made the proceeds appear to correspond in his accounts with the value of the stamps issued to him; but, under cover of the above payment, he misappropriated certain genuine stamps, *Held*, that although the guarantor might not be responsible in respect of the forgery of the stamps, yet he was responsible on his agreement by reason of the misappropriation of the genuine stamps and the false accounts rendered; and that losses, which in the first instance were caused by the forgery, were brought within the scope of the agreement by the fact of such misappropriation and false accounting. SRI KISHEN v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 12 C. 143 (P.C.) = 12 I. A. 142 = 9 Ind. Jur. 403 = 4 Sar P.C.J. 663 = Rafique and Jackson's P.C. No. 92 ... 98

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by vendors under one denomination to same persons purchasers under another denomination—See STAMP ACT (I OF 1879), 13 C. 43.

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(1) See ACT IV OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION), 13 C. 108.

(2) See PRESIDENCY MAGISTRATE, 13 C. 272.

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Time requisite for obtaining—See LIMITATION ACT (XV OF 1877), 12 C. 30, 441; 13 C. 104.

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See PLAINT, 12 C. 41.

Co-sharers.

Notice to quit—Co-sharers, suit by—Withdrawal of one co-sharer from the suit—Ejectment, Suit for.—Where several co-sharers have served a joint notice to quit, upon which notice they jointly institute a suit for the recovery of the land, the fact that one of the plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land. DWARKA NATH RAI v. KALI CHUNDER RAI, 13 C. 75 ... 548

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(1) See APPEAL—GENERAL, 12 C. 271.

(2) See APPEAL—SPECIAL APPEAL, 12 C. 179.

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(3) See APPEAL TO PRIVY COUNCIL, 12 C. 402.

(4) See LIMITATION ACT (XV OF 1877), 12 C. 357.

(5) See PRACTICE, 12 C. 551.

(6) See WILL, 13 C. 193.

Counsel.

(1) See COMPROMISE, 13 C. 115.

(2) See PRACTICE, 12 C. 551.

(3) See REVIEW, 13 C. 62.

Court.

(1) See LOCAL INVESTIGATION, 12 C. 45.

(2) See PARTIES, 13 C. 90.

(3) See POSSESSION, 13 C. 283.

Court Fees Act (VII of 1870.)

(1) S. 6—See ACT XL OF 1858 (MINORS), 12 C. 542.

(2) *Sch.* I, *and sch.* II, *Act* VII, *cl.* 3—*Suit after rejection of claim to attached property*—Ad valorem *stamp.*—In execution of a decree by the defendant, certain property was attached as being that of the judgment-debtor. The plaintiff preferred a claim, but his claim was disallowed, and the property ordered to be sold. In a suit to have it declared that the property belonged to the plaintiff: *Held*, that it was a suit in which consequential relief was asked for, and that the *ad valorem* duty prescribed by sch. I of the Court Fees Act was payable on the plaint, and not that provided by sch. II, art. 17. AHMED MIRZA SAHEB v. A. THOMAS, 13 C. 162 ... 607

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Criminal Procedure Code (Act X of 1882).

(1) Ss. 54, 489—See HINDU LAW—MAINTENANCE, 12 C. 535.

(2) S. 107—See RECOGNIZANCE, 12 C. 133.

(3) Ss. 110, 112—See SECURITY FOR GOOD BEHAVIOUR, 12 C. 520.

(4) *S.* 133—*Public way—Nuisance—Removal of obstruction—Jury—Majority of Jury.*—When a minority of a jury appointed under the provisions of s. 133 of the Crim. Pro. Code do not act, the Magistrate cannot proceed under that section upon a report submitted by the majority. IN THE MATTER OF DURGA CHARAN DAS v. SASHI BHUSAN GUHO, 13 C. 275 ... 683

(5) *S.* 133—*Removal of obstruction in public way—Question of title.*—The powers given by s. 133 and the following sections of the Crim. Pro. Code, 1882, as to the removal of obstructions, in public ways, are not intended to be exercised when there is a *bona fide* dispute as to the existence of the public right; the procedure under those sections not contemplating an inquiry into disputed questions of title. LAL MIAH v. NAZIR KHALASHI, 12 C. 696 ... 471

(6) *Ss.* 133, 135—*Application for order to remove obstruction—Disputed title—Jurisdiction of Criminal Court.*—Where an application is made under s. 133 of the Crim. Pro. Code, calling on a person to remove an obstruction, and such person *bona fide* raises a question of title. *Held*, that the case then becomes one for a Civil Court. The section contemplates only an enquiry as to the existence or non-existence of the obstruction complained of, not an enquiry into disputed questions of title. ASKAR MEA v. SABDAR MEA, 12 C. 137 ... 93

(7) *S.* 145—*Inquiry as to possesion—" Actual possession."*—Under s. 145 of the Crim. Pro. Code a Magistrate has to look to the "actual possession," that is, the possession, however obtained, of the party in possession at the time of the inquiry. CHUNDER KOOMAR PODDAR v. CHUNDRA KANTA GHOSE, 12 C. 521 ... 354

(8) *S.* 145—Julkar, *dispute regarding*—" *Tangible immoveable property.*"—A dispute concerning the right to fish in a *julkar* is not a dispute concerning any

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" tangible immoveable property within the meaning of s. 145 of the Code of Criminal Procedure. Enquiries under s. 145 should be directed to the question as to which party is in possession of the subject of dispute before any proceedings in the Court have been taken in the matter. KRISHNA DHONE DUTT v. TROILOKIA NATH BISWAS, 12 C. 539 ... 366

(9) *S.* 145—Julkar *right—Tangible immoveable property—Dispute regarding a* Julkar.—A dispute concerning a *julkar* right is not a dispute concerning " tangible immoveable property" within the meaning of s. 145 of the Code of Criminal Procedure, and cannot be inquired into by a Magistrate under the provisions of that section. ANUND MOYI DABIA v. SHURNO MOYI, 13 C. 179 ... 618

(10) *S.* 145—*Penal Code, s.* 188—*Disobedience to order of public servant—Inquiry as to possession—Parties to inquiry.*—In May 1883 the District Magistrate of Tipperah held an inquiry as to the possession of certain lands claimed by A and B, and having found on the evidence taken by him that A was in possession, he passed an order on the 21st of May 1883, declaring that A was entitled to hold possession of the disputed land until evicted in due course of law, and forbidding B and all others to disturb A's possession until such disturbance should be effected in due course of law. Previously to November 1885, B sold an eight-anna share of his interest in the disputed land to C, who, at the time of his purchase, had notice of the order of the 21st of May 1883. In November 1885, B and others went to the disputed lands, and attempted to turn A out of possession by force, and to compel the tenants of the lands to pay rent and give kabuliats to B and C. At the time that B and his companions went to the disputed land, the latter were aware of the order of the 21st of May 1883, though none of them was a party to the inquiry then made by the District Magistrate. In December 1885, they were all tried and found guilty of disobedience to an order duly promulgated by a public servant. *Held*, that the conviction was right. *Semble*, that a reference by a Magistrate to a Police report which clearly sets out the probability of a breach of the peace is a sufficient statement of the reasons for the Magistrate's being satisfied of the existence of a dispute likely to cause a breach of the peace, within the meaning of s. 145 of the Code of Criminal Procedure. GOLUCK CHANDRA PAL v. KALI CHARAN DE, 13 C. 175 ... 615

(11) *Ss.* 191, 202, 203—*Complaint—Magistrate, Power of—" May take cognizance of," Meaning of.*—The use of the term " May take cognizance of any offence " in s. 191 of the Crim. Pro. Code does not make it optional with a Magistrate to hear a complainant, but refers rather to the action of the Magistrate in taking cognizance of an offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant and then can either issue summons to the accused or order an inquiry under s. 202, or dismiss the complaint under s. 203. UMER ALI v. SAFER ALI, 13 C. 334. 723

(12) S. 195—See PENAL CODE (ACT XLV OF 1860), 13 C. 270.

(13) S. 195—See SANCTION TO PROSECUTION, 12 C. 58.

(14) S. 235—See SENTENCE, 12 C. 495.

(15) S. 239—See MAGISTRATE, 13 C. 305.

(16) Ss. 357, 424—See JUDGMENT, 13 C. 110.

(17) S. 360—See DISCHARGE, 13 C. 121.

(18) Ss. 370, 437—See PRESIDENCY MAGISTRATE, 13 C. 272.

(19) *S.* 435—*Further enquiry—Inferior Criminal Court—Magistrate of the District, powers of.*—A Magistrate of a district is competent under s. 435 of the Crim. Pro. Code, to call for and deal with the record of any proceeding before any Magistrate of whatever class in his own district. OPENDRO NATH GHOSE v. DUKHINI BEWA, 12 C. 473 (F.B.) ... 321

(20) *S.* 437—*Power of Sessions Judge to order further inquiry.*—A Sessions Judge is not competent under s. 437, Crim. Pro. Code, to direct the re-opening of the proceedings, merely because in his opinion the Subordinate Magistrate has not rightly appreciated the credit due to the witnesses. " Further inquiry" under that section means the taking of additional evidence, not the re-hearing of the same evidence. DARSUN LALL v. JUMUK LALL, 12 C. 522 ... 354

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(21) S. 491—See ARREST, 12 C. 652.
(22) Ch. XXXII—See REVISION, 12 C. 536.

Crown Debt.
See INSOLVENCY ACT (11 AND 12 VIC., C. 21), 12 C. 445.

Cumulative Sentence.
See SENTENCE, 12 C. 495.

Customary Law.
See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Cypres, Doctrine of.
See WILL, 13 C. 193.

Damages.
(1) See CAUSE OF ACTION, 12 C. 109 ; 12 C. 424.
(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 696.
(3) See MISCHIEF, 12 C. 660.
(4) See RIGHT OF SUIT, 13 C. 300.

Debts.
(1) See CERTIFICATE, 13 C. 47.
(2) See LIMITATION ACT (XV OF 1877), 13 C. 292.
(3) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 505, 610.

Debutter Property.
See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 12 C. 375.

Deceased Wife's sister.
Marriage with—See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Declaration of Title.
See CVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 291.

Declaratory Decree.
(1) *Specific Relief Act* (I *of* 1877), *s.* 42—*Discretion of Court to give a declaratory decree—Landlord and tenant—Notice to quit—Tenant setting up larger interest than he is entitled to.*—A plaintiff, admitting a defendant's right to a *kursajama* tenure in certain lands, but denying a permanent *malguzari* tenure set up by him, sought to eject the defendant from the *kursajama* holding and for a declaration that the defendant was not entitled to the permanent *malguzari* tenure, *held*, that the plaintiff was entitled to the declaration asked for, notwithstanding that in consequence of his failure to prove a reasonable notice to quit, he was unable to obtain a decree for ejectment. A Judge, interfering with the discretion exercised by a lower Court in granting a declaratory decree, should state his reasons for so doing. KALI KISHEN TAGORE v. GOLAM ALI, 13 C. 3 ... 498
(2) See MULTIFARIOUSNESS, 13 C. 147.

Decree.
(1) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 13 C. 13.
(2) See APPELLATE COURT, 12 C. 239.
(3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 209.
(4) See EVIDENCE ACT (I OF 1872), 12 C. 156.
(5) See GUARDIAN, 12 C. 69.
(6) See LIMITATION, 13 C. 73.
(7) See LIMITATION ACT (XV OF 1877), 12 C. 30.
(8) See MINOR, 13 C. 189.
(9) See POSSESSION, 12 C. 414 ; 13 C. 283.
(10) See REMAND, 12 C. 225.
(11) See RES JUDICATA, 13 C. 352.
(12) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 610.

Defamation. PAGE

See CAUSE OF ACTION, 12 C. 109; 12 C. 424.

Default.

(1) See APPEAL, 12 C. 605.

(2) See RES JUDICATA, 12 C. 563.

Defaulting Proprietor.

See VOLUNTARY PAYMENT, 12 C. 213.

Defendants.

(1) See JOINDER OF PARTIES, 12 C. 555.

(2) See LIMITATION ACT (XV OF 1877), 12 C. 590.

(3) See RES JUDICATA, 12 C. 580.

Demand

of mortgagor—See REGULATION XVII OF 1806, 12 C. 138.

Denial

of Landlord's Title by Tenant—See LANDLORD AND TENANT, 13 C. 96.

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See LIMITATION ACT (XV OF 1877), 12 C. 113.

Deposit of title deeds.

See MORTGAGE (EQUITABLE), 13 C. 322.

Depositions

not read over to Accused—See DISCHARGE, 13 C. 121.

Desertion.

See MERCHANT SEAMEN'S ACT (I OF 1859), 12 C. 438.

Disability.

See GUARDIAN, 12 C. 612.

Discharge

of Accused—Further enquiry and order of commitment passed simultaneously by Sessions Judge—Depositions not read over to accused—Oral evidence—Statement of Mooktear as to faulty record—Criminal Procedure Code (Act X of 1882), *s.* 360—*Evidence Act* (I *of* 1872), *s.* 91.—A Sessions Judge, after hearing a general statement made by a Mooktear engaged in the case, considered that the depositions of certain witnesses taken in the Magistrate's Court did not conform with the requirements of s. 360 of the Code of Criminal Procedure, and refused to admit the depositions as evidence, and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions on behalf of the Crown; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held*, on appeal, that the conviction and sentence must be set aside. ADYAN SINGH v. QUEEN EMPRESS, 13 C. 121 ... 579

Discovery.

Affidavit of documents—Sufficiency of affidavit—Further affidavit—Inspection of Documents—Privileged communications—Practice.—Where in an affidavit of documents privilege is claimed for a correspondence on the ground that it contains instructions and confidential communications from the client (the plaintiff) to his solicitor, it must appear not merely that the correspondence generally contains instructions, &c., but that each letter contains instructions or confidential communications to the attorneys with reference to the conduct of the suit. THE ORIENTAL BANK CORPORATION v. T. F. BROWN & CO., 12 C. 265 ... 180

Discretion.

(1) See DECLARATORY DECREE, 13 C. 3.

(2) See INTEREST, 12 C. 569.

(3) See LIMITATION ACT (XV OF 1877), 13 C. 266.

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(1) See APPEAL, 12 C. 605.
(2) See RES JUDICATA, 12 C. 563.

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See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

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See LIMITATION ACT (XV OF 1877), 13 C. 101.

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See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 137.

Disqualified Proprietor.
Power to lease Lands of—See LUNATIC, 13 C. 81.

Distribution of Sale proceeds.
See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 294, 12 C. 499.

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See REMAND, 12 C. 225.

District Magistrate.
See RECOGNIZANCE, 12 C. 133.

Divorce Act (IV of 1869).
S. 19—See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Document.
(1) *Alteration of—Document not requiring attestation—Material alteration—Interpolation of name of witness, effect of.*—The interpolation of the name of a witness in a document which need not be attested is not a material alteration that would render the document void. MOHESH CHUNDER CHATTERJEE v. KAMINI KUMARI DABIA, 12 C. 313 ... 213
(2) See DISCOVERY, 12 C. 265.
(3) TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 470.

Drainage.
See EASEMENT, 12 C. 323.

Durputnidar.
Payment by, to stay sale—See ARREARS OF RENT, 13 C. 331.

Easement.
Embankment—Drainage—Right to drainage of surplus surface water through natural water-course.—The right of the owner of high lands to drain off its surplus surface water through the adjacent lower grounds is incident to the ownership of land in this country. Where the defendants had erected a dam across a natural water-course which was found to interfere with the natural drainage of the surplus rain-water of the adjacent lands of the plaintiffs and where the lower Court had ordered that the dam be altogether removed: *Held*, that the Court was wrong in taking it for granted that the plaintiffs were entitled to have the whole dam removed, but should have enquired *how far* the erection of the dam interfered with the plaintiff's right. ABDUL HAKIM v. GONESH DUTT, 12 C. 323 ... 220

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See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Ejectment.
(1) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 13 C. 13.
(2) See BURDEN OF PROOF, 13 C. 1.
(3) See CO-SHARERS, 13 C. 75.
(4) See LANDLORD AND TENANT, 12 C. 82; 12 C. 93; 13 C. 96; 13 C. 248.
(5) See RES JUDICATA, 13 C. 17.

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Erroneous Construction

of Act—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 90.

Escape.

(1) *From lawful custody—Arrest under Civil Process, Criminal liability of officers suffering escape—Penal Code (Act* XLV *of* 1860), *s.* 223.—S. 223 of the Penal Code applies only to cases where the person who is allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been arrested under Civil Process. QUEEN EMPRESS v. TAFAULLAH 12 C. 190 ... 129

(2) See ARREST, 12 C. 652.

Estoppel.

See RES JUDICATA, 13 C. 17.

Evidence.

1.—GENERAL.
2.—HEARSAY.
3.—ORAL.
4.—SECONDARY.

———**1.—General.**

(1) *Admissibility in evidence of judgments not " inter partes."*—In a suit for *khas* possession of land upon the allegation that the defendant refused to give up possession or to pay rent for it, a decree declaring that the land in suit was liable for rent was tendered in evidence. The decree had been obtained by an auction-purchaser against the defendants, but the plaintiff did not claim title through the auction-purchaser who had in fact been treated as a trespasser and ejected. *Held*, that the ruling in 6 C. 171 governed the case, and that the decree was inadmissible in evidence. Although 11 C.L.R. 528 decides that in certain cases judgments not *inter partes* may be recorded in evidence, it does not lay down that such judgments can be treated as conclusive evidence of the facts with which they deal. MAHENDRA LAL KHAN v. ROSOMOYI DASI, 12 C. 207 ... 141

(2) *Proceedings not inter partes—Admissibility of proceedings between defaulting proprietor and third parties in suit by auction purchaser at sale for arrears of revenue.*—An auction-purchaser at a sale for arrears of Government revenue does not derive his title from the defaulting proprietor, and proceedings between the defaulting proprietor and third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction-purchaser as against him. RADHA GOBIND KOER v. RAKHAL DAS MUKHERJI, 12 C. 82 ... 56

(3) See APPEAL—SECOND APPEAL, 12 C. 93.

———**2.—Hearsay.**

See EVIDENCE ACT (I OF 1872), 13 C. 42.

———**3.—Oral.**

Proof of existence of mortgage.—Where a question arises (not between mortgagor and mortgagee) as to the previous existence or non-existence of a particular mortgage, the oral evidence of the mortgagee that it did exist will be sufficient to prove the fact without the production of the mortgage deed. AMJAD ALI v. MONIRAM KALITA, 12 C. 52 = 10 Ind. Jur 264 ... 36

———**4.—Secondary.**

See LIMITATION ACT (XV OF 1877), 12 C. 267.

Evidence Act (I of 1872).

(1 & 2) *S.* 32, *sub-s.* 5—*Statement as to the existence of relationship—Special means of knowledge.*—The judgment of an appellate Court, reversing that of a Court of first instance, on a question as to the existence of relationship, rested mainly on a statement recorded in prior settlement proceedings as made by a person, since deceased, who was employed therein

Evidence Act (I of 1872)—(*Concluded*). PAGE

as *mukhtar*, by certain members of the family. This judgment was reversed on a second appeal by the Court above on the ground that the statement was inadmissible, not coming within the meaning of Act I of 1872, s. 32, sub-s. 5, as that of a person having special means of knowledge on the question. *Held*, that the statement was inadmissible, as it appeared that his only means of knowledge were from his being instructed as such *mukhtar*, he not having been a member of the family, nor intimately connected with it, nor having had any special means of knowing its concerns. *Held*, also, that the Court of second appeal had rightly declined to send the case back for evidence to be taken as to whether he had, or had not, other means of knowledge. SANGRAM SINGH v. RAJAN BAHI, 12 C. 219 (P.C.)=12 I.A. 183=4 Sar. P.C.J. 676 ... 149

(3) *S.* 32, *cl.* 5 *and ill.* (*b*)—*Hearsay Evidence—Pedigree, Question of—Proof of birth—Statement of deceased father.*—In a suit on a promissory note, to which the only defence was minority, a statement made by the defendant's father (who died before proceedings by way of suit had been contemplated) to a witness as to the age of his son, *held* to be inadmissible as evidence of the age of the defendant in support of his defence. BEPIN BEHARY DAW v. SREEDAM CHUNDER DEY, 13 C. 42=10 Ind. Jur. 458 ... 525

(4) *S.* 33—*Representatives in interest.*—In order to satisfy the requirements of s. 33 of the Evidence Act, the two suits must be brought by or against the same parties or their representative in interest at the time when the suits or proceeding and the evidence is given. SITANATH DAS v. MOHESH CHUNDER CHUKERBATI, 12 C. 627 ... 426

(5) *S.* 44—*Fraud and Collusion—Decree obtained by Fraud and Collusion between mortgagor and mortgagee, Effect of, on property in hands of purchaser subsequent to decree.*—*A* mortgaged certain property to *B*, who instituted a suit on his mortgage and obtained a decree therein. Subsequent to such decree *A* sold the property to a third party *C*. *B* having attempted to execute his decree against the property in the hands of *C*, the latter instituted a suit against *A* and *B*, for the purpose of having it declared that the property was not liable to satisfy the decree because the mortgage transaction was a fraudulent one and the decree had been obtained by fraud and collusion. In such suit *B* contended that *C* having purchased subsequent to the decree was absolutely bound by it. *Held*, that having regard to the terms of s. 44 of the Evidence Act, it was perfectly open to *C* to prove that the decree had been obtained by fraud and collusion. NILMONY MOOKHOPADHYA v. AIMUNISSA BIBEE, 12 C. 156 ... 106

(6) S. 91—See DISCHARGE, 13 C. 121.

(7) S. 91—See LIMITATION ACT (XV OF 1877), 12 C. 267.

(8) S. 114—See ACT IX OF 1880 (BENGAL ROAD CESS), 13 C. 197.

(9) *S.* 154—*Hostile witness.*—The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence. KALACHAND SIRCAR v. QUEEN-EMPRESS, 13 C. 53 ... 532

Exclusion of Time

between delivery of judgment and signing decree—See LIMITATION ACT (XV OF 1877), 13 C. 104.

Execution of Decree.

(1) *Limitation—Application for execution of decree for arrears of rent—Proper application—Civ. Pro. Code* (*Act* XIV *of* 1822), *ss.* 235, 237, 245.—Within the period of three years from the date of a decree for arrears of rent under Rs. 500, the judgment-debtor applied for execution of his decree without giving a list of the properties which he sought to attach, but stating that a list was filed with a previous application, and praying that that application might be put up with the present one. Subsequently upon an order made by the Court a fresh list was filed after the period of a year had elapsed. *Held*, that, though the application was not in strict accordance with the provisions of s. 237 of the Civ. Pro.

Execution of Decree—(*Concluded*). PAGE

Code, it was still an application under s. 235, and that execution of the decree was not barred, but that it must be limited to the property specified in the previous application. HURRY CHURN BOSE v. SUBAYDAR SHEIKH, 12 C. 161 ... 110

(2) *Limitation—Civ. Pro. Code (Act* XIV *of* 1882), s. 230.—In the last paragraph of s. 230 of the Code of Civil Procedure, Act XIV of 1882, the words "the law in force immediately before the passing of this Code" refer to and include Act X of 1877, as amended by Act XII of 1879. GOLUCK CHANDRA MYTEE v. HARAPRIAH DEBI, 12 C. 559 ... 380

(3) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 13 C. 13.

(4) See APPEAL, 12 C. 624.

(5) See APPEAL TO PRIVY COUNCIL, 12 C. 402.

(6) See ATTACHMENT, 12 C. 317.

(7) See CIVIL PROCEDURE CODE ACT XIV OF 1882, 12 C. 105, 12 C. 252, 12 C. 294, 12 C. 458.

(8) See FOREIGN COURT, 13 C. 95.

(9) See LIMITATION, 13 C. 73, 13 C. 257.

(10) See LIMITATION ACT (XV OF 1877), 12 C. 441, 12 C. 453, 12 C. 608.

(11) See POSSESSION, 12 C. 169.

(12) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 436.

Extra drill.

See ACT V OF 1861 (POLICE), 12 C. 427.

Fabricating Documents.

Intention in—See FORGERY, 13 C. 349.

False Complaint.

See COMPENSATION, 13 C. 304.

False Information

to public servant, Charge of giving—See PENAL CODE (ACT XLV OF 1860), 13 C. 270.

Family Settlement.

See HINDU LAW—GIFT, 12 C. 663.

Fees

to counsel—See PRACTICE, 12 C. 551.

Final Discharge.

Where insolvent is not personally present—See INSOLVENCY, 13 C. 67.

Fishery.

Right of—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 13 C. 179.

Foreign Court.

Decree of—Execution of decree—Jurisdiction—Court of Cooch Behar, Decree of. —The Courts of British India have no power to execute a decree passed by the Court of a Foreign State. A decree of the Civil Court of Cooch Behar having been transferred for execution to the District of Rungpore: *Held*, that the Courts of Rungpore had no jurisdiction to execute the decree. HUKUM CHUND ASWAL v. GYANENDRA CHUNDER LAHIRI, 13 C. 95 ... 562

Forfeiture.

See LANDLORD AND TENANT, 13 C. 248.

Forgery.

Penal Code, s. 464—Intention in fabricating documents—Fraudulent and dishonest fabrication.—The accused who was a copyist in the Sub-Divisional office at B, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post and

Forgery—(*Concluded*). PAGE

purporting to have been made by the Sub-Divisional Officer of B, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-Divisional Officer at B, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-Divisional Officer, having some suspicion as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office the accused fabricated a third document, purporting to be a letter from the Sub-Divisional Officer to the post-master asking him to stop the despatch of the demi-official letter. The accused was charged with, and convicted in the Sessions Court of, the offence of forgery, under s. 464 of the Penal Code, in respect of the three documents. *Held*, the conviction was right with regard to the two first documents, but with regard to the third document it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of that section. ABDUL HAMID v. THE EMPRESS, 13 C. 349 ... 733

Form.

(1) Of petition of appeal under Insolvent Act—See INSOLVENT ACT (11 AND 12 VIC., C. 21), 12 C. 629.

(2) Of suit—See JOINDER OF PARTIES, 12 C. 555.

Frame of Suit.

See MINOR, 12 C. 48.

Fraud.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 204.

(2) See EVIDENCE ACT (I OF 1872), 21 C. 156.

(3) See HINDU LAW—ADOPTION, 12 C. 18.

Further Enquiry.

(1) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 473, 12 C. 522.

(2) And order of Commitment passed simultaneously by Sessions Judge—See DISCHARGE, 13 C. 121.

Good Behaviour

See SECURITY FOR GOOD BEHAVIOUR, 12 C. 520.

Government Revenue.

See VOLUNTARY PAYMENT, 12 C. 213.

Grant

of lands—See POTTAH, 12 C. 117.

Ground of Appeal.

See APPEAL—SECOND APPEAL, 12 C. 93.

Guardian.

(1) *Minor, Decree against—Sale under—Suit to set sale aside on attaining majority, Ground for—Procedure.*—Where a decree has been made against an infant duly represented by his guardian, and the infant on attaining his majority seeks to set that decree aside by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian. If the infant desire to have the decree set aside, because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree were an *ex parte* one, the procedure adopted should be that given in the Civ. Pro. Code for setting aside *ex parte* decrees. RAGHUBAR DYAL SAHU v. BHIKYA LAL MISSER, 12 C. 69 ... 48

(2) *Minor—Disability of infancy—Its continuance—Period of minority how affected by Act* XL *of* 1858—*Majority Act* (IX *of* 1875), s. 3.—When a guardian has once been appointed to a minor under the provisions of Act

Guardian—(*Concluded*). PAGE

XL of 1858, the disability of infancy will last till the age of 21, whether the original guardian continue to act or not. RUDRA PROKASH MISSER v. BHOLA NATH MUKERJEE, 12 C. 612 ... 416

(3) See ACT XL OF 1858 (MINORS), 12 C. 542, 13 C. 219.

(4) See HINDU LAW—MARRIAGE, 12 C. 140.

(5) See SPECIFIC PERFORMANCE, 12 C. 152.

High Court.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 90.

(2) See PRESIDENCY MAGISTRATE, 13 C. 272.

Hindu Wife.

See BENAMI TRANSACTION, 13 C. 181.

Hindu Law.

1.—ADOPTION.
2.—ALIENATION.
3.—DEBTS.
4.—GIFT.
5.—JOINT FAMILY.
6.—MAINTENANCE.
7.—MARRIAGE.
8.—PARTITION.
9.—REVERSIONER.
10.—STRIDHAN.
11.—SUCCESSION.
12.—WIDOW.
13.—WILL.

———**1.—Adoption.**

(1) *Adoption as regards succession to estate of a collateral relation vested in an heir before the adoption—Fraud on the part of such heir delaying adoption.*—According to Hindu law, as laid down in the decided cases, an adoption effected after the death of a collateral relation does not entitle the adopted son to come in among the heirs of such collateral. Of three brothers deceased, the one who died first left one son ; the second dying left a widow, who took her estate for life in her husband's property ; and the third left a widow to whom he gave by will a power to adopt. On the death of the widow of the second deceased, the son of the first inherited his uncle's share in the family estate, and by fraudulent acts caused delay in the exercise of the power to adopt by the widow of the third. Afterwards a boy, who had not been born in the lifetime of the widow who took for life as above stated, was adopted under the said power. *Held*, that the adopted boy could not claim to share along with the nephew the estate which had belonged to the uncle, notwithstanding the nephew's conduct in reference to the exercise of the power to adopt, inasmuch as the date of this boy's birth rendered it impossible for him, under any circumstances, to have been made an adoptive heir to the uncle. BHUBANESWARI DEBI v. NILCOMUL LAHIRI, 12 C. 18 (P.C.)=12 I.A. 137=9 Ind. Jur. 398=4 Sar. P.C.J. 651 ... 12

(2) *Adoption by two widows simultaneously—Invalidity of gift made to a person as being the adopted son of donor, where the adoption fails*—Persona designata.—A testator gave by will to each of his two wives a power to adopt, and gave his property to his *sons so to be adopted*, but did not provide, nor did he know who the adopted sons were to be. The adoption which subsequently took place was found to have been a simultaneous adoption by the two widows : *Held*, that such an adoption was invalid, and that the persons purporting to be the adopted sons did not answer the description in the will of adopted sons, and that therefore there was not a sufficient designation of their persons as to enable them to take under the will. DOORGA SUNDARI DOSSEE v. SURENDRA KESHAV RAI, 12 C. 686 ... 465

(3) *Construction of authority to adopt—Simultaneous adoption.*—Two widows of a Hindu each adopted a son to their deceased husband, under an authority from him thus expressed : "You..............the elder widow may adopt three sons successively, and you........... the younger widow, may

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adopt three sons successively." *Held*, that this might more reasonably be construed as giving the elder widow authority to adopt three sons successively, and then a similar power to the younger, than as authorizing simultaneous adoptions. *Held*, also, that, supposing that the husband had intended to give such an authority, the law did not allow two simultaneous adoptions. The opinion of W. H. Macnaghten on the subject referred to and approved. AKHOY CHUNDER BAGCHI v. KALLAPAHAR HAJI, 12 C. 406 (P.C.) = 12 I.A. 198 = 9 Ind. Jur. 400 = 4 Sar. P.C.J. 678 ... 276

(4) *Vested estate divested by adoption—Power to adopt.—A*, a Hindu, having succeeded to his father's estate died unmarried leaving him surviving his father's mother *S* and his step-mother *N*. After *A's* death, *N*, under a power from her husband, adopted *B* as a son to *A's* father. *Semble*, that the adoption did not divest the estate of *S* in whom *A's* estate had vested on his death. DROBO MOYEE CHOWDHRAIN v. SHAMA CHURN CHOWDHRI, 12 C. 246 ... 167

(5) See LIMITATION ACT (IX OF 1871), 13 C. 308.

———2.—**Alienation.**

(1) *By father—Mitakshara and Mithila Law—Execution of decree—Sale of ancestral estate in satisfaction of father's debt—Liability of sons' shares—Parties to proceedings.*—There is no conflict of authority as to the principle that sons cannot set up their rights, which are to take present vested interest, on their birth, jointly with their father in ancestral estate, against their father's alienation for an antecedent debt, or against his creditors' remedies for his debt, if such debt has not been contracted for an immoral purpose; the law on this point being the same under Mitakshara and the Mithila shasters. From the above must be distinguished the question how far the joint sons can be precluded from disputing the liability attaching to their shares, where proceedings have been taken by or against, the father alone. If the father's debt, not having been contracted for an immoral purpose, is such as to support a sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by suit. But the joint sons, not being parties to the execution proceedings or to the sale, are not precluded from having a question as to the nature of the debt, tried in a suit of their own; a right which will, however, avail them nothing unless it can be shown that the debt was not such as to justify a sale of the joint estate. If, upon the proceedings and in regard to the intention of the parties doubts are raised whether what has been sold is the interest of the father alone, or the joint estate, the absence of the sons from the proceedings may be a material consideration. But, if the purchaser has bargained and paid for the entirety, he may defend his title upon any ground which would have justified a sale, had the sons been brought in to defend their interests in the execution proceedings. 4 I.A. 247 = 3 C. 198 does not lay down as an invariable rule that co-parcenary interest will not pass by an execution sale unless the co-parceners are joined in the suit, or that only the father's interest passes to the purchaser where the suit was against the father alone. This debt being one which must be taken as a joint family debt, though the suit upon it was against the father alone, *held*, that a claim by minor sons for exemption of their shares failed on the merits, the entire family estate having passed by the sale. NANOMI BABUASIN v. MODHEN MOHUN, 13 C 21 (P. C.) = 13 I.A. 1 = 10 Ind. Jur. 151 = 4 Sar. P.C.J. 682 ... 510

(2) *By widow—Necessity—Legal expenses.*—Legal expenses incurred by a Hindu widow, in defending her life estate in her husband's property, constitute such a charge on the property as to make a sale thereof by her binding as against the reversioners. AMJAD ALI v. MONIRAM KALITA, 12 C. 52 = 10 Ind. Jur. 264 ... 36

(3) See HINDU LAW—JOINT FAMILY, 12 C. 389.

(4) See HINDU LAW—PARTITION, 12 C. 209.

———3.—**Debts.**

(1) See HINDU LAW—ALIENATION, 12 C. 52, 13 C. 21.

(2) See HINDU LAW—JOINT FAMILY, 12 C. 389.

Hindu Law—4.—Gift. **PAGE**

(1) *Gift—Settlement—Gift to a class—Construction of family settlement—Rule for gift to unborn grandsons.*—Where the intention of a donor is to give a gift to two named persons capable of taking that gift, although it is also his intention that other persons unborn at the date of the gift should afterwards come in and share therein, the part of the gift which is capable of taking effect should be given effect to, notwithstanding that the intention of the donor cannot be carried out in its entirety. *Semble.*—As a general rule where there is a gift to a class, some of whom are, or may be, incapacitated from taking, because not born at the date of the gift or the death of the testator, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking. RAM LAL SETT v. KANAI LAL SETT, 12 C. 663 450

(2) See HINDU LAW—ADOPTION, 12 C. 686.

————5.—Joint Family.

(1) *Manager, Power of, to mortgage joint family property.*—An alienation made by a managing member of a joint Hindu family is not binding upon his adult co-sharers unless it is shown that it was made with their consent, either express or implied In cases of implied consent it is not necessary to prove its existence with reference to a particular instance of alienation, but a general consent may be deducible in cases of urgent necessity from the very fact of the manager being entrusted with the management of the family estate by the other members of the family ; and the latter entrusting the management of the family affairs to the manager must be presumed to have delegated to him the power pledging the family credit or estate when it is impossible or extremely inconvenient for the purpose of an efficient management of the estate to consult them and obtain their consent before pledging such credit or estate. MILLER v. RANGA NATH MOULICK, 12 C. 389=10 Ind. Jur. 376 ... 264

(2) *Onus of proof—Presumption as to branch of family remaining joint when separation has taken place between it and other branches of joint family.*—Each branch of a family whose original stock has been divided may continue to be a joint family within the meaning of the Hindu Law, subject to all the presumptions arising from that state, and when such a state of facts exists the onus of proving a separation is on those who allege it, the presumption still being in the absence of such proof, that the branch of the family remained joint amongst themselves. BATA KRISHNA NAIK v. CHINTAMONI NAIK, 12 C. 262=10 Ind. Jur. 374 ... 178

(3) See HINDU LAW—PARTITION, 12 C. 96, 12 C. 566.

————6.—Maintenance.

(1) *Criminal Procedure Code (Act X of 1882), ss. 488, 489.*—A Magistrate has now power, under s. 488 of the Code of Criminal Procedure, to make an order for maintenance at a progressively increasing rate. He may, however, under s. 489, from time to time, alter the rate of the monthly allowance granted as maintenance under s. 488. UPENDRA NATH DHAL v. SOUDAMINI DASI, 12 C. 535 ... 363

(2) *Maintenance—Maintenance of mother on partition between her son and step-sons.*—A widowed mother on a partition taking place between her son and her step-sons, of the property left by her husband, is not entitled to have the whole property charged with her maintenance, but only that portion of it which is allotted to her son on the partition. A separation in food and worship took place between a Hindu widow, her son and her two step-sons, after which the widow lived as a member of her son's family, and was maintained by him. A partition of the moveable property having been made, a suit was brought by the son against the step-sons for partition of the immoveable property, and a decree was made defining the shares of the parties therein. That suit was brought and decreed pending a suit by the widow against her son and step-sons for maintenance from the date of the separation, and for fixing her future maintenance, in which suit she sought to have the maintenance charged on the whole estate left by her husband. *Held*, that from the separation to the decree on the partition suit, the widow was entitled to maintenance charged on the whole estate ; and subsequently to the decree to a charge on her son's

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share only. But inasmuch as she had during the former period been maintained by her son, and could not claim maintenance over again from her step-sons, whatever claim her son might have against them for contribution for her maintenance during that time, the suit as against them must be dismissed. Where the annual value of the whole estate was found to be Rs. 70,000, and the proportionate annual value of her son's portion was Rs 23,333, Rs. 150 a month was held under the circumstances to be a suitable maintenance. KEDAR NATH COONDOO CHOWDHRY v. HEMANGINI DASSI, 13 C. 336 ... 725

(3) *Maintenance—Remarriage of widow.*—Where a Hindu widow is remarried, or is living with another man, it does not necessarily follow that she would not be entitled to sell her deceased husband's estate for her maintenance. AMJAD ALI v. MONIRAM KALITA, 12 C. 52=10 Ind. Jur. 264. 36

(4) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 60.

———**7.—Marriage.**

Restitution of conjugal rights—Consent of lawful guardian—Presumption of validity of marriage—Non-performance of ceremonies.—The ceremony of Nandimukh or Bridhishradh is not an essential of Hindu Marriage, nor would the want of consent by the lawful guardian necessarily invalidate such marriage. In a suit for restitution of conjugal rights the fact of the celebration of marriage having been established, the presumption, in the absence of anything to the contrary, is that all the necessary ceremonies have been complied with. BRINDABUN CHANDRA KURMOKAR v. CHUNDRA KURMOKAR, 12 C. 140=10 Ind. Jur. 296 ... 96

———**8.—Partition.**

(1) *Mitakshara law—Separation of joint family how effected--Agreement for partition, Effect of—Right of survivorship.*—Two brothers, members of a joint Mitakshara family, executed an *ikrarnama* (agreement), whereby, after reciting that the declarants had remained joint and undivided, and in commensality up to a certain date, and that portions of their properties, both moveable and immoveable, had been partitioned between them, they provided for the partition of the remaining joint properties by certain arbitrators appointed in that behalf. *Held*, that this agreement of itself amounted to a separation of the brothers as a joint family and extinguished all rights of survivorship between them. TEJ PROTAP SINGH v. CHAMPA KALEE KOER, 12 C. 96 ... 65

(2) *Partition by sons—Widow's Share—Will, Construction of.*—On partition of the joint-family property by the sons after their father's death, the widow is entitled to get a share equal to that of each of the sons, and, if she has received any property either by gift or legacy from the father, she is entitled to so much only as with what she has already received would make her share equal to that of each of the son's. Where a Hindu by his will, after bequeathing a legacy to his widow of Rs. 1,000 and appointing her executrix along with other executors, directed that his executors should divide the estate amongst his sons in accordance with the *shastras* after his younger son had attained majority. *Held*, that such direction did not amount to an absolute bequest to his sons so as to exclude the widow from being entitled to a share upon a partition between the sons. KISHORI MOHUN GHOSE v. MONI MOHUN GHOSE, 12 C. 165 ... 112

(3) *Partition—Widow's Share.*—The plaintiff, the widow and heiress of one *N*, brought a suit for partition of the estate of one *R* (her late husband's father) against *A*, a son of her late husband's half-brother, and *K* the widow of *R*, the parties to the suit being the only members of the family then alive. *Held*, that *A* took a one-half share in the estate, the other half share being divisible between the widow of *R* and the widow of *N*. *Cali Churn Mullick* v. *Janava Dosse*, 1 Ind. Jur. N.S. 284, followed. KRISTO BHABINEY DOSSEE v. ASHUTOSH BOSU MULLICK, 13 C. 39 ... 523

(4) *Purchaser from Hindu widow, Right of, to partition—Alienation by Hindu widow of share in family dwelling house.*—An assignee of a Hindu widow, though a stranger to the family, is in the same position as the Hindu widow, and is entitled to sue for partition of the joint-family dwelling-

Hindu Law—8.—Partition—(*Concluded*). PAGE

house, and all that the Court has to see to is that the partition should be carried out in such a way as not to affect the rights of the reversioners. BEPIN BEHARI MODUCK v. LAL MOHUN CHATTOPADHYA, 12 C. 209 ... 143

(5) *Suit for partition of portion of joint property—Partial partition.*—The plaintiffs and the defendants being jointly entitled to and in possession of three *khanabaris* in a village and other immoveable property, the plaintiff sued for partition of one of the *khanabaris* only. *Held*, that the suit would not lie. HARIDAS SANYAL v. PRAN NATH SANYAL, 12 C. 566... 385

(6) See APPEAL—GENERAL, 12 C. 273, 12 C 275.

(7) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 609.

(8) See HINDU LAW—MAINTENANCE, 13 C. 336.

————9.—**Reversioner.**

Liability of, for acts of Widow.—See POSSESSION, 13 C. 283

————10.—**Stridhan.**

Mithila Law—Succession.—The *stridhan* property of a widow, governed by the Mithila law and married in one of the approved forms of marriage, goes to her husband's brother's son in preference to her sister's son. BACHHA JHA v. JUGMON JHA, 12 C. 348 = 10 Ind. Jur. 335 ... 237

————11.—**Succession.**

(1) See HINDU LAW—ADOPTION, 12 C. 18.

(2) See HINDU LAW—STRIDHAN, 12 C. 348.

————12.—**Widow.**

(1) See HINDU LAW—MAINTENANCE, 12 C. 52.

(2) See HINDU LAW—PARTITION, 12 C. 165, 12 C. 209, 13 C. 39.

————13.—**Will.**

See HINDU LAW—PARTITION, 12 C. 165.

Hostile Witness.

See EVIDENCE ACT (I OF 1872), 13 C. 53.

Idol.

See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 12 C. 375.

Ijardar.

Dispossession of—See LIMITATION ACT (XV OF 1877), 13 C. 101.

Immoveable Property.

(1) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 537.

(2) See LIMITATION ACT (XV OF 1877), 12 C. 69, 12 C. 594.

(3) Sale of, by person out of possession—See TRANSFER OF PROPERTY ACT (IV OF 1882), 13 C. 297.

Imprisonment.

See MERCHANT SEAMEN'S ACT (I OF 1859), 12 C. 438.

Incumbrances.

See BURDEN OF PROOF, 13 C. 1.

Infancy.

See GUARDIAN, 12 C. 612.

Infant.

See INSOLVENCY, 13 C. 68.

Inferior Criminal Court.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 473.

Injunction.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 515.

Inquiry.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 521.

Insolvency. PAGE

(1) *Final discharge where insolvent is not personally present in Court—Affidavit explaining absence—Opposition to final discharge.*—An insolvent who has obtained a rule *nisi* for his final discharge, but who is not personally present in Court on the return of the rule, is entitled, where no one appears to oppose the rule, to have the rule made absolute on his putting in a sufficient affidavit explaining his absence. IN RE J. W. FOX, 13 C. 67 ... 542

(2) *Infant—Minor—Trading contract—Insolvent Act* (11 & 12 *Vict.*, *c.* 21).—A minor who has traded cannot be adjudicated an insolvent on the petition of the persons who have supplied him with funds for the purposes of his business. IN THE MATTER OF NOBODEEP CHUNDER SHAW, 13 C. 68. 543

(3) *Interest on schedule debts.*—Where an insolvent's estate is sufficient to pay off his creditors in full, leaving a balance in the hands of the Official Assignee, the Court will direct interest at 6 per cent. to be paid, on such proved or admitted contract debts as expressly or impliedly carry interest, as from the date of the filing of the petition in insolvency; and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands to be made over to the insolvent. IN RE MAHOMED MAHMUD SHAH, 13 C. 66 ... 541

Insolvent Act (11 & 12 Vict., c. 21).

(1) See INSOLVENCY, 13 C. 68.

(2) *Ss.* 23, 73—*Order and disposition—Reputed Ownership—Form of petition of appeal under Insolvent Act—Civ. Pro. Code*, 1882, *s.* 590.—In 1883 B mortgaged to one D certain furniture standing in a house leased by him from one V. The mortgage deed provided that, until default, the mortgagor should have free use of the mortgaged property; that the mortgagee should be at liberty to place a durwan in charge of the furniture; and that on default by the mortgagor the mortgagee should have power to enter the premises and deal with the goods as his own. A durwan was placed in charge, and in January 1884 the mortgagor defaulted and was pressed for payment at different times previous to August 1884. On the 1st August the mortgagee sent to the premises people from Messrs. Mackinzie, Lyall & Co., for the purpose of lotting and cataloguing the furniture. Admittance into the house was refused to them by B, although they were admitted into the compound by the durwan of the mortgagee. At about this date (but whether before or after the 1st August was not clear) B asked for further time for payment which was granted. On the 4th August the furniture was attached by V in execution of a decree for rent. On the 6th August B filed his petition in insolvency, and on the 15th September the furniture was sold by the Official Assignee. On a hearing of the claims put in by the mortgagee and V, held, that on the 6th August, the furniture was not in the possession, order or disposition, of B as reputed owner with the consent of the true owner; that under the circumstances brought out in evidence, the fact that further time for payment was granted had not the effect of a fresh consent on the part of the mortgagee to the goods being in the possession of B as reputed owner; that even if this had been so, the attachment under V's execution took the goods out of the order and disposition of B, and that the mortgagee was entitled to the benefit of that circumstance. The procedure as to appeals from orders under the Civ. Pro. Code, 1882 is not made applicable by s. 580 to appeals from orders under the Insolvent Act. No particular form is prescribed for petitions of appeal under the latter Act. In this case the so-called memorandum of appeal was held to be a good petition of appeal under the Act. IN THE MATTER OF R. BROWN (CLAIM OF DWARKA NATH MITTER), 12 C. 629 ... 428

(3) *S.* 62—*Crown debt—Judgment-debt in name of Secretary of State for India in Council.*—A judgment-debt due to the Secretary of State for India in Council, arising out of transactions at a public sale of opium held by the Secretary of State for India in Council, is a debt in respect of Crown property, and therefore a "debt due to our Sovereign lady the Queen" within the meaning of s. 62 of the Insolvent Act. In determining whether or no a debt falls under the denomination of a Crown-debt, the question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State. JUDHA v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, 12 C. 445 ... 302

Inspection PAGE

of Document—See DISCOVERY, 12 C. 265

Instalments.

See LIMITATION, 13 C. 73.

Instrument.

See LIMITATION ACT (XV OF 1877), 12 C. 69.

Intention.

(1) See FORGERY, 13 C. 349.
(2) See POTTAH, 12 C. 117.

Interest.

(1) *Bond—Penalty—Contract Act*, s. 74—*Act* XXVIII *of* 1855, s. 2.—The stipulation in a bond was in these terms: "I cannot pay Rs. 1,000 now, so I will pay it within two months and 15 days; if I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month:" *Held*, that the stipulation was one for the payment of interest within the meaning of s. 2, Act XXVIII of 1855 and did not fall under s. 74 of the Contract Act. ARJAN BIBI v. ASGAR ALI CHOWDHURY, 13 C 200 ... 632

(2) *Exorbitant rate of—Unconscionable Bargain—Purda-nashin lady.*—Fraud apart, a loan to a purda-nashin woman from her own mukhtear at an exorbitant rate of interest, the security being ample, may be a hard and unconscionable bargain on which the contract for such rate of interest will not be enforced. KAMINI SUNDARI CHAODHRANI v. KALI PROSSUNNO GHOSE, 12 C. 225 (P.C.) = 12 I.A. 215 = 4 Sar. P.C.J. 652 = 9 Ind. Jur. 437 ... 153

(3) *Interest after filing of plaint—Interest at rate stated in bond—Discretion of the Court—Civil Procedure Code* (*Act* XIV *of* 1882), s. 209.—Interest after due date of suit is in the discretion of the Court, notwithstanding that a fixed rate of interest is meutioned as payable "up to realization" in the bond sued upon. MANGNIRAM MARWARI v. DHOWTAL ROY, 12 C. 569 (F.B.) ... 387

(4) *Interest at increased rate—Penalty—Contract Act*, ss. 60, 74—*Appropriation of payments.*—In consideration of an advance of Rs. 118, the defendants executed in favour of the plaintiff a mortgage bond, dated 3rd November 1879, by which it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first class rates; and in case the same is not paid in kind, it will be paid principal with interest from the date of execution at one anna per cent. per mensem in cash in the month of Baisakh 1287 F. S. (April 1880)." The defendants admitted execution of the bond, and pleaded payments in grain to the amount of Rs. 136, which they failed to prove. It was found that the plaintiff had received payments in grain to the extent of Rs. 71, more than half of which, however, he claimed to be entitled to appropriate to the payment of other antecedent debts which were due to him by the defendants. It was not stated at the time of payment towards which debt the payments were to be applied; but all the payments were admittedly made in kind. *Held*, that the plaintiff was not entitled to appropriate the payments to the antecedent debts, inasmuch as, within the meaning of s. 60 of the Contract Act, there were, "other circumstances" indicating that the payments were made in liquidation of the amount of the bond. *Held*, also, that the increased rate of interest being made payable from the date of the bond, and not only from the breach of the contract, must be taken to be in the nature of a penalty and only to be taken into consideration as a basis upon which damages for the breach of contract were to be estimated. SUNGUT LAL v. BAIJNATH ROY, 13 C. 164 ... 608

(5) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 252.
(6) See INSOLVENCY, 13 C. 66.

Interpleader Suit.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 90.

Interpolation.

See DOCUMENT, 12 C. 313.

Interpretation clause. PAGE

See ACT X OF 1871 (BENGAL DISTRICT ROAD CESS), 12 C. 430.

Intervenor.

(1) See LIMITATION ACT (XV OF 1877), 12 C. 453.
(2) See RES JUDICATA, 12 C. 563.

Invasion of Right.

See MISCHIEF, 12 C. 55.

Issues.

See RES JUDICATA, 12 C. 563.

Joinder of Parties.

(1) *Form of suit—Joinder of defendants—Joinder of causes of action—Civil Procedure Code*, 1882, *s.* 28.—*A* leased certain lands to *B* for a term of seven years commencing with the year 1288 Fasli (19th September 1880). On the 23rd October 1883, *A* sold the lands to *D*, who under his purchase became entitled to the rents of the lands from the commencement of the year 1291 Fasli (17th September 1883). When some of the instalments of the rent for the year 1291 Fasli became due, *D* applied for payment thereof to *B*, who informed him that he had paid the whole of the rent for the year 1291 in advance to *A* on the 21st May 1883. *D* then sued *A* and *B* for the rent due, praying a decree for rent against *B*, and in the alternative, for a decree against *A* if it should turn out that *B*'s allegation of payment was correct. The lower Courts found that *B* had paid *A* in good faith, and they dismissed the suit as against him. They also dismissed the suit as against *A* on the ground that the claims against *A* and *B* could not be joined in one suit. On appeal to the High Court: *Held*, that the frame of the suit was unobjectionable, and that on the facts found by the lower Courts *D* was entitled to a decree against *A*. MADAN MOHUN LALL v. F. HOLLOWAY, 12 C. 555 ... 377
(2) See POSSESSION, 12 C. 414.

Joint Wrong Doers.

See RIGHT OF SUIT, 13 C. 300.

Judgment.

(1) *Contents of—Second appeal, grounds for—Omission to state reasons in judgment—Civil Procedure Code (Act* XIV *of* 1882), *ss.* 574, 584.—The fact that the judgment of an appellate Court is not drawn up in the manner prescribed by s. 574 of the Civil Procedure Code is no ground for a second appeal under s. 584, unless it can be shown that the judgment has failed to determine any material issue of law. BISVANATH MAITI v. BAIDYANATH MANDUL, 12 C. 199 ... 136
(2) *Form and contents of judgment—Criminal Appeal to Magistrate—Criminal Procedure Code*, 1882, *ss.* 367, 424.—A Magistrate, after hearing an appeal from the Deputy Magistrate, gave the following judgment: "I see no reason to distrust the finding of the lower Court. The sentence passed however appear harsh. I reduce the term of imprisonment to fifteen days. The fines and terms of imprisonment in default will stand." *Held* that it was not a judgment within the meaning of ss. 367 and 424 of the Criminal Procedure Code. IN THE MATTER OF THE PETITION OF RAM DAS MAGHI, 13 C. 110 ... 573
(3) See EVIDENCE, 12 C. 207.

Judgment Debt.

See INSOLVENT ACT (11 AND 12 VIC., C. 21), 12 C. 445.

Julkur Right.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 537; 13 C. 179.

Jurisdiction.

(1) See ACT XV OF 1882 (SMALL CAUSE COURT, PRESIDENCY TOWNS), 13 C. 37.
(2) See APPEAL, 12 C. 271.
(3) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 333.
(4) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 137.
(5) See FOREIGN COURT, 13 C. 95.
(6) See LIMITATION, 13 C. 257.
(7) See VALUATION OF SUIT, 13 C. 255.

Jury. PAGE

Majority of—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 13 C. 275.

Knowledge.

See EVIDENCE ACT (I OF 1872), 12 C. 219.

Land Acquisition Act (X of 1870).

(1) See V OF 1876 (BENGAL MUNICIPAL), 13 C. 171.

(2) *Ss.* 9, 19, 39 *and* 40—*Settlement of amount of compensation—Apportionment of compensation, Notice of proceedings for—Right of suit to recover share of compensation.*—The apportionment of the compensation under s. 39 of Act X of 1870 is intended to be a proceeding distinct from that of settling the amount of compensation under the previous provisions of the Act, and any dispute as to the apportionment is only decided as between those persons who are actually before the Court. A separate notice therefore of the apportionment proceedings is requisite to bind any person by those proceedings, and where such a notice has not been served, any party interested, although served with notice of the proceedings for settling the amount of the compensation, cannot be considered a party to the proceedings for apportioning it, and is not barred by the decision in the latter proceedings from bringing a suit under the proviso to s. 40 to recover a share of the money so apportioned. HURMUTJAN BIBI v. PADMA LOCHUN DOSS, 12 C. 33 ... 22

Landlord and Tenant.

(1) *Ejectment—Notice to quit—Reasonableness of notice.*—There is no authority for the proposition that notice to quit to a ryot other than an occupancy ryot must terminate at the end of a cultivating year or be a three months' notice. Such ryot is only entitled to a "reasonable" notice, and such as will enable him to reap his crop; what is a "reasonable" notice is a question of fact to be decided in each case, having regard to its particular circumstances, and the local custom as to reaping crops and letting land. RADHA GOBIND KOER v. RAKHAL DAS MUKERJI, 12 C. 82 ... 56

(2) *Ejectment—Notice to quit, what is reasonable.*—It is not necessary that the period allowed in a notice to quit by a landlord to his tenant should terminate at the end of the year, but the notice must be in respect of the date of determination of the tenancy as well as in other respects a reasonable notice. A notice to quit served on the 26th of Pous, and allowing two months to the tenant to vacate his holding, such period thus expiring on the 26th Falgun, when it appeared that cultivation began in the months of Magh and Falgun, and that they were the months for letting out land in the district, held not to be a reasonable notice. BIDHUMUKHI DABEA CHOWDHRAIN v. KEFYUTULLAH, 12 C. 93 ... 63

(3) *Suit for ejectment—Cause of action—Landlords' title, Denial of—Written statement.*—*P* and *R* brought a suit for ejectment on the allegation that their tenants had failed to come to a settlement in respect of a certain *jote*, and that a notice to quit had thereupon been served on them. The defendants (tenants) in their written statement denied the landlords' title. The lower Courts found that the *jote* belonged to the plaintiffs, and the defendants had been and still were in possession of the same as tenants; but dismissed the suit on the ground that the service of notice had not been proved. *Held* (on second appeal) that, inasmuch as the cause of action must be based on something that accrued antecedent to the suit, the denial by the defendants of their landlords' title in the written statement would not entitle the plaintiffs to a decree on the ground of forfeiture. PRANNATH SHAHA v. MADHU KHULU, 13 C. 96 ... 563

(4) *Suit for ejectment—Repudiation of Title—Setting up different tenure from that alleged by Landlord—Forfeiture.*—The plaintiff in 1870 brought a suit for rent, in which the defendant set up and filed a permanent *howladari* lease, but admitted that he held at the rent alleged by the plaintiff, and that suit was decreed, the Court thinking it unnecessary to decide the question of the validity of the tenure set up by the defendant. In a suit brought after a notice to quit, which was found to be invalid, to eject the defendant, and for a declaration that he had no such permanent *howladari* tenure as he alleged; the defendant again set up the *howladari* lease under which he admitted he had paid a fixed rent to the plaintiff. *Held*, that though the defendant repudiated the particular holding which the plaintiff attributed to him, he did not question the plaintiff's right to receive the rent,

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and therefore did not in any sense repudiate his landlord's title. What he did amounted merely to questioning the rightof the landlordto enhance the rent, which was not such a disclaimer as would result in law in a forfeiture of his tenure. The plaintiff therefore was not entitled to eject the defendant without giving him a proper notice to quit. *Vivian* v. *Moat*, L.R. 16 Ch. 730, distinguished, on the ground that the principle on which it is based is wholly inapplicable in Bengal. KALI KISHEN TAGORE v. GOLAM ALI, 13 C. 3 ... 498

(5) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 12 C. 464.

(6) See BURDEN OF PROOF, 12 C. 182.

(7) See DECLARATORY DECREE, 13 C. 3.

(8) See RES JUDICATA, 13 C. 17.

(9) See VOLUNTARY PAYMENT, 12 C. 213.

Lawful Order.

See ACT V OF 1861 (POLICE), 12 C. 427.

Lease.

(1) See REGISTRATION ACT (XX OF 1866), 13 C. 113.

(2) See STAMP ACT (I OF 1879), 12 C. 383.

Legacy.

Lapse of—See WILL, 13 C. 193.

Legal Expense.

See HINDU LAW—ALIENATION, 12 C. 52.

Letters.

Stating terms of equitable mortgage—See MORTGAGE (EQUITABLE), 13 C. 322.

Letters of Administration.

See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 12 C. 375.

Liability.

(1) For loss resulting from Agent's misconduct towards his Employer—See CONTRACT OF GUARANTEE, 12 C. 143.

(2) Of Officer allowing escape—See ESCAPE, 12 C. 190.

(3) Of surety where remedy against principal is barred—See PRINCIPAL AND SURETY, 12 C. 330.

Lien.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 546.

Limitation.

(1) *Adverse possession.*—Limitation having been set up in bar of the suit, *held* that, after the creation of the under-tenure, as long as there was no dispute or conflicting claim, the possession of it was not adverse to the Ghatwal; and proceedings, either between the Ghatwal or between under-tenure holders on the one side and creditors on the other, could not be taken to show an assertion of right by either of the parties now in litigation, as against one another. They being adverse, limitation only commenced at the date of the above-mentioned claim to the compensation money which was made less than twelve years before the present suit was brought; and accordingly the suit was not barred. RAM CHUNDER SINGH v. MADHO KUMARI, 12 C. 484 (P.C.)=12 I.A. 188=9 Ind. Jur. 474=4 Sar. P.C.J. 666 ... 329

(2) *Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 23, 363, 364—*Adding Defendant.* —No question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit. THE ORIENTAL BANK CORPORATION v. CHARRIOL, 12 C. 642 ... 436

(3) *Execution of Decree—Decree payable by Instalments—Option to execute —Waiver—Construction of Decree.*—Where a decree is made payable by instalments, and contains a provision that, on failure of any one instalment, the whole is to become due, the question whether the decree-holder may waive the benefit of the provision or must execute his decree

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within three years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case. On an application for execution of a decree made payable by instalments, *held*, that the application was barred by limitation, on the ground that the judgment-creditor should have applied for execution within three years from the date of the first default in payment. JUDHISTIR PATRO v. NOBIN CHANDRA KHELA, 13 C. 73 ... 546

(4) *Execution of Decree—Jurisdiction of Court where decree was passed—Transfer of decree for execution—Code of Civil Procedure*, ss. 223, 239, 248.—On the 4th of March 1884, a decree-holder applied to the Court of the Subordinate Judge of Moorshedabad (where the decree was passed) for transfer of the decree to the District Court of Beerbhoom for execution. The transfer was made, and, on application by the decree-holder, the judgment-debtor's properties in Beerbhoom were attached. Thereupon the judgment-debtor objected to the attachment, and obtained an order under s. 239 of the Code of Civil Procedure, staying the execution proceedings. The judgment-debtor then applied to the Court of the Subordinate Judge at Moorshedabad objecting to the execution of the decree on the ground that it was barred by limitation. The objection was overruled by the Subordinate Judge, and his decision was upheld on appeal to the District Judge. On second appeal to the High Court: *Held*, that the Moorshedabad Court was competent to hear and determine the plea of limitation. *Held*, also, that the fact of the judgment-debtor's not raising the plea of limitation in the Beerbhoom Court did not, under the circumstances, preclude him from relying on it in his subsequent application to the Court at Moorshedabad. SRIHARY MUNDUL v. MURARI CHOWDHRY, 13 C. 257 ... 670

(5) See ACT XL OF 1858 (MINORS), 13 C. 219.

(6) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 12 C. 258 ; 12 C. 606.

(7) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 499.

(8) See EXECUTION OF DECREE, 12 C. 161 ; 12 C. 559.

Limitation Act (XIV of 1859).

See LIMITATION ACT (XV OF 1877), 12 C. 614.

Limitation Act (IX of 1871).

(1) S. 20—See LIMITATION ACT (XV OF 1877), 12 C. 267.

(2) *Sch.* II, *art.* 129—*Meaning of "suit to set aside adoption."*—Art. 129 of sch. II of Act IX of 1871, the Indian Limitation Act of that year, using the expression "suit to set aside an adoption," denoted a suit bringing the validity of an adoption into question ; and the rule of limitation, given by the article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption in virtue of which the opposite party was in possession. The plaintiffs, as collateral heirs of a childless Hindu, questioned the adoptions purporting to have been made by his widows, in pursuance of authority from him ; such adoptions having been followed by continuous possession, and having been recognised in formal instruments, proceedings, and decrees to which the plaintiffs were parties. *Held* on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under art. 129 of sch. II of Act IX of 1871. Part of the language of the judgment in 6 I.A. 110, referred to, and that case, in which the plaintiffs' claim was not affected by the widow's adoption, distinguished from the present. JAGADAMBA CHAODHRANI v. DAKHINA MOHUN ROY CHAODHRI. SARODA MOHUN ROY CHAODHRI v. DAKHINA MOHUN ROY CHAODHRI, 13 C. 308 (P.C.) = 13 I.A. 84 = 10 Ind. Jur. 307 = 4 Sar. P.C.J. 715 ... 705

Limitation Act (XV of 1877).

(1) S. 4—See APPEAL—SECOND APPEAL, 12 C. 30.

(2) *S.* 5—*Discretion of Court—Appeal out of time, Admission of.*—S. 5 of the Limitation Act gives a discretion to a Court to admit an appeal filed out of time. A valued his suit at Rs. 18,000 which was reduced to less than

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Rs. 5,000 by the Court of first instance at Rajshahye. A decree, dated the 20th December 1883, was given against the defendant who applied for copies on the 3rd of February, and the decree was ready on the 7th. The defendant was apparently under the impression that the appeal would lie to the High Court; but on the 16th of March a letter was despatched by his Calcutta agent informing him that he was mistaken,—and that the appeal lay to the District Judge. This letter reached Rajshahye on the 17th, and the appeal was filed on the 23rd of March. *Held*, that under the circumstances the Court might admit the appeal in the exercise of its discretion under s. 5 of the Limitation Act. HURO CHUNDER ROY v. SURNAMOYI, 13 C. 266 ... 677

(3) *S.* 5—"*Sufficient cause*"—*Admission of review after time.—Per Curiam.—Held* on the facts, that there was no "sufficient cause" for not making the application for review within the time limited by s. 5 of the Limitation Act, 1877. GOPAL CHANDRA LAHIRI v. SOLOMON, 13 C. 62 ... 538

(4) *S.* 5—*Sufficient cause—Poverty—Admission of appeal after time.*—Poverty is not "sufficient cause," within the meaning of s. 5 of the Limitation Act, Act XV of 1877, for admitting an appeal after the ordinary period of limitation prescribed therefor has expired. MOSHAULLAH v. AHMEDULLAH, 13 C. 78 ... 550

(5) *S.* 12—*Appeal presented after time—Time requisite for obtaining copy of decree.*—Where a decree was passed on the 22nd September, and application for a copy was made not until 29th, and then with insufficient folios, and the Court was closed for the vacation from 30th September to 1st November, the deficient folios being filed on the day it re-opened, 2nd November, the copy delivered on the 6th, and the appeal filed on the 14th: *Held*, that the appeal was out of time under s. 12 of the Limitation Act, the appellant not being entitled to a deduction of the time occupied in ascertaining what the requisite number of folios was. GUNGA DASS DEY v. RAMJOY DEY, 12 C. 30 ... 20

(6) *S.* 12, *sch.* II, *art.* 152—*Exclusion of time between delivery of judgment and signing decree—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 205.—*Time for obtaining copy of decree.*—Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under s. 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal. BANI MADHUB MITTER v. MATUNGINI DASSI. KALI SHUNKAR DASS v. GOPAL CHUNDER DUTT, 13 C. 104 (F.B.) ... 568

(7) *S.* 19—*Acknowledgment of debt—Secondary Evidence of Acknowledgment—Authority to bind minor by Acknowledgment.*—An original account book containing an acknowledgment of a debt had been filed in Court, and subsequently lost whilst in Court; *held*, that secondary evidence of such acknowledgment might be given, notwithstanding the words of s. 19 of the Limitation Act. A person merely by reason of being the mother and guardian of a minor has no authority to make an acknowledgment of a debt on behalf of the minor so as to give a creditor a fresh start for the period of limitation. WAJIBUN v. KADIR BUKSH, 13 C. 292 ... 694

(8) *S.* 19, *Limitation Act* (IX *of* 1871), *s.* 20—*Contents of acknowledgment of debt, Secondary evidence of—Evidence Act* (I *of* 1872) *s.* 91 —Para. 2, s. 19 of the Limitation Act, 1877, belongs to that branch of the law of evidence which is dealt with by s. 91 of Act I of 1872, and ought not to be read in derogation of the general rules of secondary evidence so as to exclude oral evidence of the contents of an acknowledgment which has been lost or destroyed. SHAMBHU NATH NATH v. RAM CHANDRA SHAHA, 12 C. 267 ... 181

(9) *Sch.* II, *art.* 11—*Civ. Pro. Code* (*Act* XIV *of* 1882). *ss.* 280, 283—*Mortgagee, Suit by, against mortgagor and thirdparty who has intervened and obtained an order under s.* 280, *Civ. Pro. Code—Execution of decree.*—Art. 11, sch. II of the Limitation Act (XV of 1877), refers only to suits contemplated by s. 283 of the Civ. Pro. Code. Where, therefore, a mortgagee having obtained a decree on his mortgage and caused the property to be attached was successfully opposed by a third party who intervened in his attempt to have the property sold, and an order was passed under s. 280 of the Code of Civil Procedure releasing the property from atachment, and

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where the mortgagee, more than a year after the date of that order, instituted a suit against such third party and his mortgagor, to have his lien over the mortgaged property declared, and to bring it to sale in execution of his decree, alleging that the title set up by such third party was a fraudulent one, collusively created between the mortgagor and such third party with a view to deprive him of his rights, and asking to have the order passed under s. 280 set aside: *Held*, that the suit was not barred by limitation under the provisions of art. II, sch. II of the Limitation Act. The right that was in litigation in the proceeding under s. 280 was the right to attach and sell the property in dispute *in execution of the decree which the plaintiff had obtained against the mortgagor*, and so far as that right was concerned the present suit was barred, but so far as the other relief claimed in the present suit went that article did not apply and the suit was not barred. BUKSHI RAM PERGASH LAL v. SHEO PERGASH TEWARI, 12 C. 453 ... 308

(10) Sch. II, art. 11—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 108.

(11) *Sch.* II, *art.* 13—*Suit for refund of sale proceeds paid in accordance with order for distribution under s.* 295. *Civ. Pro. Code,* 1882—*Multifariousness.*—In execution of a decree against six persons the plaintiffs had certain property brought to sale, the proceeds of which were brought into Court. The defendants who held five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, applied to have the amount in Court rateably distributed; and in accordance with an order of the Court, dated 13th September 1880, this was done, the proceeds being distributed in proportion to the amounts of the decrees. In a suit brought on 24th August 1883 against the defendants, on the allegation that the plaintiffs were entitled to the whole of the proceeds, or in the alternative for distribution on a different principle: *Held* the suit was one to set aside the order, and not having been brought within one year from the date of the order was barred by limitation under art. 13, sch. II of Act XV of 1877. *Held*, also, that there was no misjoinder of causes of action by reason of all the defendants being included in one suit GOWRI PROSAD KUNDU v. RAM RATTAN SIRCAR, 13 C. 159 ... 604

(12) *Sch.* II, *arts.* 30, 115—*Bill of Lading*—*Contract, Breach of, for delivery of goods*—*Onus of proof of loss of goods.*—Where a plaintiff brings a suit for breach of contract for non-delivery of goods under a bill of lading, it is not open to the defendants, after having denied receipt of the goods, to set up, or for the Court, after finding that the goods had been shipped but not delivered, to assume, without evidence, that the goods were lost, in order to bring the case within art. 30, sch. II of the Limitation Act of 1877. *Per Garth, C. J.*—*Semble:* where a plaintiff sues for breach of contract and proves his case, the three years' limitation would be applicable, although the defendants were to prove that the breach occurred in consequence of some wrongful act of theirs, to which the shorter limitation would apply. DANMULL v. BRITISH INDIA STEAM NAVIGATION COMPANY, 12 C. 477 ... 324

(13) *Sch.* II, *arts.* 61, 115, 120—*Money which plaintiff was obliged to pay in consequence of acts of defendants.*—On the 29th May, 1873, one *T* drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person his heirs sued the shroff to recover the sum deposited, and on the 30th January, 1878, obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February, 1884, the shroff sued *T*, the heirs of the third party and another person (who owned to having received some of the money from *T*), to recover the sum he had been compelled to pay under the decree of 1878. *Held*, that the plaintiff's cause of action arose at the time when he actually paid down the money on the 15th January, 1883, and that the suit therefore was not barred by limitation. TORAB ALI KHAN v. NILRUTTUN LAL, 13 C. 155. 602

(14) Sch. II, art. 69—See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 12 C. 533.

(15) *Sch.* II, *arts.* 89, 90, 116—*Principal and Agent*—*Breach of Contract*—*Account*—*Registered Agreement*—*Beng Act,* VIII *of* 1869, *s.* 30—*Costs*—*Administrator-General's Act* (II *of* 1874), *s.* 35.—A suit to recover from

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the representative of a deceased Agent certain sums of money which had been received by such Agent in the course of his duties and misappropriated by him will be governed by the limitation prescribed by art. 116, sch. II, Act XV of 1877, when the contract under which the Agent was employed is contained in a duly registered instrument. In a suit for compensation for breach of a contract in writing and registered, whether such compensation be for a liquidated or unliquidated sum, the limitation applicable is six years as prescribed by art. 116, sch. II, Act XV of 1877. In art. 116, sch. II of Act XV of 1877, the word "compensation" seems to be used in the sense in which it appears in s. 73 of the Contract Act IX of 1872. In April, 1875, A entered into an agreement in writing with B, whereby he agreed to act as the manager of B's zemindaries and other landed properties for three years, ou certain terms therein mentioned. The agreement was duly registered. On the 15th of June, 1882, B sued the Administrator-General of Bengal as Administrator of A's estate, to recover certain sums of money, set forth in detail in the plaint, as having been received by A and not accounted for, stating that they had been misappropriated by A. *Held*, that in respect of such sums as were received by A in virtue of his position as manager under the registered agreement, the limitation of six years applied: but that in respect of the sums received by him in the course of transactions which did not come within the scope of the registered agreement, the limitation of three years applied. *Held*, also, that the suit was not such as is contemplated by Beng. Act VIII of 1869, s. 30. *Held*, also, that under the special terms of the Administrator-General's Act, II of 1874, the plaintiff (having succeeded as to part of his claim only) was not entitled to any costs as against A's estate, but was liable to pay costs on the portion of his claim which was disallowed. HARENDER KISHORE SINGH v. THE ADMINISTRATOR GENERAL OF BENGAL, 12 C. 357 ... 243

(16) *Sch. II, art.* 120.—*Suit to recover deposit.*—Where A made a deposit as security for the discharge of his duties as Manager of an estate under the Court of Wards, which deposit was liable for all sums not accounted for by A; and a suit was, after his dismissal from his appointment, brought for the recovery of the deposit; *held*, that the period of limitation allowed was certainly not less than six years; and began to run not from the time when the account of charges due against the deposit was made and sent to him. UPENDRA LAL MUKHOPADHYA v. THE COLLECTOR OF RAJSHAHYE, 12 C. 113 ... 77

(17) *Sch.* II, *art.* 132—*Suit on morgatge-bond to recover amount by sale of property—Personal liability of mortgagor—Cause of action.*—By a mortgage-bond, dated the 28th Magh 1281 B.S. (9th February 1875), it was provided that if the mortgagors should fail to pay the money secured thereby according to the terms thereof, the mortgagees should immediately institute a suit and realize the amount due by sale of the mortgaged property, and that if the proceeds of such sale should not be sufficient to liquidate the debt, the mortgagees should realize the balance from the persons and other properties of the mortgagors It was further agreed that the principal and interest secured by the bond should be repaid in the month of Magh 1282, (January—February 1876). In a suit instituted on the 9th October, 1882, upon the mortgage to recover the amount due by the sale of the mortgaged property and the balance, if any, from the persons of the mortgagors—*Held*, that the bond in question provided for two remedies in one suit and did not contemplate a second suit being instituted to recover the balance from the persons of the mortgagors in the event of the first remedy against the mortgaged property proving insufficient to pay the debt in full, and consequently that the cause of action against the persons of the mortgagors accrued upon the date on which the mortgage-money became due, and as the suit was instituted more than six years after that date, the plaintiffs' claim was barred by limitation, so far as the personal liability of the mortgagors was concerned. *Held*, also, that art. 132, sch. II of the Limitation Act (XV of 1877) only refers to suits to enforce payment of money charged upon immoveable property *by the sale of such property*. MILLER v. RUNGA NATH MOULICK, 12 C. 389 = 10 Ind. Jur. 376 ... 264

(18) *Sch.* II, *arts.* 132 *and* 147—*Mortgagor and Mortgagee—Suit to follow mortgaged property.*—A mortgaged his property to *B*, in 1867, by a simple mort-

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gage. In 1868 A sold the property to *C*. In 1870 *B* brought a suit on his mortgage against *A* only and obtained a mortgage-decree. In 1883 *A* brought a suit against *C* to enforce his lien against the mortgaged property. *C* pleaded that the suit was barred by limitation, under cl. 132 of the Limitation Act, XV of 1877. *Held*, that the suit was governed by art. 147, sch. II of Act XV of 1877, and therefore was not barred by limitation. BROJO LAL SINGH v. GOUR CHARAN SEN, 12 C. 111 ... 76

(19) *Cls.* 135, 147—*Mortgagor and mortgagee—Purchaser from mortgagor—Adverse possession—Regulation* XVII *of* 1806, *s.* 8—*Transfer of Property Act, s.* 86.—Under Act XIV of 1859 a mortgagee was ordinarily bound to bring his suit within 12 years from the date of default, and was barred thereafter, unless it could be shown (or might properly be inferred) that the mortgagor or the person in possession held by permission of the mortgagee after the date of default. On the 17th of November, 1865, certain property, situate in the district of the 24-Pergunnahs, was mortgaged by the owner thereof to secure the repayment of Rs. 15,785 with interest at 18 per cent. on the 17th of February, 1866. The mortgagor and mortgagee were Hindus, and the mortgage was in the ordinary form of an English mortgage of real property. After the date of the mortgage, and before the 15th of February, 1872, the mortgagor sold various portions of the mortgaged property. On the 15th of February, 1872, the mortgagee filed a foreclosure petition in the Court of the Judge of the district of the 24-Pergunnahs under Regulation XVII of 1806. Notice of the petition was served on the mortgagor alone. Neither principal nor interest was paid by the mortgagor, and on the 6th of September, 1882, the assignee of the mortgagee filed a suit for foreclosure against the mortgagor, and the purchasers of the various portions of the property, under the provisions of the Transfer of Property Act, praying for foreclosure and sale. *Held*, that as against the purchasers from the mortgagor, the suit was barred by limitation under cl. 135, sch. II of Act XV of 1877. SHURNOMOYEE DASI v. SRINATH DAS, 12 C. 614=10 Ind. Jur. 458 ... 418

(20) *Sch. II, arts.* 136 *and* 144—*Suit to obtain possession of land from vendor who has been dispossessed and subsequently recovered possession—Possession, Suit for.*—A vendor who was at the time out of possession of certain immoveable property sold a share in it to a purchaser by a *kobala*. After the date of the sale the vendor recovered possession, and the purchaser, within 12 years of the vendors having so recovered possession, but more than 12 years after he had been originally disposed, instituted a suit to obtain possession of the share covered by the *kobala*. *Held*, that the suit was governed by art. 144 and not art. 136 of sch. II of the Limitation Act (XV of 1877), and was not barred by limitation. Art. 136 does not apply to a suit brought against a vendor himself when he recovers possession. RAM PROSAD JANNA v. LAKHI NARAIN PRADHAN, 12 C. 197. 134

(21) *Sch.* II, *art.* 141—*Suit by person claiming immoveable property on death of Hindu or Mahomedan female.*—*N*, a Mahomedan, died in 1849, leaving immoveable property which was inherited by his mother *B*, his brother *E*, and his sister *A*. It was found that *A* was never in possession of the share inherited by her and that she died in 1878. *Held*, in a suit against *E* and his son brought in 1884 by *A's* heirs for possession of that share that art. 141 of the Limitation Act did not apply, and that the suit as to that share was barred. *Per Wilson, J.*—Art. 141 of sch. II of Act XV of 1877 refers to suits by persons claiming on the death of a Hindu or Mahomedan female, under an *independent title*, in the same way as in respect of suits by remaindermen, reversioners, and others art. 140 does. It does not apply to the case of a person suing on the very same cause of action which accrued to a female, and suing by right of being her heir. AZAM BHUYAN v. FAIZUDDIN AHMAD, 12 C. 594 ... 403

(22) Sch. II, arts. 143, 144—See POSSESSION, 12 C. 38.

(23) *Sch.* II, *art.* 144—*Ijardar, Dispossession of—Adverse possession—Zamindar, Suit by.*—Possession taken by a trespasser during the currency of an *ijara* lease does not become adverse to the zemindar (lessor) until upon the expiration of the term, and a suit for possession may be brought within 12 years of that date under the provisions of art. 144 of the Limitation Act. SHARAT SUNDARI DABIA v. BHOBO PERSHAD KHAN CHOWDHURI, 13 C. 101 ... 566

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(24) *Sch.* II, *art.* 144—*Suit for possession.*—On the 7th December, 1863, *A* in execution of his decree purchased and obtained symbolical possession of a certain 4-annas share, the property of his judgment-debtor. The 4-annas share was at the time under a mortgage to *B*, who happened to be in possession of the share as lessee. The term of the lease expired in 1870 or 1871. *A*, *C* and *D*, who were members of a Hindu joint family, afterwards came to a partition of the common estate in which was included the 4-annas share, and one of them, *D*, sold his share in the 4-annas to *B*, who, on the 22nd December, 1871, purchased it in the name of *E*. *B* then brought a suit to enforce his mortgage against *F*, the heir of his mortgagor, and on the 8th December, 1873, obtained a decree which on special appeal was confirmed by the High Court on the 21st December, 1875. On the 6th December, 1875 *A*, *C* and *E* had brought a suit for the possession of the 4-annas share against one Mukund Kishore, who had wrongfully taken possession of the property in 1870 or 1871, soon after the expiration of the lease to *B*. The suit was finally decided in their favour on the 29th July, 1879. In the meantime, that is somewhere in 1876, *B* had contrived to take possession of the whole share. In 1883, symbolical possession was obtained under the decree of the 29th July. *B* then executed his mortgage-decree, and attached the 4-annas share, excluding the portion which stood in the name of his benamidar. *Z*, the heir of *A*, having failed to make good his claim to a share of the property in the execution proceedings, now brought a suit for possession against *B* on the 19th July, 1884. *Held*, that the suit, having been brought within twelve years from the date of the fraudulent possession by *B*, was in time, and fell under art. 144 of the Limitation Act. RAM KISHORE GANGOPADHYA v. BANDIKARATAN TEWARI CHOWDHRY, 13 C. 203 ... 635

(25) *Sch.* II, *arts.* 144 *and* 44—*Omission to sue within due time to set aside instrument affecting immoveable property—Suit to recover property.*—Where a certain period is allowed by the Law of Limitation, within which an instrument affecting a person's rights in immoveable property must be impugned, and the persons whose rights or property are affected fail to impugn such instrument within that period. *Held*, that he will not be precluded from availing himself of the longer period allowed for the recovery of immoveable property, provided that he can prove that such instrument is null and void so far as his interests are concerned. RAGHUBAR DYAL SAHU v. BHIKYA LAL MISSER, 12 C. 69 ... 48

(26) Sch. II, art. 152—See LIMITATION ACT (XV OF 1877), 13 C. 104.

(27) Sch. II, art. 156—See ACT XVII OF 1875 (BURMAH COURTS), 13 C. 221.

(28) *Sch.* II, *arts.* 171, 171-*A*, 171-*B*—*Civ. Pro. Code* (*Act XIV of* 1882), *s.* 582—*Respondent, Decease of, after appeal filed—Defendant.*—The word "defendant" in art. 171B of the Limitation Act does not include a respondent. S. 582 of Act XIV of 1882 affects only proceedings under the Code, and does not extend the operation of any portion of the Limitation Act. UDIT NARAIN SINGH v. HAROGOURI PROSAD, 12 C. 590 (F.B.) ... 400

(29) *Sch.* II, *art.* 179, *cl.* 4—*Application for execution of decree—Step-in-aid of execution—Application to record certificate of payment by judgment-debtor in part satisfaction.*—An application by a judgment-creditor to bring an execution proceeding on the file and to record his certificate of the payment of a sum of money by the judgment-debtor is an application to take some step in aid of execution of the decree within the meaning of cl. 4, art. 179 of sch. II of the Limitation Act. TARINI DASS BANDHYOPADHYA v. BISHTOO LAL MUKHOPADHYA, 12 C. 608 ... 413

(30) *Sch.* II, *art.* 179, *cl.* 4—*Execution of decree—Step-in-aid of execution—Confirmation of sale—Application for copy of decree.*—On the 19th of March 1888, a decree for money was passed and on the 19th of February 1881, certain property belonging to the judgment-debtor was sold in execution thereof. On the 22nd of April 1881 the Court passed an order confirming the sale. On the 10th of January 1882 the decree-holder applied to the Court for a copy of the decree, in order that he might make a fresh application for execution. On the 28th of March 1884 he applied for execution. The judgment-debtor appeared and pleaded that execution was barred by limitation. The court of first instance held that execution was not barred on the ground that the passing of the order of the

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22nd of April 1881 was sufficient under the provisions of art. 179, cl. 4 of the Limitation Act of 1877, to keep the decree alive. The lower appellate Court also held that execution was not barred by limitation, but solely on the ground that the application of the 10th of January 1882 was sufficient to keep the decree alive. It did not appear that the order of the 19th of February 1881 w›s passed in consequence of any application by the decree-holder, and neither the application of the 10th of January 1882 nor any copy thereof was put in evidence on the present application. *Held*, on appeal to the High Court, that the execution of the decree was barred by limitation. RAJKUMAR BANERJI v. RAJLAKHI DABI, 12 C. 441 ... 300

Lis Pendens.

Purchase of property on which there is a decree in suit on a mortgage bond—Suit for possession against purchaser from mortgagor.—The plaintiff in 1877 obtained a decree on a mortgage bond in execution of which property belonging to his debtor was put up for sale and purchased by the plaintiff on 15th May 1878. The defendants had, in execution of a subsequent money decree against the same debtor, purchased the same property on the 1st April 1878. In a suit by the plaintiff for possession and mesne profits, *held*, that the defendants were purchasers *pendente lite*, and were consequently bound by the proceedings in the plaintiff's suit on the mortgage bond. JHAROO v. RAJ CHUNDER DASS, 12 C. 299 ... 203

Local Investigation.

Power of Court to direct when parties do not ask for it—Remand order for local investigation.—In a suit for land where the question was as to whether the land lay within the boundaries of the plaintiff's or the defendant's land, the Court of first instance suggested to the parties that the proper mode of determining the case was in the first instance the hold a local investigation, and that such local investigation should be applied for by one or other of the parties. Both parties resolutely refused to make such application, and the Court thereupon dealt with the case upon the materials before it, and passed a decree. Upon appeal the lower appellate Court remanded the case for the purpose of a local investigation being held at the cost of the plaintiff in the first instance. *Held*, that inasmuch as neither of the parties desired to have a local investigation, the Court was wrong in remanding the case, and that it was bound to decide it upon the evidence before it. JATINGA VALLEY TEA COMPANY LD. v. CHERA TEA COMPANY LD., 12 C. 45 ... 30

Loss of Goods.

See LIMITATION ACT (XV OF 1877), 12 C. 417.

Lunatic.

Act XXXV *of* 1858, *s.* 9—*Court of Wards in Oudh—Power to lease lands of proprietor disqualified from lunacy.*—The order of a Civil Court declaring, under Act XXXV of 1858, an Oudh talukdar to be of unsound mind and incapable of managing his affairs, renders him a disqualified proprietor within the meaning of s. 9 of that Act, with the result that the Court of Wards is authorized to take charge of his estate without a further order of the Civil Court appointing the Court of Wards to be manager. A Civil Court having made an order declaring a talukdar to be of unsound mind and incapable of managing his affairs, and having at the same time appointed to be manager of his estate the Deputy Commissioner of the District, who also acted as manager of the Court of Wards: *Held*, that a lease for more than five years made by the latter officer, as representing the Court of Wards, was not invalidated under s. 14 of the above Act, providing that no manager, appointed by the Civil Court under it, shall have power to grant a lease for any period exceeding five years. SARABJIT SINGH v. CHAPMAN, 13 C. 81 (P.C.)=13 I.A. 44=4 Sar. P.C.J. 700=10 Ind. Jur. 233=Rafique aud Jackson's P.C. No. 93 ... 552

Magistrate.

(1) *Jurisdiction of—Powers of Second Class Magistrate—Reference to District Magistrate—Committal to Court of Sessions—Crim. Pro. Code, s.* 239.—An Assistant Magistrate convicted a person under ss. 406 and 417 of the Penal Code, and referred the case to the District Magistrate for sentence

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under the provisions of s. 349 of the Code of Criminal Procedure. The District Magistrate was of opinion that the offence was one properly punishable under s. 420 of the Penal Code, and one which the Assistant Magistrate had no jurisdiction to deal with, and that therefore the reference under s. 349 was *ultra vires* and iilegal On a reference to the High Court : *Held*, that the Assistant Magistrate was not wholly without jurisdiction as he was competent to commit the accused to the Court of Sessions, though not to hold a trial, and that the District Magistrate might, if he thought proper, commit the accused to the Court of Sessions. ABDUL WAHAB v. CHANDIA, 13 C. 305 ... 704

(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 473, 13 C. 334.

(3) See JUDGMENT, 13 C. 110.

(4) See RECOGNIZANCE, 12 C. 133.

Marriage.

See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Master and Servant.

Monthly service—Wrongful leaving of employment, Consequence of—Right to Wages.—When a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all rights to wages for the time he had actually served during that month. DHUMEE BEHARA v. SEVENOAKS, 13 C. 80=11 Ind. Jur. 23 ... 551

Material Alteration.

See DOCUMENT, 12 C. 313.

Material Irregularity.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 225.

Matters in Issue.

See RES JUDICATA, 12 C. 484.

Measurement.

See ACT VIII of 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 13 C. 57.

Merchant Seamen's Act (I of 1859).

S. 83, 17 *&* 18 *Vic.*, *c.* 104, *ss.* 243 (*cls.* 1 *and* 2), 288—*Merchant Shipping Act*, 1854, 43 *and* 44 *Vic.*, *c.* 16, *s.* 10—*Merchant Seamen's* (*Payment of Wages and Rating*) *Act*, 1880—*Imprisonment for desertion.*—The amendment of clauses 1 and 2 of s. 243 of 17 and 18 Vic., c. 104, by 43 and 44 Vic., c. 16, s. 10 does not affect the liability of seamen in Calcutta to imprisonment for offences under s. 83, cls. 1 and 2 of Act I of 1859. BRUCE v. CRONIN, 12 C. 438 ... 297

Merchant Shipping Act, 1854.

See MERCHANT SEAMEN'S ACT (I OF 1859), 12 C. 438.

Merchants Payment of Wages and Rating Act, 1880.

See MERCHANT SEAMEN'S ACT (I OF 1859) 12 C. 438.

Mesne Profits.

See POSSESSION, 13 C. 283.

Minor.

(1) *Next friend—Certificate under Act* XL *of* 1858—*Objection to frame of suit.*—In a suit brought on behalf of a minor by his next friend it is not necessary for the next friend to have a certificate under Act XL of 1858, provided he have in fact permission of the Court to sue. Where a suit was brought in the name of A, for self and as guardian of her daughter B, a minor, and it was objected that it should have been brought in the names of A and B a minor by her next friend and guardian, *held*, that, as no one was misled or injured by the improper form of the plaint, the objection ought not to be held fatal, but the decree must be taken to be in favour of A and of B suing by A as if the suit had been properly framed. ALIM BUKSH FAKIR v. JHALO BIBI, 12 C. 48 ... 33

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(2) *Next friend—Certificate under Act* XL *of* 1858, *s.* 3—*Civ. Pro. Code* (*Act* XIV *of* 1882), s. 440.—S. 440 of the Civ. Pro. Code, read with s. 3 of Act XI of 1858, does not make the receipt from the Court of a written permission to sue compulsory upon the next friend of an infant plaintiff. NEWAJ v. MUKSUD ALI, 12 C. 131 ... 39

(3) *Objection on the ground of Minority—Remand—Rejection of plaint—Civ. Pro. Code, ss.* 2, 53, 54, 442—*Decree, What it includes.*—S. 442 of the Civ. Pro. Code refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor. Where in a suit the plaintiffs described themselves as adults, and on the objection of the defendants an issue was raised and inquired into on the question of age: *Held*, that the order passed under the circumstances although it professed to have been made under s. 442 of of the Procedure Code, must be treated as one rejecting the plaint or dismissing the suit on the ground that the suit was instituted by persons who were established on the evidence to be minors, and was appealable as a decree within the meaning of s. 2 of the Code. The words, "rejecting the plaint," in s. 2, are not limited to the cases provided for in ss. 53, 54. *Held*, also, that the defendant, not having taken an objection to the suit on the ground of the minority of the plaintiffs, whilst it was pending in appeal to the High Court, were precluded from raising it on remand. BENI RAM BHUTT v. RAM LAL DHUKRI, 13 C. 189 ... 625

(4) See GUARDIAN, 12 C. 69 ; 12 C. 612.

(5) See INSOLVENCY, 13 C. 68.

(6) See LIMITATION ACT (XV OF 1877), 13 C. 292.

Mischief.

(1) *Penal Code* (*Act* XLV *of* 1860), *ss.* 341, 424—*Wrongful Restraint—Invasion of right causing wrongful loss.*—Where complainant had for the purpose of removal placed certain goods upon a cart, and accused came and unyoked the bullocks and turned the goods off the cart on the road, and complainant thereupon went away at once leaving them there: *Held*, that under these circumstances a conviction under s. 341 of the Penal Code could not be sustained; but that there was such 'mischief'' as to bring the offence within s. 425. *Held*, also, that s. 425 does not necessarily contemplate damage of a destructive character. It requires merely that there should be an invasion of right, and diminution of the value of one's property, caused by that invasion of right, which must have been contemplated by the doer of it when he did it. *In the matter of the petition of* JUGGESHWAR DASS. JUGGESHWAR DASS v. KOYLASH CHUNDER CHATTERJEE, 12 C. 55 =10 Ind. Jur. 297 ... 38

(2) *Penal Code* (*Act* XLV *of* 1860) *s.* 425—*Revenue sale—Damage done between date of sale and grant of certificates—Wrongful loss to property held under incomplete title.*—The damage contemplated in s. 425 of the Penal Code need not necessarily consist in the infringement of an existing present and complete right, but it may be caused by an act done now with the intention of defeating and rendering infructuous a right about *to come into existence*. Any person who contracts to purchase property, and pays in a portion of the purchase-money, has such an interest in that property, although his title may not be complete, or his right final and conclusive, that the destruction of such property may cause to him wrongful loss or damage within the meaning of s. 425. DHARMA DASS GHOSE v. NUSSER-UDDIN, 12 C. 660 ... 448

Misdescription

of plaintiff—See PLAINT, 12 C. 41.

Misjoinder

of causes of action—See MULTIFARIOUSNESS, 13 C. 147.

Mistake

of counsel—See REVIEW, 13 C. 62.

Modification.

See COMPROMISE, 13 C. 170

Money PAGE

which plaintiff had to pay in consequence of defendant's acts—See LIMITATION ACT (XV OF 1877), 13 C. 155.

Monthly Service.

See MASTER AND SERVANT, 13 C. 80.

Mooktear.

See DISCHARGE, 13 C. 121.

Mortgage.

1.—GENERAL.
2.—CONDITIONAL SALE.
3.—ENGLISH.
4.—EQUITABLE.
5.—FORECLOSURE.

———1.—**General.**

(1) *Mortgage of Crops that may be grown upon a certain plot of land, its nature and effect—Transfer of Property Act—Contract Act.*—The mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction. The transaction is neither governed by the Transfer of Property Act nor by the Contract Act; but it is in the nature of an agreement to mortgage moveable property that may come into existence in future. MISRI LAL v. MOZHAR HOSSAIN, 13 C. 262 ... 674

(2) See EVIDENCE, 12 C. 52.

(3) See POSSESSION, 12 C. 414.

(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 505.

———2.—**Conditional Sale.**

Mortgage in English form—Conditional sale.—A mortgage in the English form between Hindus of lands in the mufassil, outside Calcutta, has always been treated by the Courts as a mortgage by conditional sale. SHURNOMOYEE DASI v. SRINATH DAS, 12 C. 614 = 10 Ind. Jur. 458 ... 418

———3.—**English.**

See MORTGAGE—CONDITIONAL SALE—LIMITATION ACT (XV OF 1877), 12 C. 614.

———4.—**Equitable.**

Deposit of title deeds—Contract of Mortgage—Letter stating terms of Equitable Mortgage, Effect of—Equitable Mortgagee, his proper remedy.—*A* and *B* executed a joint and several promissory note in favour of the plaintiff, On the the same day *A* deposited with the plaintiff the title deeds of his property as collateral security, and received conjointly with *B* a part of the consideration money for the promissory note. Shortly afterwards A addressed a letter to the plaintiff to this effect: "As collateral security for the due payment of Rs. 2,000 secured by a promissory note of even date * * I herewith hand you the title deeds of my property * * money borrowed and received in pledge of house," and obtained the balance. In a suit on the basis of the documents for foreclosure or for sale of the property, or in the alternative for a conveyance of the legal estate: *Held*, that the letter itself was not a contract of mortgage, and was without registration admissible in evidence of the equitable mortgage which had been completed upon deposit of title deeds. *Held*, also, that the fact of the letter would not prevent the plaintiff from giving any other evidence in proof of his claim. *Held*, further, that the plaintiff was not entitled upon the transaction to a conveyance of the legal estate, his proper remedy being by sale of the mortgaged property. OO NOUNG v. MOUNG HTOON OO, 13 C. 322 ... 715

———5.—**Foreclosure.**

(1) *Notice of foreclosure—Reg.* XVII *of* 1806.—A notice of foreclosure signed by the Sherishtadar of the Judge's Court and bearing the seal of the Court, but not the signature of the Judge, *held*, following the principle of the decision in 4 A. 276, not to be a valid notice under Reg. XVII of 1806, s. 8. DOMA SAHU v. NATHAI KHAN, 13 C. 50 ... 530

Mortgage—5.—Foreclosure—(*Concluded*). PAGE

(2) *Suit for—Mortgage by conditional sale—Reg.* XVII *of* 1806—*Transfer of Property Act* (IV *of* 1882), *s.* 2, *cl.* (*c*), *s.* 86—*Procedure.*—Where a suit is brought after the date of the Transfer of Property Act, for the foreclosure of a mortgage dated previous to the Act, the procedure to be followed is that given by the Transfer of Property Act: the procedure of Reg. XVII of 1806 not being saved by s. 2, cl.(*c*)of Act IV of 1882. *Per* Wilson, J.—It is a general rule in construing statutes that in matters of substantive right they are not to be so read as to take away vested rights, but that in matters of procedure they are general in their operation. There is nothing in the Transfer of Property Act from which it can be beyond reasonable doubt concluded that the Legislature intended to depart from this settled principle of legislation. *Per* Trevelyan, J.—There is a clear distinction between " relief " and the mode of procedure for obtaining such relief. The " relief " remains unaffected by a change of procedure. The " rights and liabilities " of a mortgagor and mortgagee, and the " relief " in respect of such rights and liabilities, are the same under Act IV of 1882 as they were before. A different procedure for enforcing such rights and obtaining such relief has, however, been adopted by the Transfer of Property Act BHOBO SUNDARI DEBI v. RAKHAL CHUNDER BOSE, 12 C. 583 (F.B.) ... 396

(3) See REGULATION XVII OF 1806, 12 C. 138.

Mortgage-bond.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 546.

(2) See LIMITATION ACT (XV OF 1877), 12 C. 389.

Mortgage-decree.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 436.

Mortgaged-property.

(1) See LIMITATION ACT (XV OF 1877), 12 C. 111.

(2) See POSSESSION, 12 C. 414.

Mortgagor and Mortgagee.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 346.

(2) See LIMITATION ACT (XV OF 1877), 12 C. 111; 12 C. 389; 12 C. 453; 12 C. 614.

(3) See POSSESSION, 12 C. 414.

(4) See REGISTRATION, 13 C. 70.

(5) See REGULATION (XVII OF 1806), 12 C. 138.

(6) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 505.

Multifariousness.

(1) *Misjoinder of causes action—Civ. Pro. Code,* 1882, *s.* 28—*Suit for declaratory decree—Specific Relief Act* (I of 1877), *s.* 42.—The plaintiffs having obtained a decree for the possession of certain lands and having received formal possession thereof, brought a suit against 86 persons holding distinct and separate tenures in those lands, on the allegations that, " on the plaintiffs attempting to measure the lands, and calling on the tenants to pay rent, ten of the defendants described as *prodhans* or headmen formed a combination and gained over the other defendants with a view to injure the plaintiffs; that through their help and endeavour the remaining defendants failed to recognize the plaintiffs as landlords, and declined to pay any rent or to allow them to measure the lands, driving away an Amin who went to measure the lands, on behalf on the plaintiffs, and thereby preventing the plaintiffs from exercising their proprietary rights: that the plaintiffs brought suits for rent against some of the defendants, and in those suits the defendants denied the plaintiffs' title as landlords, whereupon the plaintiffs, seeing the necessity of instituting a suit for declaring the defendants tenants of the land, withdrew the suits for rent." They stated their cause of action to " be the defendants' act of not recognizing us as their landlords and thereby preventing us exercising our proprietary rights in respect of the land in suit, and not allowing us to make a measurement of that land, and also withholding the payment of rent;" and prayed for a decree establishing their proprietary right and

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declaring the defendants to be their tenants. *Held*, that there was but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property they had purchased; and that the suit was not multifarious within s. 28 of the Civ. Pro. Code. *Held*, also, that the declaratory decree prayed for could be made notwithstanding the plaintiffs might have asked for possession of the lands. LOKE NATH SURMA v. KESHAB RAM DOSS, 13 C. 147=11 Ind. Jur. 105 ... 597

(2) See LIMITATION ACT (XV OF 1877), 13 C 159.

Municipal Corporation

See ACT V OF 1876 (BENGAL MUNICIPAL), 13 C. 171.

See SALE, 12 C. 307.

Necessity.

See HINDU LAW—ALIENATION, 12 C. 52.

Neglect of Duty.

See ACT V OF 1861 (POLICE), 12 C. 427.

Next Friend.

See MINOR, 12 C. 48, 131.

Non-delivery of Goods.

See LIMITATION ACT (XV OF 1877), 12 C. 477.

Non-payment of Rent.

See RIGHT OF OCCUPANCY, 12 C. 115.

Notice.

(1) See ACT VII OF 1880 (BENGAL PUBLIC DEMANDS RECOVERY), 12 C. 603.

(2) See LAND ACQUISITION ACT (X OF 1870), 12 C. 33.

(3) See MORTGAGE—FORECLOSURE, 13 C. 50.

(4) See REGISTRATION, 3 C. 70.

(5) See SALE, 12 C. 67.

(6) See SANCTION TO PROSECUTION, 12 C. 58.

(7) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 505.

Notice to quit.

(1) See CO-SHARERS, 13 C. 75.

(2) See DECLARATORY DECREE, 13 C. 3.

(3) See LANDLORD AND TENANT, 12 C. 82; 12 C. 93.

Nuisance.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 13 C. 275.

Objection.

(1) On ground of Minority—See MINOR, 13 C. 189.

(2) To frame of suit—See MINOR, 12 C. 48.

Obligor.

Possession of bond by—See BOND, 12 C. 546

Obstruction.

See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 137; 12 C. 696; 13 C. 275.

Occupancy.

See RIGHT OF OCCUPANCY, 12 C. 115.

Official Assignee.

See INSOLVENCY, 13 C. 66.

Omission

to state reasons in judgment—See JUDGMENT, 12 C. 199.

Opposition

to final discharge—See INSOLVENCY, 13 C. 67.

Order. PAGE

(1) And disposition—See INSOLVENCY ACT (11 & 12 VIC., C. 21), 12 C. 629.

(2) Directing commission of partition to issue—See CIVIL PROCEDURE CODE, (ACT XIV OF 1882), 12 C. 209.

(3) Dismissing appeal presented out of time—See APPEAL—SECOND APPEAL, 12 C. 30; 12 C. 610.

(4) *Ex parte*—See APPEAL—GENERAL, 13 C. 78.

(5) For partition in execution of decree—See APPEAL—GENERAL, 12 C. 273, 275; 511 & 624.

(6) For recovery of railway fare—See ACT IV OF 1879 (RAILWAYS), 12 C. 192.

(7) In discretion of Court—See APPEAL—SPECIAL APPEAL, 12 C. 179.

(8) Irregularly made—See BENCH OF MAGISTRATES, 12 C. 558.

(9) Of remand for local investigation—See LOCAL INVESTIGATION AND APPEAL, 12 C. 45.

(10) Refusing application by decree-holder for leave to bid—See APPEAL—GENERAL, 13 C. 174.

(11) Rejecting application to be made a party—See APPEAL—GENERAL, 13 C. 100.

(12) Remitting case to original Court to pass decree upon award—See ARBITRATION, 12 C. 173.

Pardanashin Lady.

See INTEREST, 12 C. 225.

Parties.

(1) *Civ. Pro. Code, s. 32—Power of Court to add party.*—A Court may, in the exercise of its discretion under s. 32 of the Civ. Pro. Code, add a party to a suit upon his own application. RABBABA KHANUM v. NOORJEHAN BEGUM *alias* DALIM SHAHIBA, 13 C. 90 ... 558

(2) See APPEAL—GENERAL, 13 C. 100.

(3) See CIV. PRO. CODE (ACT XIV OF 1882), 13 C. 326.

(4) See JOINDER OF PARTIES, 12 C. 555.

(5) See POSSESSION, 12 C. 414.

Partnership.

See STAMP ACT (I OF 1879), 12 C. 383.

Passenger

not producing season ticket when called upon—See ACT IV OF 1879 (RAILWAYS), 12 C. 192.

Payment.

(1) By judgment-debtor in part satisfaction, application to record—See LIMITATION ACT (XV OF 1877), 12 C. 608.

(2) Of bond, presumption of—See BOND, 12 C. 546.

(3) Out of proceeds before confirmation of sale—See CIV. PRO. CODE (ACT XIV OF 1882), 12 C. 252.

(4) To stay sale—See ARREARS OF RENT, 13 C. 331.

Pedigree.

See EVIDENCE ACT (I OF 1872), 13 C. 42.

Penal Code (Act XLV of 1860).

(1) Ss. 143, 147, 324, 353—See SENTENCE, 12 C. 495.

(2) S. 182—*False information to a Public servant, Charge of—Crim. Pro. Code, s. 195—Sanction to prosecution—Separate convictions for one statement, Illegality of.*—An information was given to a police officer in the course of which two persons were named in whose houses stolen property belonging to a certain individual would be discovered: on complaint the information was found to be false, and the accused was convicted and punished for two offences under s. 182 as affecting two different persons. *Held*, that although the information related to two different persons the accused could be charged with having made only one false statement, and punished for one offence under s. 182. S. 195, Crim. Pro. Code, clearly shows that

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a complaint directly made by a public servant mentioned therein is quite as sufficient as his sanction. POONIT SINGH v. MADHO BHOT, 13 C. 270 ... 679

(3) S. 188—See CRIM. PRO. CODE (ACT X OF 1882), 13 C. 175.

(4) S. 223—See ESCAPE, 12 C. 190.

(5) Ss. 341, 425—See MISCHIEF, 12 C. 55.

(6) S. 425—See MISCHIEF, 12 C. 660.

(7) S. 464—See FORGERY, 13 C. 349.

Penalty.

See INTEREST, 13 C. 164, 200.

Persona Designata.

See HINDU LAW—ADOPTION, 12 C. 686.

Personal liability of Mortgagor.

See LIMITATION ACT (XV OF 1877), 12 C. 389.

Petition of Appeal

under Insolvent Act, form of—See INSOLVENT ACT (11 & 12 Vic., C. 211, 12 C. 629.

Plaint.

(1) *Form of—Practice—Form of suit by Company—Corporation, Suit by—Plaintiff, Misdescription of—Civil Procedure Code (Act XIV of* 1882), *s.* 435—*Companies Act (VI of* 1882), *s.* 41.—A plaint was filed in which the plaintiff was described as J, Manager of the X Company, Limited, and in the body of the plaint several allusions were made to the "plaintiff-company," and the claim made in the plaint was a claim made on behalf of the Company. It was not suggested that the X Company was a Company authorised to sue or be sued in the name of an officer or trustee, nor was it shown that it was registered as a corporation under s. 41 of the Indian Companies Act. *Held* that the suit was badly framed, and that it should be dismissed. S. CAMPBELL v. J. A. JACKSON, 12 C. 41. 28

(2) See APPEAL—GENERAL, 12 C. 271.

(3) See INTEREST, 12 C. 569.

(4) See MINOR, 13 C. 189.

Plaintiff.

See PLAINT, 12 C. 41.

Pleader.

See APPEAL—GENERAL, 12 C. 605.

Police Constable.

See ACT V OF 1861 (POLICE), 12 C. 427.

Possession.

(1) *Auction-purchaser Suit by, for possession—Execution proceedings—Possession, Application for, by auction-purchaser—Civil Procedure Code (Act* XIV *of* 1882), *s.* 318.—A suit by an auction-purchaser to obtain possession of land, the subject-matter of his purchase, will lie when it is shown that an attempt has been made to obtain possession in execution proceedings, and that such attempt has been unsuccessful. In 10 C.L.R. 258, it was not intended to hold that under no circumstances would such a suit lie, but that so long as the means provided by s. 318 of the Civil Procedure Code are open to a purchaser, he is bound to have recourse to that section rather than to bring a fresh suit. ISWAR PERSHAD GURGO v. JAI NARAIN GIRI, 12 C. 169 ... 115

(2) *Limitation Act* (XV *of* 1877), *arts.* 143, 144—*Conflicting evidence of possession—Presumption of title.*—Where two adverse parties are each trying to make out a possession of twelve years, and the evidence is conflicting and not conclusive on either side, *held* that the presumption that possession goes with the title must prevail. DHARM SINGH *v.* HUR PRASAD SINGH, 12 C. 38 ... 26

(3) *Mesne profits—Decree silent as to mesne profits—Power of Court executing Decree—Hindu Law—Daughters' sons—Representatives—Reversioners, Liability of, for acts of widow.*—Plaintiff sued for possession of certain

Possession—(*Concluded*). PAGE

lands and for mesne profits. He obtained a decree for possession, but the decree was silent as to mesne profits. *Held*, that the Court executing the decree was not competent to entertain a claim for mesne profits made by the decree-holder. A Hindu, governed by the Bengal School of Hindu Law, brought a suit for possession of a certain taluk, but died before decree, leaving him surviving a widow and two daughters. The widow was substituted in the suit instead of her husband, and she obtained a decree for possession. By a summary order made in execution of the decree the widow was put in possession of the taluk as well as of certain lands, which lands were claimed by a person not a party to the suit, as lands not belonging to the taluk. The claimant afterwards brought a suit for these lands against the widow. The widow died during the suit, and was succeeded by her daughters, who also died after a decree for possession of the lands had been obtained by the claimant against them, when their sons were substituted in their stead as defendants. It appeared that the widow, the daughters and the daughters' sons had all been in possession of the disputed lands as a portion of the family estate. *Held*, that the reversioners, the daughters' sons, were liable as the legal representatives of the daughters, and as such were liable for all costs incurred in the suit brought by the claimant for possession of the disputed lands. CHUNDER COOMAR ROY v. GONESH CHUNDER DASS, 13 C. 283 ... 688

(4) *Suit for, by Mortgagee—Purchase by third parties of mortgagee's interest in portions of mortgaged property--Redemption and apportionment of liability of purchasers for the mortgage charge—Joinder of parties--Mortgage account —Form of decree.*—Purchasers of the right, title, and interest of a mortgagor in certain portions of the mortgaged property, sold in execution of prior decree against the mortgagor, were added as co-defendants in a mortgagee's suit against the mortgagor for foreclosure on failure to redeem. As against these purchasers the suit was dismissed with costs, on the ground that their claims to portions of the mortgaged property, under titles prior to, and independent of, the mortgagee's title, could not be decided therein. A decree was then made against the mortgagor, and on his subsequent failure to redeem or to pay the debt, his equity of redemption was sold, and was bought by the mortgagee. In a suit brought by the mortgagee against the representatives of one of the said purchasers, who refused to deliver possession of the portion, *held*, that (*a*) as this purchaser had disclaimed the right to redeem the portion, and had alleged a paramount title causing the dismissal of the suit as against him, he, and those claiming under him, were precluded from afterwards claiming to redeem; and (*b*) the portion of mortgage charge for which he was liable could not be apportioned by the taking an account as between him and the mortgagee alone, in the absence of the purchasers of the other portions. A decree which ordered that the defendants, without any account being taken at all, should retain possession of the portion purchased as above stated, clear of the proportion of mortgage debt chargeable thereon, on payment to the mortgagee of the sum for which he had bought the equity of redemption, was held to be incorrect, and was accordingly reversed. NILAKANT BANERJI v. SURESH CHANDRA MULLICK, 12 C. 414 (P.C.) = 12 I.A. 171 = 9 Ind. Jur. 439 = 4 Sar. P.C.J. 685 ... 281

(5) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 12 C. 606.

(6) See BOUNDARY DISPUTE, 13 C. 280.

(7) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 291.

(8) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 521 ; 13 C. 175.

(9) See LIMITATION ACT (XV OF 1877), 12 C. 197 ; 13 C. 203.

(10) See LIS PENDENS, 12 C. 299.

(11) See RIGHT OF OCCUPANCY, 12 C. 115.

(12) See WASTE LANDS, 12 C. 279.

Pottah.

Construction of—Meaning of the words "istemrari mokurari," in connection with grant of lands--Intention of parties.—The words "istemrari mokurari" in a pottah granting land do not, of themselves, denote that the estate granted is an estate of inheritance. Not that such an estate cannot be so

Pottah—(*Concluded*). PAGE

granted unless, in addition to the above words, such expressions as "ba farzandan," or "naslan bad naslan," or similar terms are used. Without the latter, the other terms of the instrument, the circumstances under which it has been made or the conduct of the parties, may show the intention with sufficient certainty to enable the Courts to pronounce the grant to be perpetual ; the above words not being inconsistent therewith, though not themselves importing it : *Held* accordingly that where the words "mokurari" "istemrari" were used in connection with a grant in a pottah (as it was also held in another case where the instrument was termed)" mukurari ijara pottah" that the question was whether the intention of the parties that the grant should be perpetual had, or had not, been shown with sufficient certainty in any other way, *e.g.*, by the other terms, by the objects, or circumstances, of the grant, or by the acts of the parties. And *held* that in the present case the intention was not so shown. TULSHI PERSHAD SINGH v. RAMNARAIN SINGH, 12 C. 117 (P.C.) = 12 I.A. 205 = 9 Ind. Jur. 433 = 4 Sar. P.C.J. 646 ... 80

Poverty.

See LIMITATION ACT (XV OF 1877), 13 C. 78.

Practice

(1) *Costs—Attorney and Client—Taxation—Refreshers to Counsel—Counsel's fees—Rules of Court* 707, 703.—Refreshers are not as a general rule to be allowed on motion heard by affidavit ; but the Court hearing the motion can, in its discretion, and if applied to for the purpose, give special directions allowing costs as on the hearing of a case. In the absence of such special directions refreshers should not be allowed. GARDEN REACH SPINNING AND MANUFACTURING CO. v. EMPRESS OF INDIA COTTON MILLS CO., 12 C. 551 ... 374

(2) Hearing of part of case by one Bench and decisiou by another—See BENCH OF MAGISTRATES, 12 C. 558.

(3) Successor to Judge who passed decree, Applicatiou for review, heard by—See REVIEW, 13 C. 231.

(4) See APPEAL TO PRIVY COUNCIL, 12 C. 658.

(5) See DISCOVERY, 12 C. 265.

(6) See PLAINT, 12 C. 41.

Pre-emption.

See VALUATION OF SUIT, 13 C. 255.

Presidency Magistrate.

Summary trial—Conviction in non-appealable case—High Court as a Court of Revision—Code of Criminal Procedure, ss. 370, 437.—In every case which is not appealable to the High Court, a Presidency Magistrate should state his reasons for convicting the prisoner, so that the High Court may judge as to whether there were sufficient materials before the Magistrate to support the conviction. In a case where the accused was convicted of theft and sentenced to six months' rigorous imprisonment, the notes of the evidence taken by the Magistrate did not afford sufficient materials upon which the prisoner could be legally convicted, and the Magistrate had omitted to record his reasons for the conviction under s.370, cl. (i) of the Code of Criminal Procedure. *Held*, by the High Court as a Court of Revision, that the conviction and sentence must be set aside, notwithstanding the provisions of s. 437 of the Code of Criminal Procedure. IN THE MATTER OF THE PETITION OF YACOOB. YACOOB v. ADAMSON, 13 C. 272. 681

Presumption.

(1) As to branch of joint family remaining joint after separation—See HINDU LAW—JOINT FAMILY, 12 C. 262.

(2) Of payment—See BOND, 12 C. 546.

(3) Title—See POSSESSION, 12 C. 38.

(4) Validity of Marriage—See HINDU LAW—MARRIAGE, 12 C. 140.

(5) See ACT IX OF 1880 (ROAD CESS), 13 C. 197.

(6) See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Principal and Agent.

See LIMITATION ACT (XV OF 1877), 12 C. 357.

Principal and Surety. PAGE

Contract Act (IX *of* 1872), *ss.* 133, 139—*Surety still liable though remedy against principal barred.*—Where a plaintiff sued a principal and a surety for arrears of rent, and it appeared that the principal was dead at the time the suit was instituted, and where the representative of the principal was not made a party till after the right to recover the arrears as against him was barred by limitation, *held*, that the surety was still liable, the suit as against him having been instituted within the period allowed. KRISHTO KISHORI CHOWDHRAIN v. RADHA ROMUN MUNSHI, 12 C. 330. 225

Priority.

(1) Of attaching creditors—See ATTACHMENT, 12 C. 317.

(2) See REGISTRATION, 13 C. 70.

Privileged Communications.

See DISCOVERY, 12 C. 265.

Procedure.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 37.

(2) See GUARDIAN, 12 C. 69.

(3) See MORTGAGEE—FORECLOSURE, 12 C. 583.

(4) See REMAND, 12 C. 225.

Proceedings.

(1) Not inter partes—See EVIDENCE, 12 C. 82.

(2) Taken pending appeal on illegal order of remand—See APPEAL, 12 C. 45.

(3) See APPEAL—SECOND APPEAL, 13 C. 86.

Pro Forma Defendant.

See RES JUDICATA, 12 C. 580.

Prohibited Decrees.

See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Property.

(1) See REMAND, 12 C. 225.

(2) See SALE, 12 C. 307.

Publication.

See SALE, 12 C. 67.

Public Servant.

(1) See CRIM. PRO. CODE (ACT X OF 1882), 13 C. 175.

(2) See PENAL CODE (ACT XLV OF 1860), 13 C. 270.

Public Way.

See CRIM. PRO. CODE (ACT X OF 1882), 12 C. 696 ; 13 C. 275.

Purchase.

(1) See BENAMI TRANSACTION, 13 C. 181.

(2) See LIS PENDENS, 12 C. 299.

(3) See POSSESSION, 12 C. 414.

Purchase-Money.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 252 ; 13 C. 326.

Purchaser.

(1) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 12 C. 24.

(2) See ACT X OF 1871 (BENGAL DISTRICT ROAD-CESS), 12 C. 430.

(3) See APPEAL—SECOND APPEAL, 12 C. 610.

(4) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 204 ; 12 C. 546.

(5) See EVIDENCE, 12 C. 82.

(6) See EVIDENCE ACT (I OF 1872), 12 C. 156.

(7) See HINDU LAW—PARTITION, 12 C. 209.

(8) See LIMITATION ACT (XV OF 1877), 12 C. 614.

(9) See POSSESSION, 12 C. 169.

(10) See REGISTRATION, 13 C. 70.

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See SALE, 12 C. 622.

Question for Court executing Decree.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 105.

Question of Law.

See APPEAL—SECOND APPEAL, 12 C. 93.

Question of Title.

(1) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE), 12 C. 606.

(2) See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 996.

(3) See RES JUDICATA, 12 C. 563.

Rateable Distribution.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 499; 13 C. 225.

Recognizance.

(1) *To keep the peace—Criminal Procedure Code (Act X of* 1882), *s.* 107—*Power of District Magistrate to call on person residing in another district for security.*—A Magistrate has no jurisdiction to take proceedings under s 107 of the Criminal Procedure Code against a person not personally within his jurisdiction. Even assuming there was jurisdiction, it was not a case where the Magistrate should have called upon the petitioner to appear personally, he residing at a distance, there being no special circumstance making his personal attendance necessary, and the Magistrate having power under s. 116 to allow him to appear by a pleader. IN THE MATTER OF THE PETITION OF DINONATH MULLICK. DINONATH MULLICK v. GIRIJA PROSONNO MOOKERJEE, 12 C. 133 ... 91

(2) See ARREST, 12 C. 652.

Recorder of Rangoon.

Appeal from—See ACT XVII OF 1875 (BURMA COURTS), 13 C. 232.

Record of Rights.

See SONTHAL PERGUNNAHS SETTLEMENT, 13 C. 245.

Reference.

(1) To arbitration—See ARBITRATION, 12 C. 173.

(2) To District Magistrate—See MAGISTRATE, 13 C. 305.

Refreshers to Counsel.

See PRACTICE, 12 C. 551.

Registered Agreement.

See LIMITATION ACT (XV OF 1877), 12 C. 357.

Registered Transferee.

See SALE, 12 C. 622.

Registration.

Notice—Mortgagor and Mortgagee—Unregistered mortgage—Purchaser with notice of prior unregistered mortgage—Priority.—Where property has been mortgaged by a deed, the registration of which is not compulsory, a subsequent purchaser of the property, who has duly registered his purchase deed, but who has bought with notice of the unregistered mortgage, takes the property subject to that mortgage. ABOOL HOSSEIN v. RAGHU NATH SAHU, 13 C. 70 ... 544

Registration Act (XX of 1866).

(1) *S.* 17, *cl.* 4—Zur-i-peshgi *lease*—"*Leases not exceeding one year,*" *Meaning of.*—Leases which were exempted from the operation of s. 17, cl. 4, Act XX of 1866, were leases the term of which was one year certain. Where a *zur-i-peshgi* lease was granted for one year, but with a stipulation that unless the loan were repaid within that time it should continue in force, *held*, that such a lease came within the words of s. 17, cl. 4, Act XX of 1866, "leases of immoveable property for any term exceeding one year" of which registration was compulsory. BHOBANI MAHTO v. SHIBNATH PARA, 13 C. 113 ... 575

(2) *Ss.* 53, 55—See APPEAL—GENERAL, 12 C. 511.

Registration Act (XX of 1866)—(*Concluded*). PAGE

(3) *Ss. 73, 76 and 77—Suit for registration of document.*—An application having been made under s. 73 of the Registration Act, the Registrar passed the following order. "All the parties have not appeared, the appeal is struck off. It, however, seems to me that the order of the Sub-Registrar was quite correct." *Held*, that the mere fact of the applicant not having adduced any evidence before the Registrar did not make his order one not refusing registration within the meaning of s. 76; nor was the applicant precluded on that ground alone from pursuing his remedy under s. 77 by a civil suit. SAJIBULLAH SIRKAR v. HAZI KHOSH MOHAMED SIRKAR, 13 C. 264 ... 675

Regulation XVII of 1806.

(1) *Foreclosure, Right of—Demand from mortgagor.*—Under the terms of Regulation XVII of 1806, a demand from the mortgagor or his representative is a condition precedent to the right to take foreclosure proceedings. GONESH CHANDRA PAL v. SHODA NUND SURMA, 12 C. 138 ... 94

(2) See MORTGAGE—FORECLOSURE, 12 C. 583; 13 C. 50

(3) S. 8—See LIMITATION ACT (XV OF 1877), 12 C. 614.

Regulation VIII of 1819.

(1) See ARREARS OF RENT, 13 C. 331.

(2) S. 8—See SALE, 12 C. 67.

(3) *S. 13—"Profits"—Adjustment of accounts between defaulting tenure-holder and person who has held possession as mortgagee under Regulation* VIII *of* 1819, *s.* 13.—The word "profits" in the 4th clause of s 13 of Regulation VIII of 1819 means that which is left to the teuure-holder after payment of the rent of the tenure. A person who enters into possession of the tenure as mortgagee under the provisions of that section is bound in the first place to pay the rent due to the landlord out of the collections before applying the same to the liquidation of his own debt, and the defaulter is not to be liable for the rent of the tenure during the period of the possession by the person so holding it as mortgagee. LALA BHARUB CHANDRA KARPUR v. LALIT MOHUN SINGH, 12 C. 185 ... 126

(4) S. 14—See SALE, 12 C. 622.

Regulation III of 1872.

Ss. 24, 25—See SONTHAL PERGUNNAHS SETTLEMENT, 13 C. 245.

Relationship.

See EVIDENCE ACT (I OF 1872), 12 C. 219.

Release.

See ARREST, 12 C. 652.

Relinquishment.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 50 ; 12 C. 60.

Remand.

(1) *Powers of Appellate Court—Property in different districts—Decrees of District Courts, Powers of Appellate Court to amend—Act* VIII *of* 1859, *s.* 12—*Procedure.*—Neither under s. 12 of Act VIII of 1859, nor in any other way, has the High Court in its appellate capacity power to give jurisdiction to a District Court to inquire into facts as upon a remand, in a suit decided in the Court of another district, and relating to lands in the latter. Of two mortgages between the same parties, the first comprised four villages, of which three were in district A, and a fourth property was in district B. The second mortgage comprised, in addition to the above, three other villages in district B. Suits brought in both districts by the assignee of the mortgagee against the mortgagor were thus framed, *viz.*, in the suit in district A for possession upon foreclosure of both mortgages, and for a declaration of the plaintiff's right as purchaser of one of the properties ; and in the suit in district B, for payment of the debt on the second mortgage. Both suits were dismissed. The High Court hearing appeals in both suits together, affirmed the dismissal of the suit in district B, and remanded the other to the Court of first instance in district A to have the proportionate value of the properties determined, with a view to the apportionment of the liabilities of the parties by way of contribution. As the defendant who succeeded in both suits in

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the District Courts raised no question of jurisdiction, each of them might be taken to have had the consent of parties to its hearing the whole suit before it. But no consent could be deemed to have been given to the order of the High Court made as above stated on contested appeals. This order was, accordingly unauthorised. Although wide powers of amendment, of framing new issues, and of modifying decrees are conferred upon the High Court by provisions in the Code, of which the plain meaning is not to be narrowed by judicial construction, these powers were exceeded in the change of the suits by the order in question into a suit of a description differing totally from that of either of them, as originally decreed; and this without the consent of the parties. KAMINI SUNDARI CHAODHRANI v. KALI PROSSUNNO GHOSE, 12 C. 225 (P. C.) = 12 I. A. 215 = 4 Sar. P. C. J. 652 = 9 Ind. Jur. 437 ... 153

(2) See LOCAL INVESTIGATION—APPEAL, 12 C. 45.

(3) See MINOR, 13 C. 189.

Re-marriage.

See HINDU LAW—MAINTENANCE, 12 C. 52.

Removal

of obstruction in public way—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 696.

Rent.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 50.

(2) See RIGHT OF OCCUPANCY, 12 C. 115.

Rent-free Lands.

See BURDEN OF PROOF, 12 C. 182.

Rent-suit.

See RES JUDICATA, 12 C. 563.

Repeal.

See APPEAL—SECOND APPEAL, 13 C. 86.

Representatives.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 458.

(2) See EVIDENCE ACT (I OF 1872), 12 C. 627.

Repudiation of Title.

See LANDLORD AND TENANT, 13 C. 248.

Reputed Ownership.

See INSOLVENT ACT (11 AND 12 VIC., C. 21), 12 C. 629.

Res Judicata.

(1) *Admissibility in evidence of decree in former suit.*—The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by the defendants. The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against the same defendants for the rent of the same tenures, and in that suit the present plaintiffs and other co-charers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession and were liable to pay to the then plaintiff his share of the rent. *Held* (*Mitter*, *J.*, dissenting), that the decree in the former suit was not a *res judicata* or even admissible as evidence in the present suit. SURENDER NATH PAL CHOWDHRY v. BROJO NATH PAL CHOWDHRY, 13 C. 352 ... 735

(2) *Civ. Pro. Code, Act* X *of* 1877, *s.* 13—*Matters directly and substantially in issue in a suit.*—Where a decree awarding to one of the parties money deposited in a Treasury by a third party, as the compensation for land taken by the latter for railway purposes, was based upon the right to the land, the question of title having been directly and substantially in issue between the parties: *Held*, that the contest of title was conclusive between them under s. 13 of Act X of 1877. In a suit brought by a ghatwal to resume, as determinable at will, an under-tenure granted by one of his ancestors of land, part of the ghatwali mehal, it was alleged for the

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defence that the under-tenure was permanent. A prior judgment upon conflicting claims made by the ghatwal and the under-tenure holders to receive the above-mentioned compensation money, which had been paid in respect of lands in part comprised in the under-tenure, determined that the ghatwal was entitled to the money, being founded on the under-tenure-holders having been in possession of it by the mere sufferance of the ghatwal, who could put an end to it at any time. *Held*, that the question whether the latter had a permanent tenure, having been directly and substantially in issue in the former suit, could not be contested in another. RAM CHUNDER SINGH v. MADHO KUMARI, 12 C. 484 (P. C.) = 12 I. A. 188 = 9 Ind. Jur. 474 = 4 Sar. P. C. J. 666 ... 329

(3) *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 13—Pro forma *defendant.*—*A* brought a suit against *B* claiming certain property as tenant of *C*, who was also made a defendant in the suit; this suit was on the merits decided in favour of *B*. *C*, then brought a suit against *B* for possession of the same property. *Held*, that such suit was not barred by s. 13 of the Civ. Pro. Code. BROJO BEHARI MITTER v. KEDAR NATH MOZUMDAR, 12 C. 580 (F. B.) ... 394

(4) *Landlord and tenant—Suit for ejectment—Issue previously heard and determined—Estoppel—Civ. Pro. Code, s.* 13.—In a suit by a landlord against his tenant for ejectment, the defences were (1) no notice to quit had been served; and (2) the tenure was a permanent one. The suit was dismissed on the first ground, the Court holding at the same time that the tenure was not a permanent one. In a subsequent suit for ejectment from the same holding, brought by the same plaintiff against the same defendant, the defences were: (1) the tenure was permanent; and (2) the plaintiff was estopped by the conduct of his predecessor in title from asserting as against the defendant that the tenure was not a permanent one. The lower appellate Court found the question of estoppel in favour of the defendant and dismissed the suit. On appeal to the High Court, *held*, that the decision was right, and must be affirmed. *Semble*, that where a former suit between the same parties in respect of the same subject-matter has been dismissed on a preliminary point, a finding in that suit on the merits in the plaintiff's favour will not bar the defendant from putting forward the same defence on the merits in a subsequent suit by the same plaintiff against the same defendant. *Semble*, that 6 C. 319 has been impliedly overruled by 12 I.A. 23 = 11 C. 301. NUNDO LALL BHUTTACHARJEE v. BIDHOO MOOKHY DEBEE, 13 C. 17 ... 508

(5) *Rent suit—Intervenor—Dismissal for Default—Questions of title—Issues—Code of Civil Procedure, s.* 13.—In a suit for arrears of rent and possession of certain property a person intervened and was made defendant on his alleging that he was entitled to an eight-anna share of the property in question, and that the plaintiffs were not entitled to any portion thereof. Issues were fixed on the questions of title, but the plaintiffs failed to adduce evidence and their suit was dismissed. They afterwards brought a suit for possession of the same property, on the same title, against the intervenor in the former suit. *Held*, that the second suit was barred as *res judicata*. KARTICK CHUNDER PAL v. SRIDHAR MANDAL, 12 C. 563 ... 383

Respondent.

(1) See APPEAL TO PRIVY COUNCIL, 12 C. 402.

(2) See LIMITATION ACT (XV OF 1877), 12 C. 590.

Restitution of Conjugal Rights.

(1) *Suit for—Marriage, Validity of—Prohibited degrees—Roman Catholic—East Indians—Customary Law—Dispensation, Proof of—Presumption—Divorce Act* (IV *of* 1869), *s.* 19—*Deceased wife's sister, Marriage with.*—In a suit for restitution of conjugal rights the parties were East Indians, and at the time of the marriage on 22nd July 1877 were domiciled in British India, resident within the limits of Calcutta and members of the Roman Catholic religion. The defence to the suit was that a previous marriage had on 6th December 1871, been performed between the respondent and the petitioner's sister, and the respondent prayed that the second marriage might be declared a nullity. The ceremony of 6th December 1871 had taken place while the petitioner's sister was on her death bed, and *in extremis*, and had been celebrated in accordance with the rites of the Roman

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Catholic Church, and it was held both by the Original Court and on appeal to be a valid marriage. The first Court (*Cunningham, J.*) held that the second marriage was null and void on the ground that the parties were within the prohibited degrees. *Held*, on appeal (by *Garth, C. J.*, and *Wilson, J.*, while referring to a full Bench the question "whether the second marriage was a valid marriage, or on the other hand was either void or voidable") that it was competent to the Court in a suit for restitution of conjugal rights to make a declaration of nullity of marriage if the respondent showed himself entitled to such relief. *Held by the Full Bench.*—The prohibited degrees mentioned in s.19 of the Indian Divorce Act do not necessarliy mean the degrees prohibited by the law of England. All that was known in respect of the parties to the marriage being that they were Roman Catholic subjects with Portugnese names, and it not having been found whether they were of English or any other European descent or of native or mixed parentage; *held* that the prohibited degrees for the parties to the marriage were not the degrees prohibited by the law of England, but those prohibited by the customary law of the class to which they belonged, that is to say, the law of the Roman Catholic Church as applied in this country ;*Held* by the Division Bench (*Garth, C.J.*, and *Wilson, J.*) *on the case being returned to it.*—Where a man and a woman intend to become husband and wife and a ceremony of marriage is performed between them by a clergyman competent to perform a valid marriage, the presumption in favour of everything necessary to give validity to such marriage is one of very exceptional strength, and unless rebutted by evidence strong, distinct, satisfactory and conclusive, must prevail. According to the rule of the Church of Rome, a dispensation from the proper ecclesiastical authority is necessary to give validity to a marriage between a man and the sister of his deceased wife. In this case the parties Roman Catholics and intended to become husband and wife, and a ceremony of marriage was performed between them by a clergyman competent to perform a valid marriage: *Held* that the Court was bound to presume that a dispensation necessary to remove the obstacle to the marriage on the ground of affinity had been obtained V. H. LOPEZ v. E. J. LOPEZ, 12 C. 706 (F.B.) = 11 Ind. Jur. 62 ... 478

(2) See ACT VII OF 1875 (BURMA COURTS), 13 C. 232.

(3) See HINDU LAW—MARRIAGE, 12 C. 140.

Restraint on anticipation.

See ACT III OF 1874 (MARRIED WOMAN'S PROPERTY), 12 C. 522.

Resumption.

See BURDEN OF PROOF, 12 C. 182.

Revenue Courts.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 50.

Revenue Law.

See VOLUNTARY PAYMENT, 12 C. 213.

Revenue Sale.

See MISCHIEF, 12 C. 660.

Review.

(1) *Civ. Pro. Code*, 1882, *s.* 624—*Application for review heard by successor to Judge who passed the decree.*—When an application for review is presented to the Judge who made the decree, and he thereupon issues notice to the other side, the application is "made" to him within the meaning of s. 624 of the Civ. Pro. Code, and may be heard and disposed of by his successor in office. FAZEL BISWAS v. JAMADAR SHEIK, 13 C. 231 ... 653

(2) *Mistake of Counsel—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 623—*Per Garth, C. J.*—Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason" in s. 623 of the Civ. Pro. Code, yet from the earlier part of the clause it is clear that a point which might have been, but which was not, discovered by the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review. *Per Wilson, J.*—*Semble.*—If at a trial all parties, counsel on both sides, and the Judge,

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are under a misapprehension as to the contents of a document, or, even if the Judge alone is misled on such a point, and in consequence a wrong decree is made, the mistake ought to be corrected on review. GOPAL CHANDRA LAHIRI v. SOLOMON, 13 C. 62 ... 538

(3) See LIMITATION ACT (XV OF 1877), 13 C. 62.

Revision.

(1) *Crim. Pro. Code*, 1882, *Chapter* XXXII—*Sonthal Pergunnahs, Act* XXXVII *of* 1855, *s.* 4, (cl. 1)—*Scheduled Districts Act* (XIV *of* 1874). —Under s. 4 (cl. 1) of Act XXXVII of 1855 (which is still in force in the Sonthal Pergunnahs) all sentences passed in criminal cases are final. An order under that Act sentencing an accused to imprisonment is not open to revision under Chapter XXXII of the Code of Criminal Procedure. DULAR DAT RAI v. NIJABAT HOSEIN, 12 C. 536 ... 364

(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 90.

(3) See PRESIDENCY MAGISTRATE, 13 C. 272.

Right of Occupancy.

(1) *Bengal Act* VIII *of* 1869, *s.* 6—*Suit for possession of land—Non-payment of rent.*—Where a ryot had been in possession of land, but had been dispossessed, and for some years previous to suit had failed to pay rent, held, that at the time of the institution of a suit for recovery of possession, he had no subsisting title and consequently his suit must fail. HEM CHUNDRA CHOWDHARI v. CHAND AKUND, 12 C. 115 ... 79

(2) *Wrongful eviction—Acquisition of ryot's holding by zemindar, Effect of—Benami purchase.*—The right of occupancy is a right given to a ryot continuing only so long as the ryot pays rent for the land he holds, and though it cannot be affected by a wrongful eviction, still when the zemindar acquires the land by purchase and takes possession, even in the *benami* name of a third party, seeing that he cannot pay rent to himself, the right is gone and cannot subsequently be revived. RADHA GOBIND KOER v. RAKHAL DAS MUKHERJEE, 12 C. 82 ... 56

Right of Suit.

(1) *Cause of action--Contribution, Suit for—Joint wrong-doers--Breach of Covenant—Damages for breach of contract—Breach af contract.*—In a suit for damages against *A* and others for breach of a covenant not to open a ferry at a particular place, a decree was obtained against all the defendants. The amount of this decree was levied by execution from *A* alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrong-doers, and that no suit for contribution would lie as between them. On second appeal to the High Court: *Held*, that the rule of law relied on by the Courts below had no application to the circumstances of the present case, and that the plaintiff was entitled to maintain his action. BROJENDRO KUMAR ROY CHOWDHRY v. RASH BEHARI ROY CHOWDHRY, 13 C. 300. 700

(2) See TRANSFER OF PROPERTY ACT (IX OF 1882), 12 C. 470.

Right of Way.

(1) *User of twenty years to support servitude—Extent and mode of user—Calcutta Municipal Act* (*Bengal Act* IV *of* 1876).—As establishing his right of way over the defendant's passage, the plaintiff relied upon a user of it, several times in the year, for twenty years prior to the defendant's interruption of it, by mehters for the purpose of removing the contents of a cesspool connected with a privy belonging to the plaintiffs' house. The facts indicated by way of limit to the user of the passage only showed that it must be a reasonable user for the above purpose. There was no agreement specifying times, or occasions of access, and the inference was that, if the plaintiffs had thought fit to use the passage more frequently than they did, they were at liberty to do so. In and after 1876, instead of the plaintiffs' mehters those employed by the Municipality came and went upon the passage, not at distant intervals, but daily, the plaintiffs under bye-laws, in conformity with Bengal Act IV of 1876, being bound to give them access, and the system being to clean the place daily. *Held*, that the above was neither a discontinuance by the plaintiffs of their

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user, nor an aggravation of the servitude. Also, that, although a servitude gained for one purpose cannot be used for another the purposes before and after 1876 being identical, the user proved prior to that year supported a right in the plaintiffs to use the passage for giving access to the servants of the Municipality, for the above purpose, at reasonable and convenient times. JADULAL MULLICK v. GOPALCHANDRA MUKERJI, 13 C. 136 (P.C.) = 13 I.A. 77 = 10 Ind. Jur 350 = 4 Sar. P.C.J. 713 ... 590

(2) See ACT V OF 1876 (BENGAL MUNICIPAL) 13 C. 171.

Rival Decree-holders.

See ATTACHMENT, 12 C. 317.

Road Cess.

See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT PROCEDURE) 12 C. 533.

Roman Catholics.

See RESTITUTION OF CONJUGAL RIGHTS, 12 C. 706.

Rules of High Court.

Ss. 707, 708—See PRACTICE, 12 C. 551.

Sale.

(1) And delivery of goods, breach of warranty on—See BREACH OF CONTRACT, 13 C. 237.

(2) Application to set aside—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 346.

(3) At instance of one attaching Decree-holder during pendency of other attachments—See ATTACHMENT, 12 C. 317.

(4) By Inferior Court pending an unknown—Attachment by a superior Court—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 333.

(5) Certificate granted in name of benamidar—See CIVIL PROCEDURE CODE, (ACT XIV OF 1882), 12 C. 204.

(6) Confirmation of—See LIMITATION ACT (XV OF 1877), 12 C. 441.

(7) Effect of, before confirmation—See SALE, 12 C. 597.

(8) *For arrears of rent—Putni Taluk—Transfer of Putni—Registered transferee—Unregistered proprietor, Right to sue—Regulation* VIII *of* 1819, *s.* 14.—Where a putni taluk has been sold under the provisions of Regulation VIII of 1819, an unregistered share-holder therein is entitled to sue for a reversal of the sale under the provisions of s. 14 of the same Regulation. CHUNDER PERSHAD ROY v. SHUVHADRA KUMARI SHAHEBA, 12 C. 622 ... 423

(9) *Regulation* (VIII *of* 1819), *s.* 8—*Notice of Sale—Publication of Proof of Service—Suit to set aside sale.*—Compliance with directions in Regulation VIII of 1819 as to service of notice is essential to the validity of a sale under that Regulation. Where there was evidence of service upon this defaulter personally, but not of service at his *kachari*: *Held*, that this was not sufficient, and that the sale must be set aside. MAHOMED ZAMIR v. ABDUL HAKIM, 12 C. 67 ... 46

(10) For arrears of rent—See BURDEN OF PROOF, 13 C. 1.

(11) *Arrears of Revenue—Under-tenures—Avoidance of tenure—Act* XI *of* 1859, *s.* 37, *cl.* 4.—Leases of lands which may not have been expressly leased for the purpose of making gardens thereon, but on which gardens have subsequently been made, are, under the provisions of Act XI of 1859, s. 37, cl. 4, protected from avoidance by a revenue auction-purchaser. GOBIND CHANDRA SEN v. JOY CHUNDRA DASS, 12 C. 327 ... 223

(12) Of Road Cess, Effect of—See ACT V OF 1871 (BENGAL DISTRICT ROAD CESS), 12 C. 430.

(13) Ground for setting aside—See GUARDIAN, 12 C. 69.

(14) In execution of decree—See APPEAL—GENERAL, 13 C. 174.

(15) In Execution of Decree—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 294.

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(16) *For arrears of rent—Suit to set aside sale—Separate suit—Effect of sale before confirmation—Second sale for arrears of rent.*—The plaintiff and the defendants *C* and *D* were the co-owners of a portion of a shikmi taluk in the 10-annas share of a zamindari belonging to the defendant A. *A* having succeeded in enhancing the rent of the tenure obtained a decree for arrears of rent at the enhanced rate which she proceeded to execute in 1880. In 1881 she obtained another decree for arrears of rent of a subsequent period, in execution of which the tenure was put up to auction and sold for Rs. 15,000 on 20th July 1881, *A* herself being the purchaser. Before this sale was confirmed the tenure was, on 20th September 1881, again put up for sale in execution of the first decree, and was purchased by *A* for Rs. 10. The plaintiff and *C* and *D* applied to have both sales of 20th September 1881, and this order was confirmed by the High Court on 14th August 1882, and (on review) 21st March 1883 Meanwhile the sale of the 30th July 1881 was set aside by the order of the Subordinate Judge on 19th June, 1882. In a suit against A, *B* the agent of A, *C*, and *D*, brought on the 20th March 1884, in which the plaintiff prayed that the sale of 20th September 1881 " be declared ineffectual, and be set aside, and that the plaintiff do recover possession of the property." *Held*, that the suit being not one to set aside the sale on the ground of fraud or anything connected with the sale itself, but on account of the setting aside of the first sale, which took place long after the second sale had been confirmed, and when no execution proceedings were pending in which it was possible for the plaintiff to raise the question, the suit would lie. *Held*, also, that the first sale, not having been set aside at the time of the sale, was at that time, although it had not been confirmed, a good and effectual sale to pass the property as against the plaintiff and *C* and *D*, so that there was nothing left to pass under the second sale. In the interval between the sale and the confirmation of sale, there is not merely a contract for sale, but an inchoate transfer of title which only requires confirmation to perfect it, a sale actually takes place which, if not made absolute, must be set aside. Where a tenure has once been sold for its own arrears, it cannot be again put up to sale for the arrears on account of a previous period. PRANGOUR MOZOOMDAR v. HIMANIA KUMARI DEBYA, 12 C. 597 ... 405

(17) *Power of Munsif's Court to execute decree against property out of its local jurisdiction.*—In execution of a decree, property situate in three Munsifs, *viz.*, Serajgunge, Pabna, and Nattore, all three being at that time portions of the district and subordinate to the Court of Rajshahi, was attached and sold by order of the Court of the Munsif of Serajgunge. *Held* by analogy to the principle on which 11 B.L.R. 56=19 W.R. 434, was decided, that the sale was not necessarily limited only to the portion of the property situate in the Munsif of Serajgunge, but that that Court might have jurisdiction to make a valid sale of the whole estate, although it might be more convenient in such a case that the sale should be held by a superior Court having jurisdiction over the entire district. RAM LALL MOITRA v. BAMA SUNDARI DABIA, 12 C. 307 ... 209

(18) Notification of—Specification of—See ACT VII OF 1880 (PUBLIC DEMANDS RECOVERY), 13 C. 208.

(19) Of ancestral estate in satisfaction of Father's debt—See HINDU LAW—ALIENATION, 13 C. 21.

(20) Immoveable property by person out of possession—See TRANSFER OF PROPERTY ACT (IV OF 1882), 13 C. 297.

(21) Of portion of under-tenure—See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 12 C. 464.

(22) Of tenure by shareholder in Zamindari, effect of—See ACT VIII OF 1869, (BENGAL LANDLORD AND TENANT AND PROCEDURE), 12 C. 24.

(23) Proceeds, distribution of—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 294.

(24) Proceeds, suit for refund of—See LIMITATION ACT (XV OF 1877), 13 C. 159.

(25) Proceeds, suit for share of—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 499.

Sanction to Prosecution. PAGE

(1) *Crim. Pro. Code* (*Act* X *of* 1882), s. 195—*Notice to accused.*—No notice is necessary to the person against whom it is intended to proceed, before the Court, before which the alleged offence has been committed, can under s. 195 of the Criminal Procedure Code, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section. *In the matter of the petition of* KRISHNANUND DAS, KRISHNANUND DAS v. HARI BERA, 12 C. 58 (F.B.) 40

(2) See PENAL CODE (ACT XLV OF 1860), 13 C. 270.

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See INSOLVENCY, 13 C. 66.

Second Class Magistrate.

(1) See ACT IV OF 1876 (CALCUTTA MUNICIPAL CONSOLIDATION), 13 C. 108.

(2) See MAGISTRATE, 13 C. 305.

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Security Bond.

See APPEAL—GENERAL, 12 C. 624.

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See APPEAL TO PRIVY COUNCIL, 12 C. 402.

Security for Good Behaviour.

Crim. Pro. Code (*Act* X *of* 1882), ss. 110, 112.—The mere fact that a person from whom security is required, has been previously convicted of offences against property is not sufficient to justify proceedings under s. 110 of the Code of Criminal Procedure, unless there be additional evidence that the person complained against has done some act or resumed avocations indicating on his part an intention to return to his former course of life. *In the matter of the petition of* HAIDER ALI, 12 C. 520 ... 353

Sentence.

Cumulative sentences—Separate Convictions for more than one offence where acts combined form one offence—Penal Code (*Act* XLV *of* 1860), *ss.* 143, 147, 324, 353 (*Act* VIII *of* 1882), *s.* 4—*Crim. Pro. Code, Act* X *of* 1882, *s.* 235. —Four persons were charged with being members of an unlawful assembly consisting of themselves and others, the common object of which assembly was resisting the execution of a legal process, namely, the arrest of a judgment-debtor by a Civil Court peon, who went with a warrant for his arrest accompanied by other persons, *A* and *B*, for the purpose of identifying him, and with using force or violence in prosecution of the common object, such force or violence consisting of an assault on the Civil Court peon and another by means of a dangerous weapon on *A*. The Deputy Magistrate convicted all the accused of offences under ss. 147 and 353 of the Penal Code, and sentenced them to six months' rigorous imprisonment under the former section and two months' rigorous imprisonment under the latter. He further convicted one of the accused of an offence under s. 324, in respect of the assault on *A* and sentenced him to one month's rigorous imprisonment in respect of that offence, and directed that the sentences were to take effect one on the expiry of the other. *Held* that the offence of rioting was completed by the assault on *A*, and that the assault on the peon was a further offence under the first sub-section of s. 235 of the Code of Criminal Procedure. *Held*, further, that even if *A* had not been assaulted, the conviction and sentences passed for rioting and the assault on the peon were legal, inasmuch as the acts of the accused taken separately, constituted offences under ss. 143 and 353 of the Penal Code, and combined an offence under s. 147 ; and under s. 235, sub-section 3 of the Code of Criminal Procedure, the accused might be charged with and tried at one trial for the offence under s. 147, and those under ss. 143 and 353, and therefore also separately convicted and sentenced for each such offence, provided the punishment did not exceed the limit imposed by s. 71 of the Penal Code, as amended by s. 4 of Act VIII of 1882, which limit had not been exceeded in the present case. *In the Matter of* CHANDER KANT BHATTACHARJEE. CHANDER KANT BHATTACHARJEE v. THE QUEEN-EMPRESS, 12 C. 495 ... 335

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See SENTENCE, 12 C. 495.

Separate Suit.

(1) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 105, 12 C. 108, 13 C. 326.

(2) See SALE, 12 C. 597.

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(1) See ACT VII OF 1880, PUBLIC DEMANDS RECOVERY), 12 C. 603.

(2) See SALE, 12 C. 67.

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(1) See ACCOUNT, 13 C. 124.

(2) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 499.

Setting up Different Tenure
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(1) See HINDU LAW—GIFT, 12 C. 663.

(2) See LAND ACQUISITION ACT (X OF 1870), 12 C. 33.

Settlement Officer.

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(1) In Partnership, Transfer of—See STAMP ACT (I OF 1879), 12 C. 383.

(2) Of inheritance, suit for, and suit for maintenance distinguished—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 60.

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Sonthal Pergunnahs.

(1) *Settlement—Reg.* III *of* 1872, *ss.* 24, 25—*Suit to set aside order of Settlement Officer—Non-publication of record of rights.*—Where, in December 1884, a suit was brought to set aside an order of the Settlement Officer under Reg. III of 1872, made in December 1875, after disposing of the plaintiff's objections to the defendant's title, and it was found that no record of rights had been published in accordance with s. 24 of the Regulation: *Held,* the suit was not barred under s. 25 as not having been brought within three years from the date of the order. The final order referred to in that section must be one subsequent to or not preceding the publication of the record of rights. RAM NARAIN SINGH *v.* RAM RUNJUN CHUCKERBUTTY, 13 C. 245 ... 662

(2) See REVISION, 12 C. 536.

Special Means of Knowledge.

See EVIDENCE ACT (I OF 1872), 12 C. 219.

Specific Performance.

Contract—Agreement to sell land by guardian of minor contingent upon the permission of the Court—Specific Relief Act (I *of* 1877), *s.* 26.—A certificated guardian of certain minors entered into an agreement with the plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary being obtained to the transaction, and a portion of the purchase-money was paid by the plaintiff. The Court sanctioned the sale, but at a higher price than that

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agreed on between the plaintiff and the guardian, and the latter sold to a third party. The plaintiff, thereupon, sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement. *Held*, that the contract was not one which could be specifically enforced, and that s. 26 of the Specific Relief Act did not apply. The contract as it stood was never a complete contract at any time, as it was contingent upon the permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties. NARAIN PATTRO v. AUKHOY NARAIN MANNA, 12 C. 152 ... 104

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(1) S. 26—See SPECIFIC PERFORMANCE, 12 C. 152.

(2) S. 42—See DECLARATORY DECREE, 13 C. 3.

(3) S. 42—See MULTIFARIOUSNESS, 13 C. 147.

Splitting Cause of Action.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 291.

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See CIVIL PROCEDURE CODE (ACT X OF 1877), 12 C. 482.

Stamp Act (I of 1879).

(1) See COURT FEES ACT (VII OF 1870), 13 C. 162.

(2) *S.* 3, *sub-s.* 4, *cl. b*, s. 34, *Pro.* 1 *and* 3, *s.* 50—*Unstamped document admitted by Original Court on payment of duty and penalty—Power of Appellate Court to review such admission.*—Where the Court of first instance has on payment of the prescribed duty and penalty, admitted an unstamped document as evidence, under s. 3, pro. 1 of Act I of 1879, a superior Court sitting in appeal has no jurisdiction to review the lower Court's proceedings, in so far as they concern such admission, except in the case provided for by s. 50 of that Act. PUNCHANUND DASS CHOWDHRY v. TARAMONI CHOWDHRAIN, 12 C. 64 ... 44

(3) *S.* 13—*Suit on bond—Stamp, Sufficiency of.*—A bond stipulated that for the consideration of a loan of Rs. 80 the debtor should deliver to the creditor on a future day "800 arris of grain valued at Rs. 10 per 100 arris." The bond was engrossed on an 8-anna stamp paper. In a suit on the bond for the recovery of 800 arris at 4 arris per rupee or its price, Rs. 200: *Held*, that the bond was adequately stamped. BAIRAB CHUNDRA CHOWDHRI v. ALEK JAN, 13 C. 268 ... 678

(4) *Art.* 21, *Sch.* I—*Conveyance by vendors under one denomination to the same persons purchasers under another denomination.*-Eight persons, the owners of a tea estate, purported to convey their rights in the estate to a Company ; the consideration expressed in the deed of conveyance being £43,320, payable in shares and debentures of the Company taken at *par*. The only share-holders or debenture-holders of the Company were the eight persons who purported to sell the estate to the Company. *Held*, that, although the conveying parties were the share-holders of the Company, there was just as much a sale and transfer of the property and a change of ownership as there would have been if the shareholders had been different persons ; and that the proper duty payable on the conveyance was therefore that mentioned in art. 21, sch. I of the Stamp Act. *In re* THE KONDOLI TEA CO., 13 C. 43 = 11 Ind. Jur. 22 ... 526

(5) *Arts.* 21, 60 (*cl. b*)—*Transfer of lease—Transfer of a share of a partnership.*—Where a transaction is in substance a sale of a share in a partnership, and the transfer of a share in a lease only forms part of the subject-matter of the sale, as being a part of the partnership assets, the transaction should be regarded not as the transfer of a lease, but as the sale of a share in a partnership and the duty payable in respect thereof should be that falling under sch. I, art. 21 of Act I of 1879. *In re* THE MENGLAS TEA ESTATE, 12 C. 383 ... 260

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as to existence of relationship—See EVIDENCE ACT (I OF 1872), 12 C. 219, 13 C. 42.

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S. 10—See MERCHANT SEAMEN'S ACT (I OF 1859), 12 C. 438.

Statute 44 and 45 Vict., C. 58.

(1) Ss. 148, 151—See ARMY ACT, 1881, 13 C. 143.

(2) Ss. 148, 151—See ACT XV OF 1882 (SMALL CAUSE COURTS PRESIDENCY TOWNS), 13 C. 37.

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S. 172, excep.—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 60.

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(1) Against purchaser buying benami—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 204.

(2) Based on title—See BOUNDARY DISPUTE, 13 C. 280.

(3) By Company, Form of—See PLAINT, 12 C. 41.

(4) Corporation—See PLAINT, 12 C. 41.

(5) Person claiming Immoveable Property on death of Hindu or Mahomedan Female—See LIMITATION ACT (XV OF 1877), 12 C. 594.

(6) For arrears of rent—See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 12 C. 464.

(7) See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 50.

(8) Money paid in excess of Road Cess—See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 12 C. 533.

(9) Partition of portion of joint property—See HINDU LAW—PARTITION, 12 C. 566.

(10) Possession by unregistered purchaser after Ejectment—See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 12 C. 24.

(11) For refund of sale proceeds—See LIMITATION ACT (XV OF 1877), 13 C. 159.

(12) For Registration of Document—See REGISTRATION ACT (III OF 1877), 13 C. 264.

(13) For rejection of claim to attached property—See COURT FEES ACT (VII OF 1870), 13 C. 162.

(14) Share of sale proceeds—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 499.

(15) In Revenue Courts, Application of Procedure Code to—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 50.

(16) To follow mortgaged Property—See LIMITATION ACT (XV OF 1877), 12 C. 111.

(17) Obtain possession of land from vendor who has been dispossessed and subsequently recovered possession—See LIMITATION ACT (XV OF 1877), 12 C. 197.

(18) Recover deposit—See LIMITATION ACT (XV OF 1877), 12 C. 113.

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(20) To recover purchase-money after reversal of decree under which sale took place—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 326.

(21) Share of Compensation—See LAND ACQUISITION ACT (X OF 1870), 12 C. 33.

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(22) To set aside Adoption—See LIMITATION ACT (IX OF 1871), 13 C. 308.
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(26) Sale—See SALE, 12 C. 67.
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(3) See STAMP ACT (I OF 1879), 12 C. 383.
(4) See TRANSFER OF PROPERTY ACT (IV OF 1882), 12 C. 505.

Transfer of Property Act (IV of 1882).
(1) See MORTGAGE—GENERAL, 13 C. 262.
(2) *Ss.* 2, 67, 99—*Mortgage-decree—Execution of decree.*—A decree-holder, who had obtained a decree in the year 1880 against his judgment-debtor, declaring his title on certain mortgaged properties and authorising a sale, sought, after several previous applications keeping the decree alive, to execute his decree again on the 15th April, 1885. The judgment-debtor

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objected on the ground that no suit had been instituted or decree obtained under s. 67 of the Transfer of Property Act, as directed by s. 99. *Held*, that s. 99 of that Act was not intended to apply to decrees already obtained declaring a lien and authorizing a sale ; but even assuming that it was so intended, s. 2 of the Act saved the right of the decree-holder to obtain a sale of the mortgaged properties. DINENDRA NATH SANYAL v. CHANDRA KISHORE MUNSHI, 12 C. 436 ... 295

(3) Ss. 2, (cl. c) and 86—See MORTGAGE—FORECLOSURE, 12 C. 583.

(4) S. 10—See ACT III OF 1874 (MARRIED WOMAN'S PROPERTY), 12 C. 522.

(5) *Ss.* 52, 135--*Sale of immoveable property by person out of possession—Actionable Claim.*—A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession. A and B being owners of an 8-annas share of certain immoveable property sold it under a kobala to C and D. At the time of the sale X and Y were in adverse possession of the share. *Held*, that the transaction was a sale under s. 52 of the Transfer of Property Act, to which the provisions of ch. 8 of the Act, specially those of s. 135, were inapplicable. *Semble.*—S. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. MODUN MOHUN DUTT v. FATTARUNNISSA, 13 C. 297 ... 698

(6) S. 86—See LIMITATION ACT (XV OF 1877), 12 C. 614.

(7) Ss. 86, 87—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 346.

(8) *S.* 131—*Decree—Debt.*—A decree is not a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act. A "debt" under that section means an actionable claim, and not a claim which has already passed into a decree. AFZAL v. RAM KUMAR BHUDRA, 12 C. 610. 415

(9) *S.* 131—*Transfer of Debts—Notice of transfer—Assignment of mortgage—Mortgagor, Liability of, to Assignee of Mortgagee when no notice of Assignment given.*—The provisions of the Transfer of Property Act apply to the assignment of a mortgage made after that Act came into force, although the mortgage may have been made before the commencement of that Act. An assignment is perfectly valid, though the notice referred to in s. 131 of the Transfer of Property Act has not been given, though the title of the assignee as against the third parties is not complete until such notice has been given ; the object of such notice being the protection of the assignee. S. 131 of the Transfer of Property Act makes no alteration in the law as it obtained in England previous to the passing of that Act and as laid down in the cases cited in the note to *Ryall* v. *Rowles*, 2 W. and T.L.C. 777, the first portion of the section merely fixing the time when the section comes into operation, and the latter providing for the protection of the debtor if he deals with the debt before that time. Where therefore an assignee of a mortgagee brought a suit on the mortgagee against the mortgagor and the mortgagee and no notice of the assignment had been given to the mortgagor under s. 131 of the Transfer of Property Act : *Held*, that the Court was wrong in dismissing the suit merely on the ground that no notice was served, as after the suit was instituted the mortgagor became aware of the assignment, and the transfer accordingly came into operation on the date when he thus became aware of it. LALA JUGDEO SAHAI v. BRIJ BEHARI LAL, 12 C. 505 = 10 Ind. Jur. 419 ... 343

(10) *S.* 135—*Right of Suit—Suit to set aside a document—Actionable claim.*—The co-sharers of a Hindu family, one of whom was a minor, owned certain immoveable property in Munshigunge near Dacca. In 1873 a perpetual lease of this property, executed by all the co-sharers except the minor, was granted to certain persons hereinafter called the lessees. On the minor's behalf the lease was executed by his elder brother as guardian of the minor. In May 1882 the minor, who had previously attained his majority, sued the lessees and his co-sharers for a declaration of his right to and for possession of his share in the said property, alleging that the perpetual lease was not binding on him. On the day after the institution of the suit the plaintiff sold all his interest therein to A for Rs. 600. *Held* that A's purchase was an actionable claim within the meaning of s. 135 of the Transfer of Property Act (IV of 1882). RAJANIKANTH NAG RAI CHOWDHURI v. HARI MOHAN GUHA, 12 C. 470 ... 319

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(11) *S.* 135—*Transferee of a claim for smaller value—Recovery of full amount of debt.*—It is not the object of s. 135 of the Transfer of Property Act absolutely to prevent a transferee, who has purchased a claim at a smaller value, from recovering the full amount of the debt due from the debtor. GRISH CHANDRA v. KASHISAURI DEBI, 13 C. 145=11 Ind. Jur. 105... 595

Transferee.

See TRANSFER OF PROPERTY ACT (IV OF 1882), 13 C. 145.

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with power of appointment—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 12 C. 375.

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(1) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 12 C. 461.

(2) See BURDEN OF PROOF, 13 C. 1.

(3) See SALE, 12 C. 327.

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(1) *Suit for pre-emption—Jurisdiction—Bengal Civil Courts Act* (VI *of* 1871), *s.* 20.—In a pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under s. 20, Act VI of 1871. NAUN SINGH v. RASH BEHARI SINGH, 13 C. 255 ... 669

(2) See APPEAL, 12 C. 271.

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Voluntary Payment.

Landlord and Tenant—Government revenue, Payment of, by putnidar-Defaulting proprietor, Liability of, to recoup putnidar who pays Government revenue for him when a separate account has been opened—Revenue Sale Law (Act XI *of* 1859), *ss.* 9, 10, 11, 13, 14 *and* 54—*Contract Act* (IX *of* 1872), *ss.* 69, 70.—A putnidar who had made certain payments on account of Government revenue due by his superior landlords who had defaulted, although a separate account had been opened for the payment of such Government revenue, brought a suit to recover the amount so paid. In such suit it was contended that the payments were merely voluntary, and that the plaintiff could not recover them. *Held*, that the plaintiff was "interested" in making the payments, and was therefore entitled to recover under s. 69 of the Contract Act. *Held* further, that s. 70 of the Contract Act applied to the case, inasmuch as the word "does" in that section includes payments of money, and also that the plaintiff was entitled to recover under s. 9 of the revenue sale law, as he believed in good faith that his interest would be endangered by a sale taking place. The liability of a landlord under s. 9 of the revenue-sale law to recoup a person paying Government revenue for him does not depend upon the question of whether the money was originally deposited or not, but accrues upon its being credited in payment of the arrears. SMITH v. DENONATH MOOKERJEE, 12 C. 213 ... 145

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Waste Lands.

(1) *Act* XXIII *of* 1863, *ss.* 8, 18—*Suit for possession—Statute, Interpretation of.*—Where an Act expressly takes away one particular remedy which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication declare that those rights shall cease, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further. There is nothing in Act XXIII of 1863 to prevent a person who has a good title and has throughout been in possession, or who has a good title, and at any time succeeds in peaceably getting possession, and is not ousted in a possessory suit, or who for any other reason is in the advantageous position of a defendant, from defending his rights, notwithstanding any sale which the Government may have professed to make under the Waste Lands Act. *Quaere.*—Whether the terms of the Act are not sufficiently satisfied by making it apply to waste lands of Government, and by understanding the claims and objections mentioned in the Act as claims in respect of Government land and objections with the same limitation. KRISTIO CHUNDER DASS v. O. STEEL, 12 C. 279 ... 190

(2) See ACT VIII OF 1869 (BENGAL LANDLORD AND TENANT AND PROCEDURE), 13 C. 57.

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Charitable gift—Cypres, Doctrine of—Lapse of Legacy—Costs.—Under the will of A who appointed the Administrator-General of Bengal his executor, *B* had a life interest in the residue of the testator's estate. *B* brought a suit against the Administrator-General to have it declared that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between *B* and the Administrator-General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed on appeal. On the question of costs, *held*, that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit. MALCHUS v. BROUGHTON, 13 C. 193 ... 628

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(2) "A material irregularity"—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 225.

(3) "Assets realised by sale or otherwise in execution of a decree"—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 13 C. 225.

(4) "Beneficiary"—See ACT V OF 1881 (PROBATE AND ADMINISTRATION), 12 C. 375.

(5) "By sale or otherwise"—See CIVIL PROCEDURE CODE (ACT XIV OF 1882), 12 C. 225.

(6) "Compensation"—See LIMITATION ACT (XV OF 1877), 12 C. 357.

(7) "Debt"—See TRANSFER OF PROPERTY ACT, (IV OF 1882), 12 C. 610.

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(8) "Debt due to our Sovereign lady, the Queen"—See INSOLVENT ACT (11 & 12 VICT., C. 21), 12 C. 445.
(9) "Decree"—See APPEAL—GENERAL, 12 C. 273, 12 C. 275, 13 C. 111.
(10) "Decree passed in appeal"—See APPEAL—SECOND APPEAL, 12 C. 30.
(11) "Defendant"—See LIMITATION ACT (XV OF 1877), 12 C. 590.
(12) "Dispute concerning julkar right"—See CRIMINAL PROCEDURE CODE (ACT X OF 1882), 12 C. 539, 13 C. 179.
(13) "Does"—See VOLUNTARY PAYMENT, 12 C. 213.
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